



Lifting the Bar:

Undocumented Law Graduates & Access to Law Licenses

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ABOUT THE BICKEL & BREWER LATINO INSTITUTE FOR HUMAN RIGHTS

The Bickel & Brewer Latino Institute for Human Rights aims to positively affect change in our nation's Latino communities. The Institute brings political, legal, and business leaders face to face with emerging scholars and lawyers committed to social and legal reform, and to promoting justice for the Latino community. It emphasizes hands-on training in problem-solving strategies, including litigation, lobbying, education and outreach, community organization, and organizational and network management. Through research and collaboration with community groups, the Latino Institute and the select lawyers it trains work to improve the quality of life in Latino communities and ensure that the United States and the world live up to democratic aspirations.

ABOUT LATINOJUSTICE PRLDEF

LatinoJustice PRLDEF champions an equitable society. Using the power of the law together with advocacy and education, LatinoJustice PRLDEF protects opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities. By litigating precedent-setting impact cases across the country and training young people to be leaders in their community, LatinoJustice PRLDEF has profoundly improved the way Latinos are treated in U.S. society. LatinoJustice PRLDEF's committed staff works to ensure that Latinos have more opportunities for political, economic, social and educational equality. Today, LatinoJustice PRLDEF works with an

extensive network of community activists, institutional and private sector partners to advocate for Latino rights nationally.

ABOUT THE STORIES PROFILED IN THIS REPORT

Throughout the report, we highlight stories drawn from widely publicized cases as well as the results of a new survey conducted by the Bickel & Brewer Latino Institute for Human Rights. The survey collected the stories of thirty undocumented students who are interested in attending law school, are current law students, or who have graduated from law school. The survey asked these individuals what schools they attended and how they were able to finance their educations. The survey also asked the individuals to describe the effect that federal immigration policy had on their decisions, as well as detailing any other obstacles they faced. Finally, the survey sought explanations of why education mattered and what individuals hoped to accomplish after completing this training. Various survey responses are discussed throughout the report; some individuals will be referred to by pseudonyms and abbreviations to protect their identities.

Table of Contents

Executive Summary	1
Part I - The Path to Law Licenses: Undocumented Students and Obstacles to the Bar.....	3
Ready, Willing, & Able: Undocumented Students Seeking to Practice Law	3
Achieving the Dream to Attend College & Law School: Profiles of Undocumented Pre-Law and Law Students.....	4
Putting The Law Degree to Work: Profiles of Undocumented Law Graduates	7
Confusion in the Courts: Barriers to Practice for Undocumented Law Graduates.....	11
The Federal Question	11
State Rules & Practices	12
Part II - Applications to the Bar: A Road Map for State Bar Admission Examiners and Courts.....	15
Resolving The Federal Question.....	15
Navigating The Impact of State Requirements In Light of Constitutional Concerns.....	18
Character and Fitness.....	22
Part III - Legislative Action for Positive Change: A Road Map for State Legislatures	25
Conclusion & Recommendations	27
To State Bar Examiners	27
To State Courts	27
To State Legislatures	27
To the President	28
To Congress	28
Endnotes	29

Executive Summary

Over the last several years, a growing controversy has arisen in state bar admissions: what relevance, if any, should immigration status have in determining which qualified U.S. law graduates are permitted to practice law? As undocumented immigrants enroll and graduate from law school, they find themselves unable to take the final step in their dream of practicing law: obtaining their law license. Recent high profile cases across the U.S. indicate that undocumented immigrants face severe barriers in order to be admitted into the legal profession. These cases demonstrate how highly qualified law graduates face these barriers despite overcoming significant hardships in achieving their law degrees so that they may serve their communities.

This report attempts to unpack this complicated issue and provide the public and potential actors—including bar admissions entities and legislators—with the information they need to assess this critical question.

Part I of the report describes the potential that undocumented students have to add value to the legal profession, along with the legal barriers they face in their access to law licenses. It explains how undocumented students may enroll in law school and obtain work authorization or work as independent contractors under current law. It further describes the growing body of court cases that have considered whether

state and federal law bar these qualifying law graduates from obtaining law licenses due to their immigration status.

Part II of the report explains how state bar admissions examiners should consider the various legal issues that typically arise in these cases. It explores the constitutional and statutory concerns that arise in cases that predicate access to law licenses on immigration status. It also addresses the “character and fitness” requirements in the context of immigration status.

Part III explores the potential legislative changes that could occur at the state level to ensure qualifying law graduates’ access to bar admissions, regardless of immigration status. While such changes are not wholly necessary or a prerequisite in order to provide access to law licenses, they help remove any doubt in the face of state bar admissions examiners and courts that might otherwise view their ability to grant licenses to undocumented law graduates as limited.

This report finds that lack of immigration status should not be a barrier for the many highly qualified and dedicated law graduates who seek a career in law. State bar examiners and courts should interpret applicable federal law, state law, and state bar requirements in line with the proper constitutional and statutory concerns to ensure all aspiring

lawyers have access to law licenses regardless of immigration status. State legislatures may also act to protect equal access to bar admissions for these qualified law graduates.

In line with these findings, the report concludes with a series of recommendation to various policymakers for how to achieve this important goal. State bar examiners, state courts, state legislatures, the President, and Congress all have a role to play in removing obstacles to law licenses for undocumented law graduates.

Part I - The Path to Law Licenses: Undocumented Students and Obstacles to the Bar

Each year, approximately 65,000 undocumented students graduate from high school.¹ With limited opportunities for student financial aid and barriers to employment, approximately 5-10 percent enroll in college, and even fewer go on to graduate school.² While there are no publically available statistics on the number of undocumented students in U.S. law schools, one study estimates that approximately 8,000 undocumented youth who are eligible for Deferred Action for Childhood Arrivals (“DACA,” a federal program that provides work authorization and a temporary reprieve from deportation for undocumented youth who meet certain age and educational requirements) have completed a professional degree.³ The unique group of young people within this number who do have law degrees are poised to make their mark on the legal profession. This Part describes the potential of these students to practice law, while also describing the current legal controversy over whether they may be admitted to practice.

Ready, Willing, & Able: Undocumented Students Seeking to Practice Law

There are many misconceptions about undocumented youth and their ability to

contribute to their communities in the U.S. The thirty individuals profiled from our survey are residents of eight different states across the U.S. and had lived in the U.S. for an average of sixteen years (often the majority of their young lives). Hailing originally from countries like Mexico, the Philippines, Colombia, Israel, Bangladesh, Paraguay, and Honduras, these young immigrants came to the U.S. at an early age, ranging from nine *months* to fifteen years old. Thirty percent of respondents cited favorable in-state tuition policies as a reason they were able to pursue higher education, and many others relied on private scholarships and family support. All of the respondents expressed a desire to pursue a career in the law out of a commitment to serve their communities here in the U.S.

This section separates the myths and the reality by highlighting the stories of immigrants who seek to enter the practice of law and by describing the ways in which undocumented law graduates may contribute under current law.

AL* – Overcoming Personal Struggle

AL has felt the force of the immigration system coming to the U.S. at the age of 12. She speaks eloquently about her experiences: "In my community many immigrant families do not have the resources to seek legal aid. Undocumented people are at greater risk of discrimination and violation of their rights. When my father was deported, my family could not afford an attorney to help us during that hard and painful process. Language is still a barrier for many of my family members and community therefore being able to communicate in their own language is very essential. I want to make a difference and fill that empty space that was noticeable during my father's deportation." Despite the personal stakes that AL has in attending law school, cost is a great barrier. She worked her way through college, but is not sure this will work because law school is so expensive. She has felt lost and confused, not knowing where to look for possible financial support options. Organizations like Educators for Fair Consideration have helped her navigate the law school admissions process, but she knows many more people who need assistance in order to pursue their dreams.*

Achieving the Dream to Attend College & Law School: Profiles of Undocumented Pre-Law and Law Students

The path to a legal career is a challenging one for any aspiring attorney. Being undocumented makes that path all the more difficult. Nonetheless, many undocumented youth are choosing to take on this challenge. Among the students surveyed by the Latino Institute, some students are drawn to the intersections of law and fields such as technology and religion.⁴ Some want to become immigration attorneys or prosecutors,⁵ others would rather practice corporate law or be public defenders.⁶ Clerkships, academia, and politics are all in the minds of our survey participants. These individuals are driven and committed; they are willing to sacrifice years to complete their educations.

Inspired by a commitment to service and a passion for the law, these promising young people must overcome incredible obstacles to achieve their dreams. Below we describe some of the institutional barriers undocumented youth face, and some of the developments in the law that have made it easier for undocumented youth to pursue a career in law.

Undocumented immigrants must overcome severe hardships and financial barriers in their pursuit of a higher education. For most people seeking admission to law school, the long path to a legal education begins with admission to a bachelor's degree program. For undocumented youth

aspiring to become lawyers, this is the first challenge to their professional goals. While the Supreme Court has protected all children's access to a free primary and secondary education in the U.S. regardless of immigration status, undocumented youth face severe financial barriers to pursuing college beyond those experienced generally by youth.⁷ In particular, undocumented youth are not eligible to receive federal financial aid such as grants and loans.

Undocumented youth must thus rely on state, local, or private funding to make their dream of higher education a reality. Unfortunately, most states do not provide undocumented immigrants with in-state tuition or financial assistance to attend college, even for those who have been long time residents and graduated from high school in that state.⁸ For some students, like **Ainee Athar** whose story is profiled, these barriers are a deterrent from attending law school entirely. Ainee has not applied due to the massive cost and lack of access to financial aid; Ainee is not alone. Nearly all of the undocumented students surveyed by the Latino Institute identified financial constraints as a significant barrier to pursuing a law school education. As one respondent noted, while she wants to provide quality services to low-income communities, she is "torn between supporting [her] family and going to law school." Another respondent, **Kelsey Burke**, is also concerned about the lack of access to financial aid, especially considering the possibility that being admitted to the bar is not guaranteed based on her immigration status.

Ainee Athar – Limited Funding, Unlimited Dedication

AINEE ATHAR is a 22-year-old who successfully applied for DACA. She dreams of pursuing a career in legislative advocacy but the lack of financing options means that she cannot currently apply for law school. Ainee recently graduated from college with degrees in Anthropology and Government. In the 18 years since she arrived from Pakistan at the age of 2, Ainee has remained committed to achieving her goals despite the uncertainty she has faced.

Fortunately, progressive developments in the law have expanded undocumented students' access to in-state tuition and other forms of state financial aid. At least seventeen states, including most recently New Jersey, have enacted legislation or implemented policies to permit qualified undocumented state residents to receive in-state tuition rates for public universities statewide, and large public university systems have enacted similar in-state tuition policies in at least two other states.⁹ In addition, at least three states, California, Texas, and New Mexico, also allow undocumented students access to state financial aid and scholarships administered by public universities, and legislation is pending in other states.¹⁰ Thirty percent of the survey respondents indicated that access to in-state tuition and/or other state-based financial aid programs has made all the difference in their pursuit of college and graduate school.

Expanding access to in-state tuition and financial assistance will help address some of the most significant financial barriers that undocumented students face in pursuing a higher education in law. Of course, access to in-state tuition and financial assistance does not remove all financial barriers for undocumented youth. Students must still pay some tuition without the benefit of federal student loans. Moreover, once an undocumented student makes it through college, the prospect of then paying fees for law school applications and preparing for the Law School Admission Test (LSAT) without the benefit of expensive preparation courses can be daunting.¹¹

Many undocumented youth therefore need access to work opportunities to cover their education expenses—and to gain valuable experiences to demonstrate their readiness for a law school education. Federal law prohibits employers from hiring immigrants who lack work authorization.¹² As a result, undocumented youth are often unable to find the kinds of opportunities that will allow them to earn money to pay for college, LSAT preparation, law school application fees, and finally law school tuition itself. Furthermore, some employers will not even consider undocumented immigrants for internships and other special opportunities due to their status. Undocumented immigrants thus feel like

they are unable to compete in the law school application process.

Many undocumented youth now have the opportunity to work through a 2012 federal program, Deferred Action for Childhood Arrivals (DACA).¹³ Through DACA, undocumented immigrants may receive a two-year reprieve from deportation for a period of two years, subject to renewal.¹⁴ Upon receiving DACA, an individual is eligible for work authorization.¹⁵

DACA has changed the lives of thousands of undocumented youth in the United States, including many students who want to pursue careers in the law. For example, some students chose to apply for law school only after obtaining this status, while others who might have been forced to leave were able to continue their educations. As one survey respondent indicated, “I would probably not have continued in law school if DACA had not passed during the summer after my 1L...[p]ost DACA, I was lucky enough to secure a position at a large law firm and better able to shore up my finances.”

DACA does not provide a specific immigration status and does not qualify a recipient for federal financial aid. While DACA opens some doors, it leaves many still closed. Thus, DACA recipients in law school still express uncertainty over their futures.

Anthony Ng – A Future Organizer for Vulnerable Communities

ANTHONY NG came to the United States from the Philippines when he was twelve years old. He's spent the last twelve years living in Los Angeles, and was able to receive relief under DACA. His undergraduate major is in political science, which he received from UC Irvine in 2011. He was able to afford college because he received in-state tuition and was supported by his family. When he goes to law school, Anthony wants to continue his work organizing communities of color to stand up for their rights. He hopes that by providing low-cost services to marginalized communities he will empower people to speak out. He sees himself as a possible catalyst for change; once people feel empowered they will be more likely to take the initiative and organize themselves. In law school, Anthony plans to draw on his experiences organizing undocumented Asian and Pacific Islander youth and other immigrant youth. He's involved with Asian Students Promoting Immigrant Rights through Education (ASPIRE) Los Angeles, a pan Asian and Pacific Islander immigrant youth led organization as well as United We Dream, the largest immigrant youth led network in the country. He also pushes for policy objectives as an immigrant rights policy advocate at Asian Americans Advancing Justice-Los Angeles. Despite his focused goals, Anthony doesn't feel confident about the law school admissions process. He finds the system confusing and he's overwhelmed with the financial cost of applying for and then attending law school.

Both with and without DACA, students have been able to overcome numerous obstacles and continue to pursue their dream of attending law school and becoming an attorney. One of the primary motivators is a commitment to social justice. The students whose stories are profiled in this report exemplify the dedication, talent, and resilience of this group of aspiring undocumented lawyers.

Putting The Law Degree to Work: Profiles of Undocumented Law Graduates

Against all odds, undocumented law students and graduates are already making a significant contribution to our society. They have overcome tremendous obstacles and have found ways to contribute through careers in

public service and consulting, among others. This section profiles the stories of undocumented law graduates and the important work they continue to do today.

Several of these stories have already captured public attention and serve as models for aspiring lawyers who face the challenges of being undocumented. Sergio Garcia, Cesar Vargas, and Jose Manuel Godinez-Samperio are leading the fight in high profile cases in California, New York, and Florida. As discussed in greater detail in Parts II and III of this report, Sergio Garcia's case led to a new law and a state court decision in California that paved the way for his admission to the California bar earlier this year. An incredible law graduate who

Leslye Osegueda – Working Toward a Truly Equal System

LESLYE OSEGUEDA has lived in the United States since she was five. She graduated from UCLA with a Political Science major in 2012, after receiving in-state tuition and other forms of support. Leslye has big plans for law school, where she plans to hone her knowledge of labor and immigration law while continuing her community organizing efforts. As an undocumented immigrant who has received DACA, Leslye wants to help her community fight “against the injustices and oppression it faces every day in a society and legal system that is not colorblind. With the skills I acquire, I want to continue being an organizer who is better equipped to challenge the bureaucracy and legal system that is undermining poor and working class communities.” Though Leslye knows exactly how she will use her law degree, she is uncertain how she will pay for it. She has deferred her application until she is certain that she will be able to attend the first year without needing to work.

earned the respect of the many individuals and organizations who supported his admission to the bar, Sergio Garcia is now able to pursue his dream of helping others through his law degree.

Other stories similarly demonstrate the incredible impact that undocumented immigrants may have on the practice of law if barriers to law licenses are

removed. For example, Jose Manuel Godinez-Samperio, whose case is still pending in Florida, has led an exemplary life in the United States. As the filings in his case describe, he came to the United States on a visa when he was young but eventually became undocumented. Growing up in the United States, he became an Eagle Scout and graduated as valedictorian of his high school. He graduated from college and law school, and passed the Florida bar exam in 2011. He is awaiting a decision on his application for admission to the Florida bar so that he can continue to achieve excellence as a lawyer.

His story, along with the stories of Sergio Garcia and Cesar Vargas (who is also profiled in this report), have captured the headlines precisely because of their achievements over their years and their admirable desire to contribute to their communities here in the United States as lawyers.

Beyond the headlines, there are countless other undocumented immigrants who have successfully graduated from law school and are seeking to contribute their skills as lawyers. Some of these graduates shared their stories in the Latino Institute’s survey. Their stories, too, demonstrate the potential benefits that the legal profession has to gain by ensuring that all qualified bar applicants have access to law licenses.

Marisol Conde Hernandez – Achieving the DREAM in New Jersey

MARISOL CONDE HERNANDEZ lived with uncertainty as an undocumented immigrant for 24 years. She is now a DACA recipient. She has been an outspoken and committed advocate for many needed immigration reform initiatives. Social justice is very important to her, and she hopes to pursue a career in public interest law in New Jersey. This is only one more dream in a series that Marisol hopes to accomplish. She advocated as an undocumented student in support of the federal DREAM Act, and was also a strong supporter of an in state tuition bill for New Jersey's undocumented students. This tuition bill was passed in New Jersey, providing much needed support for undocumented students in the state. Even with this financial assistance, Marisol has worked full time to support herself in college and in law school. She is committed to bringing equality and justice for marginalized communities.

The ability of some of these law graduates to contribute with their law degrees has been made easier by DACA, which has given qualifying recipients work authorization. However, for the many immigrants like Sergio Garcia and others who are not eligible for DACA, there are still opportunities to put one's law degree to work. While employers are prohibited from hiring undocumented immigrants without work authorization under federal law, nothing prohibits clients from retaining undocumented law graduates as solo practitioners.¹⁶ As the American Civil Liberties Union and others have argued, clients are not considered "employers" hiring "employees" when they retain attorneys; instead attorneys operate as independent contractors.¹⁷ Moreover, it is undisputed that undocumented lawyers may provide pro bono services to their communities.¹⁸ Many are involved in policy advocacy and organizing to change the laws that

prohibit them from legalizing their status and achieving their dreams. Cesar Vargas, for instance, is a co-founder and

Luis Cortes Romero – Pushing the Boundaries for Bar Admission

LUIS CORTES ROMERO graduated from law school and now feels empowered by the recent California decision allowing bar admission for undocumented individuals. Luis is using his position as a law graduate to expand the bar admission fight. When he saw the work that had already been done in California, Luis decided to take a different state's bar exam instead. Luis graduated from a college in the Midwest, and he hopes to fight for bar admission and expand access in his state. He hopes to empower undocumented immigrants to take a more active stand against legal restrictions and learn to navigate the immigration system.

leader of the DRM Action Coalition, an advocacy group that has been a trailblazer in the movement for passage of the DREAM Act and immigration reform.²¹

Of course, law graduates must still be licensed in order to practice law in their respective states. It is therefore important to open bar admissions to all qualified law graduates, regardless of immigration status. Bar admission can make a tremendous difference in the ability of

law graduates to pursue a wide range of productive work. Without law licenses these graduates are limited in the types of representation and counsel they are permitted to give. With law licenses, the possibilities are endless. Attorneys who were formerly undocumented, for example, can be found practicing in almost every field of law, running the gamut from corporate and transactional work to public defense. Immigration status alone should not be an obstacle to law licenses.

Cesar Vargas – Bringing the Fight to New York

*In New York, **CESAR VARGAS** leads the fight for equal opportunity and access to the state bar. He is also one of the nation's leading immigration advocates. Cesar was brought to the United States from Mexico at age 5 after his father passed away. He is now 30 and fighting for rights of all immigrants in the country and more specifically to gain access to the New York state bar.¹⁹ Cesar Vargas was an honors student in both college and law school. His work experience demonstrates a strong commitment public service. He interned with a State Supreme Court judge and a Congressman. After the Second Judicial Department Committees on Character & Fitness conducted a full review on his application including forming a Subcommittee to hold an evidentiary hearing, they referred his application to the Appellate Decision Second Department for determination. Cesar is currently awaiting the court's decision.²⁰*

SP* – Working for Social Justice as a Public Defender

SP came to the United States when he was one year old and lived without immigration status for 28 years before achieving legal permanent resident status. In the intervening years, he relied on in-state tuition benefits and private scholarships to attend college and law school. He also worked 20-25 hours a week during the school year. He was admitted to a state bar in 2011. He is committed to social justice and addressing inequality. He was able to put these goals into action by becoming a public defender and serving countless indigent clients. Being admitted to the bar has allowed him to pursue these dreams and to work for social justice.*

Confusion in the Courts: Barriers to Practice for Undocumented Law Graduates

One might think that immigration status would be irrelevant to whether an individual is admitted to practice law in any given state. After all, as the legal profession has become increasingly globalized, many foreign law graduates sit for bar examinations and are admitted to practice each year. But as undocumented law graduates have sought admission, the recent high-profile cases in California,²² Florida,²³ and New York²⁴ have raised questions about state bar examiners' ability to grant licenses to otherwise qualified applicants who lack immigration status. This section describes the legal issues that are being raised in these cases. As discussed later in the report, these concerns should not be deemed to bar undocumented law graduates from law licenses.

The Federal Question

Bar admissions are generally governed by state law and state court rules.²⁵ The power to admit law graduates to the state bar ultimately rests with the state judiciary.²⁶ In 1996, Congress passed legislation that restricted states' ability to provide certain types of benefits to undocumented immigrants.²⁷ Despite state courts' authority to address law licensing, some state bar examiners have questioned whether one of these federal statutes, 8 U.S.C. § 1621, prohibits state courts from licensing undocumented law graduates.²⁸ Likewise, some state courts have required briefing on the question.²⁹

Section 1621(c) states that undocumented immigrants³⁰ are "not eligible for any State or local *public benefit*," unless a state "affirmatively provides for such eligibility."³¹ This has raised the question whether granting undocumented law graduates admission to the bar constitutes a "public benefit." Section 1621(c) defines a "public benefit" to include "any . . . professional license . . . provided by an agency of a State or local government or by appropriated funds of a State or local government."³² Because of this definition, courts have been asked to determine whether law licenses are (a) provided by state agencies or (b) funded by appropriated funds from the state.³³

Opponents of law licensing for undocumented law graduates have made both arguments: that courts constitute "an agency of a state"³⁴ and that law licensing is provided by "appropriated funds" since the state provides some financing to the courts.³⁵ State bar examiners have, in some cases, requested guidance from their state courts on these questions, placing some undocumented law graduates' bar applications on hold.³⁶

In both the California and Florida litigation, the Obama Administration's U.S. Department of Justice (DOJ) weighed in against the undocumented law graduates' admission to the bar based on their reading of federal law.³⁷ The DOJ argued that bar admissions were tantamount to a "public benefit" under 8 U.S.C. § 1621(c) and, therefore,

undocumented law graduates should not be admitted to practice law.³⁸ The DOJ further argued that since the California and Florida Supreme Courts are ultimately responsible for admitting applicants to the state bar, and because the Supreme Courts are financed with appropriated funds, the law licenses they grant must necessarily be “provided . . . by appropriated funds of a State.”³⁹ Thus, the DOJ argued, law licenses fall under the prohibition in § 1621(c).

As explained below in Part II, however, such a broad interpretation of 8 U.S.C. § 1621(c) is flawed in many ways, and should not impede state courts from granting law licenses to undocumented law graduates. Thus far no court has squarely addressed this issue. Even in California where the court held that Sergio Garcia could be admitted to the bar, this issue was not addressed. As noted by the California Supreme Court, the California legislature opted to “affirmatively provide[] for such eligibility” by passing California Assembly Bill No. 1024 as a way of complying with the savings clause in § 1621(d).⁴⁰ The court in *In re Garcia* therefore held in favor of Sergio Garcia based on the passage of the state legislation and thus did not rule on the specific question of whether law licenses are granted by appropriated funds as to trigger the prohibition in § 1621(c).⁴¹ This remains an open question in other states. For applicants in states without such “affirmative” laws like California, Parts II and III offer a roadmap for applicants, practitioners,

and judges on how best to assure that undocumented law graduates are allowed to become lawyers and serve their communities despite their immigration status.

State Rules & Practices

A second set of questions involves various state law rules and requirements that relate to bar admissions. These requirements can be grouped in two categories. First, some states have explicit citizenship or immigration status requirements. Second, all states have some kind of “character and fitness” requirements, which some have interpreted to be negatively impacted by an applicant’s lack of immigration status. Each of these is discussed in turn.

First, several states have citizenship, immigration status, or domicile requirements that may raise immigration questions. Some bar applicants have challenged these requirements when seeking admission to the state bar. For example, a bar applicant challenged the Georgia Board of Bar Examiners’ request for additional documentation from non-citizens but not U.S. citizens under a state law requiring proof of citizenship or immigration status.⁴² However, the federal district court ultimately upheld the state requirement on federalism grounds.⁴³ Similarly, this became a central issue in a case arising in Florida, where proof of citizenship or immigration status is also required.⁴⁴ This case is still pending.

These states are just two among many that question law graduates about citizenship and immigration status in

their bar admissions process. According to a document filed by the Florida Bar of Board Examiners in the Florida case, at least twenty-two states inquire about citizenship or immigration status as part of the bar admission process.⁴⁵ As discussed below, an inquiry about immigration status is not the equivalent as a bar on admissions for those who lack immigration status. Whether as an inquiry or as a requirement, there are arguments that such provisions may be unconstitutional or, at the very least, contrary to public policy. These arguments will be discussed in part II.

AY* – Finding Creative Ways to Jumpstart a Legal Career

AY is currently studying at CUNY School of Law. She came from Guyana when she was thirteen, and her undocumented status continues to cause severe uncertainty despite what she has achieved. Even after graduating with a double major in Political Science and Economics, AY is unable to view her future with any certainty. Nonetheless, she continues to pursue her legal studies. She hopes to eventually work in family law, focusing on child custody cases. She understands that the bar admissions eligibility question will severely limit the use of her law degree.*

It should also be noted that some states have laws that affirmatively protect immigrants from discrimination in licensing. For example, New York Judiciary Law explicitly provides that “alienage... shall constitute no cause for

refusing any person examination or admission to practice.”⁴⁶ As Professors Calvo, Lung, and Newman have argued, this statute aims to protect bar applicants from discrimination based on alienage without privileging any particular form of immigration status.⁴⁷ These types of laws provide another means by which undocumented immigrants may argue that their status should have no bearing on their admission to the bar.

Irrespective of any citizenship or immigration requirements, all states have some kind of “character and fitness” requirement. In cases where bar applicants have applied for admission, this has been raised as an argument for why undocumented immigrants should not be admitted to the bar. For example, in the Georgia case, the federal court compared an applicant’s undocumented status with constant engagement in illegal activities.⁴⁸ The Florida Board of Bar Examiners also seemed to raise this concern in their filings with of the Florida Supreme Court.⁴⁹ These issues were raised, but thankfully rejected, in the California case.⁵⁰ As explained below in Part II, there is little basis to create a per-se bar to undocumented immigrants on the basis of “character and fitness” requirements.

Despite the hard work and diligence of immigrants who have graduated from law school, and irrespective of their ability to work and serve their communities as lawyers, there have been several roadblocks on their path to practice law. The next Part describes

how state bar admission examiners (and courts, to the extent these issues are referred to the courts) should handle these questions in favor of undocumented bar applicants.

Part II - Applications to the Bar: A Road Map for State Bar Admission Examiners and Courts

As noted above in Part I, undocumented law graduates have faced many obstacles on their path to practice law. Federal law and bar admissions requirements based on immigration status should not be one of them. This Part describes the various considerations that state bar admission examiners—and courts, to the extent that these questions are referred to them—should weigh when addressing to what extent immigration status should matter when licensing law graduates to practice.

Resolving The Federal Question

Despite the arguments of the DOJ and others, bar examiners and courts should conclude that federal law does not prohibit states from licensing attorneys without immigration status. And thus bar examiners and courts should not hesitate to admit qualified undocumented law graduates to practice law in their respective states.

As noted above, the federal law at issue is 8 U.S.C. § 1621(c), which prohibits states from providing undocumented immigrants with “public benefits” (defined to include a “professional license”) if the benefit in question is “provided by an agency of a State . . . or by appropriated funds of a State”⁵¹ Thus, in the context of law licenses, the main question is whether a court is an “agency of a State” or whether

law licenses are issued “by appropriated funds.”

As several parties and amici have argued in the California and Florida cases, and as the DOJ conceded in its own brief on the issue, there is a strong argument that a state court cannot be “an agency of a State” under § 1621(c).⁵² As noted by the DOJ, “[i]n ordinary parlance, . . . courts are not described as ‘departments’ or ‘agencies’ of the Government, and it would be strange indeed to refer to a court as an ‘agency.’”⁵³ This is so because under state constitutions (like in the U.S. Constitution), the judicial branch is considered to be a co-equal branch of government that is independent from executive and legislative bodies.⁵⁴ While agencies are typically lodged within the executive department, the judiciary is not.

Congress understood this difference when enacting the prohibition found in 8 U.S.C. § 1621(c). This is why Congress explicitly differentiated between administrative agencies and courts in other sections of the same legislation, using the word ‘administrative agency’ side by side the word ‘court’ in several provisions, thus making it clear that Congress did not mean to encompass courts whenever it used the word ‘agency.’⁵⁵ By only referring to agencies in § 1621(c), and by referring to both

administrative agencies and courts when it intended to cover both in other sections of the same legislation, Congress manifested its intent to only prohibit the types of benefits dispensed by *administrative* agencies.

The second question as to whether bar admissions are “provided . . . by appropriated funds of a State” has resulted in more debate, however. The DOJ has argued, for example, that bar admissions come from appropriated funds and thus are subject to the prohibition.⁵⁶ The DOJ’s reasoning is that since judges’ salaries are paid from state coffers, and because it is ultimately state courts that grant bar admissions, this means law licenses are provided by appropriated funds.⁵⁷

This view of § 1621(c) is flawed. As others have pointed out, the DOJ’s argument ignores the significant difference between public benefits specifically designated and funded by state money (which is what § 1621(c) targets) and those only incidentally involving individuals paid by state appropriations.⁵⁸ The fact that appropriated funds are used by a court in making the final decision of issuing a license should be insufficient to trigger the bar in § 1621(c).⁵⁹ To hold otherwise would create absurd results. In the words of the Committee of Bar Examiners of the State Bar of California:

“Taken to its extremes, under the DOJ’s premise, if the Court were to adjudicate a private contract matter, to which an undocumented immigrant was a party, because the Justices’ salaries are paid for

*by appropriated funds, any order or judgment in the case giving the undocumented immigrant the benefit of the contract would transform it into a public benefit provided by appropriated funds. This type of strained argument was flatly rejected in Campos v. Anderson . . . where the California Court of Appeal found that the State’s active assistance in collecting child support payments did not render the payments public in nature, since the source of the payments were funded by private individuals and not by the government.”*⁶⁰

As the California Bar Examiners went on to explain, Congress used this language “to capture non-governmental entities that receive appropriated monies for the specific and designated purpose of passing those funds directly on to undocumented immigrants in the form of loans, grants etc.”⁶¹ The DOJ’s contrary reading that *any* funds is sufficient “would render language in the statute superfluous . . . [since] the word ‘appropriated’ means to set apart for or assign to a particular purpose or use.”⁶²

Aside from the salaries paid to judges, which are not specifically designated for any purpose, bar admissions are entirely financed by private funds. Indeed, the California Attorney General, who wrote a brief in support of Sergio Garcia, made this exact point. The whole bar admissions process is “funded by fees paid by its members directly to the State, which are never appropriated by the Legislature.”⁶³ In other words, the costs of maintaining a bar committee that is responsible for reviewing bar applications and referring applicants to

be admitted to the highest court are paid by lawyer dues, not state appropriations.⁶⁴ Similarly, any costs that come with applying to the bar—like paying to take the bar exam—are paid by the applicant, meaning that the state does not subsidize the granting of law licenses with appropriated funds.⁶⁵

In all, because bar admissions are not specifically provided by appropriated funds—and instead are funded privately by attorney and application fees—undocumented law graduates should not be prevented from receiving a law license by § 1621(c).

Seth Ronquillo – Fighting for the Underrepresented

SETH RONQUILLO is currently studying Film and Linguistics at UCLA. His experience as an undocumented immigrant has reaffirmed his commitment to social justice and immigration law reform. Seth plans to use his education to find creative solutions, even if he is not able to pursue law school. His “ultimate aspiration is to create stories that share underrepresented perspectives (e.g. undocumented immigrants)” with the public.

One other argument that has also arisen in the context of 8 U.S.C. § 1621 is that there is no harm in construing it to bar states from licensing undocumented law graduates because § 1621(d) allows states to “affirmatively provide[] for such eligibility” through state legislation. Indeed, in the California and Florida cases, the DOJ has argued that

undocumented law graduates and their supporters should enact legislation at the state level as a way to resolve the issue.⁶⁶

While bar examiners and state courts may be tempted to use § 1621(d) as a way to avoid the question of § 1621(c)’s applicability to law licenses, doing so does not avoid the constitutional concerns that § 1621(d) may invoke if it is construed to bar law licenses in the absence of state legislation. The constitutional issues arise under the Tenth Amendment, which says that “[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively.”⁶⁷ As noted by MALDEF in their brief supporting Sergio Garcia in the California case, federal legislation can violate the Tenth Amendment if: (1) it regulates the states as states; (2) it concerns attributes of state sovereignty; and (3) it is “of such nature that compliance with it would impair a state’s ability to structure integral operations in areas of traditional governmental functions.”⁶⁸

Each of those factors is present in the context of § 1621(d), and so bar examiners and state courts should not rely on it as a means to avoid the issue of whether bar admissions are subject to the prohibition in § 1621(c). First, § 1621(d) regulates the states in that it tells the states who they can offer public benefits to, and how the state should go about extending them.⁶⁹ Second, if § 1621(d) were interpreted to apply to law licenses, this would implicate issues of

state sovereignty, since bar admissions have historically been within the province of state courts.⁷⁰ Third, such a reading of § 1621(d) would alter “traditional governmental functions,” since to require an affirmative law by the state legislature in a matter involving bar eligibility would undermine the governmental organization of the states by shifting the responsibility over bar eligibility from the judiciary to the legislature.⁷¹ Because this is a federal statute interfering in state matters, which alters the separation of powers between the legislature and judiciary, reading § 1621(d) to bar law licenses in the absence of state legislation raises serious constitutional questions of federalism.⁷² Due to the constitutional concerns involved, bar examiners and judges should refrain from using § 1621(d) as an excuse to pass the buck to state legislatures. After all, determining bar eligibility is clearly within the jurisdiction of the judiciary. And while the legislatures can act in these matters, the judiciary is equally (if not more) competent to decide such questions.

Navigating The Impact of State Requirements In Light of Constitutional Concerns

As noted in Part I, some states do address immigration issues in education and licensing. These types of laws may cut in different ways in the context of bar admissions. Some states require bar applicants to disclose citizenship and immigration status or even explicitly exclude undocumented immigrants

from the bar.⁷³ Other states have favorable policies, providing for in-state tuition or financial aid to undocumented immigrants or expressly prohibiting discrimination in licensing based on alienage.⁷⁴ The existence of both favorable and non-favorable state laws implicate different constitutional concerns under the Equal Protection Clause, the Contracts Clause, and the Due Process Clause, which bar examiners should consider when addressing the relevance of immigrants status in bar eligibility.

State laws that would distinguish among bar applicants based on immigration status raise constitutional concerns under the Equal Protection Clause of the Fourteenth Amendment. To deny undocumented law graduates a law license—even after completing all necessary schooling and character and fitness requirements—subjects them to arbitrary discrimination based solely on their immigration status, and this is highly suspect under the Equal Protection Clause.

Under the Equal Protection Clause of the Fourteenth Amendment, states are prohibited from “deny[ing] to any person . . . the equal protection of the laws.”⁷⁵ The Equal Protection Clause protects the rights of not just citizens or lawful residents, but of immigrants as well, including those who are undocumented.⁷⁶ Unlike the federal government, whose responsibility is to regulate immigration,⁷⁷ states have “little, if any basis, for treating persons who are citizens of another state

differently from persons who are citizens of another country.”⁷⁸ Since states admit not only residents of other states, but also various classes of immigrants to practice law, it can be argued that excluding undocumented law graduates is unreasonable, for such a policy furthers no legitimate governmental interest, and constitutes a form of invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.⁷⁹

As Professors Calvo, Lung, and Newman have argued, there is a particularly strong Equal Protection argument in the context of DACA recipients with work authorization.⁸⁰ They make the case that DACA recipients are a prime example of “an insular minority” that deserve to be protected under the Second Circuit’s Equal Protection precedent.⁸¹ DACA recipients are authorized to work in the United States and will not be deported for at least a two-year period (with an option to renew), making them no different than other non-citizens routinely admitted to state bars.⁸² Given the similar ability of DACA recipients to work and exercise their duties as officers of the court, singling them out to deny them admission to the bar is irrational and serves no legitimate state purpose.⁸³ This is completely arbitrary and in direct conflict with the Equal Protection Clause.⁸⁴

However, Equal Protection arguments should not just be limited to DACA recipients. As noted in Part I, undocumented immigrants who do not have DACA still have opportunities to

practice law and to fulfill their ethical obligations as members of the bar. Because of their equal competence, it can be argued that denying undocumented law graduates admission to state bars would be a violation of the Equal Protection Clause of the Fourteenth Amendment regardless of whether they have DACA or not. Although there is disagreement as to whether undocumented law graduates can practice as independent contractors, there is “general agreement that a licensed undocumented immigrant would not violate federal law if he or she provided legal services on a pro bono basis or outside the United States.”⁸⁵ Thus, it makes no sense for states to deny law licenses to undocumented law graduates on this basis when foreign nationals are admitted to state bars all the time, even though they too lack work authorization.⁸⁶

It is also irrational to deny undocumented law graduates access to the bar based on the belief that, due to their unlawful status, they are per se unfit to be admitted to state bars. As noted by the California Supreme Court, “the fact that an undocumented immigrant’s presence in this country violates federal statutes is not itself a sufficient or persuasive basis for denying undocumented immigrants, as a class, admission to the State Bar.”⁸⁷ The fact is that immigration laws are civil laws, the violations of which do not involve criminal conduct nor necessarily constitute crimes involving moral turpitude.⁸⁸ Given the federal

government's broad discretion in enforcing immigration laws, even the violation of said laws does not necessarily result in civil sanctions. Civil sanctions are especially unlikely of persons with long ties to the United States and who have been educated here for large portions of their life.⁸⁹ Current enforcement priorities by the federal government further support this point.⁹⁰ For all these reasons, Equal Protection arguments should not be limited to DACA recipients, since even non-DACA law graduates possess similar opportunities to work as lawyers and have the same ability to meet the ethical obligations as officers of the court. Thus, barring any qualified undocumented law graduate from becoming a lawyer solely based on their immigration status is likewise arbitrary and in violation of the Equal Protection Clause.

Now, favorable state laws may provide further ammunition for arguments against considering immigration status when providing law licenses. As Professors Calvo, Lung, and Newman note in the context of New York, any prohibition against undocumented immigrants would violate an existing state law prohibiting discrimination in licensing based on "alienage."⁹¹

Applicants living in states with similar laws can use these laws to obtain law licenses.

Other legal advocates have gone even further and argued that the mere existence of state laws that give undocumented students in-state tuition or financial aid prevent states from

denying undocumented law graduates law licenses under the Contracts Clause and the Due Process Clause of the U.S. Constitution. As argued by MALDEF in the California case, for example, the fact that California provides in-state tuition to undocumented students and now, with the passage of the California DREAM Act, offers them governmental aid, may mean that denying them access to the state bar contravenes the Contracts Clause of the U.S. Constitution.⁹²

The Contracts Clause reads: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁹³ Contract Clause violations occur when: "(1) there is a contractual relationship . . .; (2) there is a change in the law that impairs the contractual relationship; and (3) that the impairment is substantial."⁹⁴ Such violations are upheld only if the state demonstrates that "the impairment is reasonable and necessary to serve an important public purpose."⁹⁵ Under this legal standard, MALDEF argues that by admitting undocumented law graduates to their public law schools, California has created an implied contract with undocumented students—a contract that promises them an opportunity to put their degree to work and practice law in California.⁹⁶ After all, California law schools accredited by the American Bar Association are to confer Juris Doctorate degrees only upon students who complete a program of legal education that qualifies them to apply for the state bar.⁹⁷

RY* – Keeping Immigrant Communities United

RY has been a longtime advocate for undocumented youth and recently entered law school. She struggled over the years to pursue her dreams, coming to the U.S. with her family from Bangladesh when she was a young girl and later learning that she was undocumented. She worked hard to graduate from high school and went on to attend a private university on scholarships. After working with immigrant youth to advocate for federal and state legislation, she recently started law school. Recently receiving DACA status, RY has been able to afford this endeavor through a combination of private financial aid, scholarships, and work. She continues to advocate for immigrant youth while pursuing her legal studies. Once she gets her law degree, she hopes to use her skills to help other undocumented immigrants. She is all too familiar with the lack of opportunities undocumented immigrants face.*

This means that to deny undocumented law graduates a law license would abrogate the contract that the state entered into when they enrolled them in their law schools, for such a denial renders their degree useless.⁹⁸

Cancelling these contracts serves no important public purpose, at least not in states like California, where in-state tuition and financial aid are provided for undocumented students by the government. If anything, these state laws evince a state policy in favor of

furthering the careers of undocumented law graduates, not hindering them.⁹⁹ To deny them a law license upon completion of their law degree cannot be justified, and thus may violate the Contracts Clause.

Another reason bar examiners should be weary of denying law licenses on the basis of immigration status is that there are serious Due Process Clause implications. As MALDEF argues in the Florida case, undocumented law graduates have a property interest in a law license that is protected by the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹⁰¹ Quoting the Supreme Court, MALDEF noted that “[a] state cannot exclude a person from the practice of law or from any occupation in a manner or for reasons that contravene the Due Process [Clause].”¹⁰² Such a property interest in a law license can be created “based on the conduct and representations of government officials when their actions lead to the creation of a mutual explicit understanding.”¹⁰³ In the case of undocumented law graduates, they have gone through the required schooling, invested resources in passing the bar exam, and have offered satisfactory evidence of good moral character to the bar examiners—all with “the understanding that the Board ultimately would make a recommendation to the . . . Supreme Court regarding [their] admissibility.”¹⁰⁴ Yet, in the Florida case, the bar

examiners deferred the application even after receiving all information necessary to make a recommendation.¹⁰⁵ This process is questionable under the Due Process Clause since it denies the applicant an “opportunity to contest the deferral of his application by the Board.”¹⁰⁶ For these reasons, a failure to make a recommendation when all the requirements have been met may deprive an applicant of his or her property interest in a law license in violation of the Due Process Clause of the Fourteenth Amendment.

Due to all of these constitutional concerns, bar examiners should be wary of relying on state laws that implicate immigration issues as a reason to bar immigrants from law licenses. In states where there are favorable laws protecting immigrants from discrimination or extending educational rights to those immigrants, bar examiners should take note of those protective provisions.

Character and Fitness

The debate over bar admission for undocumented individuals has also centered on whether being undocumented constitutes a lack of fitness to practice law. Character and fitness inquiries usually determine whether the public can trust an attorney, and whether the attorney's clients can use his or her counsel with

confidence. Typical inquiries might explore a bar applicant's past dishonesty, employment misconduct or evidence of mental instability. Many investigations are legitimately focused on whether the applicant should be trusted with client funds and important aspects of a client's life or livelihood. However, the arguments surrounding undocumented bar applicants argue that these applicants are unfit to practice law as a class.

For instance, the Florida Board of Bar Examiners has argued that an applicant's willingness to live in the United States as an undocumented immigrant may speak negatively about an applicant's character and fitness. This assertion is plainly unsupported.¹⁰⁷ As explained in the amicus curiae submitted by Americans for Immigrant Justice in the Florida case, being undocumented is not a crime.¹⁰⁸ Living in this country as an undocumented immigrant does not preclude a finding of good moral character under immigration laws, such as 8 U.S.C. § 1101(f).¹⁰⁹ Even if bar admissions boards consider something to be a negative factor as part of their character and fitness determination, they should also consider mitigating factors, such as age, seriousness of alleged misconduct, the applicant's candor and positive contribution to the country, and other underlying factors instead of creating a per-se bar.¹¹⁰

KELSEY BURKE – FACING DOWN FLORIDA’S BAR LIMITATIONS

KELSEY BURKE lives in Florida, where she’s currently in her second year of law school. She has received Temporary Protected Status, which could give her work authorization but does not qualify her for a green card. She was able to attend college and ultimately law school after receiving TPS status, but she does not know if Florida’s Supreme Court will allow her to gain admission to the Florida Bar. Kelsey has wanted to be a lawyer since she was fourteen years old, and she is working toward this goal despite not receiving any financial aid to attend law school. She knows exactly what she hopes to achieve with her education: “Why do I want to practice law? Because I have not only lived but also seen what the broken immigration system does to our families by separating them, students who are bright and have a great potential to give back, the constant fear of living in limbo, wondering if anything will ever change. The false hope that something will be different the next year yet everything remains the same. Unless we continue to pursue higher education, help and give back to those in our communities who are still unaware of their rights and are being taken advantage of, nothing will ever change.”

A similar argument arose and was rejected in Sergio Garcia’s case. One of the amici curiae litigants argued that an undocumented individual should not be permitted to pass the character and fitness portion of that state’s bar based on California’s Business and Professions Code. California’s code requires an oath to faithfully discharge the duties of an attorney.¹¹¹ Among these duties is the obligation to support the laws of the United States.¹¹² The author then claimed that an undocumented individual would be in violation of federal law and therefore could not take the oath.¹¹³

The Supreme Court of California disagreed that past or present violations of law “invariably render[] the applicant unqualified to be admitted to the bar or to take the required oath of office.”¹¹⁴

Rather, the question for bar admission is whether a violation shows the applicant’s moral turpitude, which would typically require additional investigation into the circumstances surrounding the violation of law.¹¹⁵ This investigation was conducted in Sergio Garcia’s case.¹¹⁶ The Court’s decision convincingly outlined why excluding undocumented immigrants as a class was not warranted:

“We conclude the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California. Although an undocumented immigrant’s presence in this country is unlawful and can result in a

*variety of civil sanctions under federal immigration law (such as removal from the country or denial of a desired adjustment in immigration status) (8 U.S.C. §§ 1227(a)(1)(B), 1255(i)), an undocumented immigrant's unauthorized presence does not constitute a criminal offense under federal law and thus is not subject to criminal sanctions.*¹¹⁷

This reasoning is convincing when one considers the purpose of a character and fitness evaluation. These investigations are undertaken to ensure that clients are not exposed to unscrupulous attorneys whose services cannot be trusted. Character evaluations focus on an applicant's history of fraud or deceit. Mere presence in the United States does not necessarily indicate that an applicant

VH* – Balancing Family and Education

VH is an undocumented immigrant from Romania who entered the United States at age nine. He is currently working, and he worries that law school will not be attainable. He needs to be able to support his mother while studying. If he is able to find a way to satisfy these competing needs, he would like to focus on civil rights and constitutional law. He has felt a great deal of support when the legal system has failed him in the past, and he would like to give others this same help.*

has behaved fraudulently. At the very least, an individualized analysis is warranted; exclusion of undocumented immigrants as a class is inappropriate.

Moreover, as several amici parties have noted in these recent cases, the policy considerations in licensing undocumented attorneys are similar to those supporting the DREAM Act,¹¹⁸ which the American Bar Association itself has supported.¹¹⁹ An applicant's immigration status should not be held against him or her in determining character and fitness.

FD* – Committed to Serving the Underprivileged

FD, now 26, was brought from Colombia when he was 13 years old. He is a DACA recipient, and he would love to be able to attend law school. However, he is concerned about the lack of job opportunities after he gets his degree. He is also limited because of the cost of applying to different schools and gathering all the necessary materials to complete an application. FD graduated college with a double major in Psychology and Political Science in 2012. He is motivated by the humanitarian aspects of practicing law. Rather than being interested in law school only for monetary reasons, FD wants to aid those who are being exploited and whose rights are being threatened.*

Part III - Legislative Action for Positive Change: A Road Map for State Legislatures

Although legislative action should not be required for state bar admission examiners to grant undocumented law graduates their law licenses, continuing confusion in the courts may create the need for legislation. In California, after oral arguments indicated judges' concern over their ability to act without a legislative solution, the California legislature promptly stepped in. This Part describes that legislation and some considerations that other states should account for if they similarly seek to legislate in this arena.

In September of 2013, the California Legislature approved AB 1024.¹²⁰ This measure allows applicants who are not lawfully present in the United States to be admitted to the California State Bar and practice as attorneys. On October 5, 2013 Governor Jerry Brown signed AB 1024 into law. The statute became effective on January 1, 2014.¹²¹

AB 1024 added subdivision (b) to section 6064 of the California Business and Professions Code that now reads:

“(b) Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its

records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court.”¹²²

The measure came as a response to Sergio Garcia's case in the California Supreme Court, after oral arguments but before a decision was rendered in the case.¹²³ Following the enactment of the legislation, the California Supreme Court held that this legislation permitted the state to grant the license given the permissive language in §1621(d).¹²⁴ Section 1621(d) provides that “a State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”¹²⁵

The California Supreme Court concluded that the enactment of section 6064(b) sufficiently satisfied the federal requirements in §1621(d), thus removing the barrier Garcia faced in being admitted to the State Bar. Along with Garcia satisfying the character and fitness requirement required by the Committee of Bar Examiners' (the body of the State Bar of California that manages the California bar

examination), he was finally able to gain admission to the State Bar.¹²⁶

In reaching this decision after the passage of AB 1024, the California Supreme Court first had to deal with the question of whether the law affirmatively provided that undocumented immigrants were now eligible to obtain a professional license to practice law, meeting the requirements of §1621(d). In *Martinez v. Regents of University of California*, 50 Cal.4th 1277, 1294-1296 (Cal. 2010), the California Supreme Court decided that the language used in section 68130.5 of the Education Code of the State of California was sufficient to show that AB 540 “affirmatively provide[d]” that undocumented immigrants were eligible to avoid paying the nonresident tuition, despite not specifically referring to §1621(d) requirements.¹²⁷ In Sergio Garcia’s case, the California Supreme court similarly agreed that the language in AB 1024 and the enactment of section 6064(b) satisfied the requirements of § 1621(d) because it applied to those “not lawfully present,” thus granting Garcia the right to practice law.

Notably, the California legislation covered all undocumented immigrants and was not limited to immigrants who had work authorization. This was critically important for Sergio Garcia and others who are not eligible for DACA. It also ensures that the law does not run afoul of some of the constitutional concerns described above, since people without work

authorization may still practice as lawyers in the United States, for pro bono clients, as solo practitioners, or for foreign employers.¹²⁸

For current and future state legislatures battling with the issue of allowing undocumented immigrants to practice law, it may be advisable to follow California’s conclusion: to “affirmatively provide[]” a benefit under §1621(d), a proposed state law should be explicit in stating that it applies to “an applicant who is not lawfully present” (i.e., undocumented immigrants), rather than providing a licensing benefit without stating that those who could benefit may include undocumented immigrants.¹²⁹ In addition, some states may also need to repeal or amend any laws on the books that currently aim to prohibit or limit undocumented students from obtaining licenses. While this was not an issue for California, it may be an issue for other states.

LT* – NEW HOPE THROUGH NEW LEGISLATION

LT was too old – by three months - to qualify for DACA. He is severely limited by not having a work permit and not having the ability to travel freely. He has passed the California bar, and as soon as he has the funds available, he will be taking the character and fitness portion of the examination. The recent California Supreme Court decision has given him more certainty, and he hopes to work in low-income Spanish-speaking communities to address the dearth of legal services.*

Conclusion & Recommendations

Untold numbers of undocumented law graduates are ready and committed to providing legal services for underprivileged populations. There is no question that these undocumented law graduates can and already have made substantial contributions to the legal field. By the time undocumented law graduates pass the bar exam, they have already overcome serious hardships to get to where they are, and bar admission is the last obstacle before being able to practice law.

Many state bar examiners, courts, and legislators around the country will be confronting the question of whether undocumented law graduates can be admitted to their respective state bars in the near future. As we explain above, the lack of immigration status should not bar access to law licenses. Additionally, while strong arguments have been made to demonstrate why 8 U.S.C. §1621 should not prevent undocumented law graduates from seeking admission to state bars, states can also preemptively take action by passing similar legislation to that of California to ensure that there are no barriers to admission based on immigration status.

In light of the ongoing controversy and the significant impact this issue has on the promising undocumented law students and graduates profiled in this report, we make the following

recommendations to state policymakers.

To State Bar Examiners:

- State bar applications should omit inquiries into citizenship or immigration status.
- State bar examiners should not postpone or refer decisions on bar applicants' admissions based solely on immigration status.

To State Courts:

- If addressing cases involving undocumented bar applicants, state courts should consider the various constitutional, statutory, and policy arguments that demonstrate why the type or lack of immigration status should have no bearing on whether a qualified law graduate should be admitted to the bar.
- If state courts seek amicus briefing on the issue, they should provide ample opportunity for various parties with expertise to weigh in on the relevant issues.

To State Legislatures:

- As a protective measure, states should enact legislation that explicitly permits undocumented law graduates to be admitted to the bar.
- States should enact legislation that prohibits discrimination based on alienage in all professional licensing.
- States should take proactive measures to ensure access to education for all of its residents, regardless of immigration status, by ensuring in-state tuition and state

tuition assistance to undocumented youth.

Although this report focuses on state-level policymakers, we also call on the federal government to make the following important changes in this arena.

To the President:

- The President should ensure that the U.S. Department of Justice reverses its position that 8 U.S.C. §1621(c) bars undocumented law graduates' access to the bar, and should instead come out in support of undocumented bar applicants in pending cases.
- The President should expand the reach of programs like DACA so that more undocumented immigrants will have the opportunity to put their education to the best use through work authorization.
- The President should reexamine policies limiting undocumented

immigrants' and DACA grantees' access to various federal benefits.

To Congress:

- Congress should repeal laws that prohibit otherwise qualified undocumented immigrants from federal financial aid and other federal benefits.
- Congress should repeal laws that make it more difficult for states to provide in-state tuition, state financial aid, licenses and other benefits to undocumented immigrants.

We also join millions of Americans in calling upon Congress to enact comprehensive immigration reform, so that a path to citizenship—and all of the opportunities that entails—will finally be made available to aspiring Americans like the promising undocumented law students and graduates profiled in this report.

Endnotes

¹ See Alene Russell, American Association of State Colleges and Universities, *State Policies Regarding Undocumented College Students: A Narrative of Unresolved Issues, Ongoing Debate and Missed Opportunities* 2 (Mar. 2011), available at <http://www.congressweb.com/aascu/docfiles/2011.marchpm.pdf>.

² *Id.*

³ See Jeanne Batalova et al., Migration Policy Institute, *Deferred Action for Childhood Arrivals at the One-Year Mark* 7 (Aug. 2013), available at <http://www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf>.

⁴ For instance, one of our survey respondents noted that he hopes to use his educational background to work in the law and technology field. Another respondent noted that he is very interested in the interplay of ethics, law and religion, and hopes to someday teach in this field.

⁵ As one survey respondent explained, “I hope to use my law degree to work for immigrants, particularly undocumented immigrants. As an undocumented immigrant, I am aware of the lack of opportunities for undocumented immigrants and the unfair policies and law that limit the kind of quality of life we can have. I hope to work to change this working as a public-interest attorney.” Similarly, another respondent stated how this as a “propitious time to fight for those changes we would like to see” in our society, particularly for undocumented immigrants.

⁶ One of the survey respondents, for instance, is currently in practice as a public defender, after having been able to adjust his status to lawful permanent residence.

⁷ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁸ See REBECCA PHIPPS & JESSICA ROFÉ, N.Y.S. YOUTH LEADERSHIP COUNCIL & N.Y.U. LAW SCH. IMMIGRANT RIGHTS CLINIC, *THE NEW YORK DREAM ACT: CREATING ECONOMIC OPPORTUNITIES FOR NY STATE* 21–22 & n.55 (2013), available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_075253.pdf (noting that only a few states, including California, Texas, and New Mexico, provide state financial assistance of some form to undocumented students).

⁹ Sixteen states—California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, and Washington—have enacted legislation to provide qualified undocumented immigrants access to in-state tuition. Rhode Island’s Board of Governors for Higher Education approved a similar policy at the state’s public colleges and universities. In addition, the University of Hawaii’s Board of Regents and the University of Michigan’s Board of Regents have adopted similar policies for their school systems. See, e.g., National Immigration Law Center, *Basic Facts about In-State Tuition for Undocumented Immigrant Students* (updated December 13, 2013), <http://www.nilc.org/basic-facts-instate.html> (listing state legislation and policies providing in-state tuition for undocumented students). Similar bills are pending in several other state legislatures. See National Immigration Law Center, *Access to Education: State Bills* (updated Feb. 7, 2014), <http://www.nilc.org/statebillsedu.html> (listing pending state bills providing for tuition access and equity for undocumented students). For an overview and update on state legislation, policies, and litigation related to undocumented students, we also recommend reviewing the resources collected by Professor Michael Olivas on the University of Houston Law Center’s Institute for Higher Education Law and Governance website, <https://www.law.uh.edu/ihelg/>.

¹⁰ *Supra* note 8.

¹¹ One survey respondent noted that he is currently struggling to make ends meet during his gap year before law school so that he will be adequately prepared for the LSAT.

¹² 8 U.S.C. § 1324(a) (2012).

¹³ Consideration of Deferred Action for Childhood Arrivals Process, U.S. Citizenship & Immigration Servs., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process> (last updated Jan. 18, 2013).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 8 U.S.C. § 1324(a) (2012); Brief for ACLU et. al. as Amici Curiae Supporting Petitioner, *In re Garcia*, 315 P.3d 117 (Cal. 2014).

¹⁷ Brief for ACLU et al. as Amici Curiae Supporting Petitioner at 20-25, *In re Garcia*, 315 P.3d 117

(Cal. 2014) (stating that the Immigration and Nationality Act and federal law do not serve as bars to practicing law as a solo practitioner or contractor) .

¹⁸ *Id.* at 24; see also Katherine T. Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 966-70 (Fall 2013) (describing the various ways undocumented law graduates may make use of law licenses).

¹⁹ Cesar Vargas, *Don't End My American Dream*, POLITICO (Jul. 23, 2013), <http://www.politico.com/story/2013/07/dont-end-my-american-dream-opinion-94622.html>; Kirk Semple, *Bar Exam Passed, Immigrant Still Can't Practice Law*, N.Y. Times (Dec. 3, 2013), <http://www.nytimes.com/2013/12/04/nyregion/for-immigrant-passing-the-bar-exam-wasnt-enough.html>.

²⁰ Semple, *supra* note 20.

²¹ DRM ACTION COALITION, <http://drmactioncoalition.org/our-staff/> (last visited Feb. 11, 2014).

²² *In re Garcia*, 315 P.3d 117, 124 (Cal. 2014) (first case to offer a decision regarding whether Sergio C. Garcia, an undocumented law graduate, could be admitted to the State Bar of California).

²³ Petition for Advisory Opinion, Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to The Florida Bar, SC 11-2568 (Fla. filed Dec. 13, 2011).

²⁴ See Semple, *supra* note 20 (reporting on Cesar Vargas's case which is currently pending before the New York State Supreme Court, Appellate Division Second Judicial Department).

²⁵ *In re Garcia*, 315 P.3d 117, 124 (Cal. 2014).

²⁶ *Id.*

²⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (1996).

²⁸ E.g., Petition for Advisory Opinion at 1, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568 (Fla. filed Dec. 13, 2011), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_12-13-2011_Petition.pdf.

²⁹ See, e.g., Order to Show Cause at 1-2, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (en banc), available at http://www.courts.ca.gov/documents/oc12-May_16SC.pdf (requiring the Committee of Bar Examiners to brief the

issue of whether 8 U.S.C. § 1621 prohibits undocumented law graduate from being admitted to the State Bar of California).

³⁰ Under this federal statute, an undocumented immigrant is defined as someone who is neither “(1) a qualified alien (as defined in section 1641 of this title), (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year.” 8 U.S.C. § 1621(a)(1–3) (2012).

³¹ *Id.* at (c)(3)(D).

³² *Id.* at (c)(1)(A).

³³ See, e.g., *In re Garcia*, 315 P.3d 117, 126 (Cal. 2014) (noting that prior to the passage of California Assembly Bill No.1024, the main issue briefed in the case was whether bar admissions were a “public benefit” as defined in 8 U.S.C. § 1621(c)(1)(A)).

³⁴ E.g., Amicus Curiae Brief in Opposition to Admission at 9–12, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/5-s202512-amicus-larry-desha-072312.pdf>.

³⁵ E.g., Application and Proposed Brief for Amicus Curiae the United States of America at 5–11, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>.

³⁶ See e.g., Petition for Advisory Opinion at 5, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568 (Fla. filed Dec. 13, 2011), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_12-13-2011_Petition.pdf (requesting an opinion from the Florida Supreme Court before admitting an undocumented applicant to the state bar).

³⁷ Application and Proposed Brief for Amicus Curiae the United States of America, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>; Brief for the United States of America as Amicus Curiae, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568 (Fla. filed May 20, 2013), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_05-20-2013_Amicus_Brief_DOJ.pdf.

³⁸ Application and Proposed Brief for Amicus Curiae the United States of America at 2, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>; Brief for the United States of America as Amicus Curiae at 1, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568 (Fla. filed May. 20, 2013), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_05-20-2013_Amicus_Brief_DOJ.pdf.

³⁹ Application and Proposed Brief for Amicus Curiae the United States of America at 5–11, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (citations omitted) (internal quotation marks omitted), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>; Brief for the United States of America as Amicus Curiae at 7–10, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568 (Fla. filed May 20, 2013), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_05-20-2013_Amicus_Brief_DOJ.pdf.

⁴⁰ *In re Garcia*, 315 P.3d at 127–29.

⁴¹ Id.

⁴² *Godoy v. The Office of Bar Admissions, the Board to Determine Fitness of Bar Applicants*, No. 1:05-CV-0675-RWS, 2006 WL 2085318 (N.D. Ga. July 24, 2006).

⁴³ See id. (holding that Georgia has a permissible interest in requiring proof of immigration status).

⁴⁴ Fla. Bd. of Bar Exam'rs, SC 11-2568.

⁴⁵ App. to Reply to Bar Applicant's Resp. to the Board's Pet. for Advisory Op. at 6–14, Fla. Bd. of Bar Exam'rs, No. SC11-2568 (Fla. Mar. 29, 2012), at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-29-2012_Reply_Appendix.pdf (citing citizenship or immigration inquiries in the bar admissions process for twenty-two states, including Florida, Arizona, and Texas).

⁴⁶ New York N.Y. Jud. Law § 460 (McKinney 2013).

⁴⁷ Janet M. Calvo, Shirley Lung, & Alizabeth Newman, New York Bar Admission of Law Students Afforded Deferred Action for Childhood Arrivals (DACA), CUNY L. REV. (Nov. 13, 2013), available at <http://www.cunylawreview.org/?p=869> (last visited February 15, 2014).

⁴⁸ See *Godoy*, 2006 WL 2085318, at *5.

⁴⁹ See Reply to Bar Applicant's Response to the Board's Petition for Advisory Opinion, Fla. Bd. of Bar Exam'rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC11-2568, at 12–13 (Fl. Filed Mar. 29, 2012).

⁵⁰ See generally *In Re Sergio Garcia*, 315 P.3d 117 (Cal. 2014) (basing its character and fitness determination on Garcia's clean record and positive comments from professors and acquaintances).

⁵¹ 8 U.S.C. § 1621(c)(1)(A) (2006).

⁵² Application and Proposed Brief for Amicus Curiae the United States of America at 2, 7–8, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (internal quotation marks omitted), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>; see also *Qu*, supra note 26, at 962–66 (discussing arguments regarding interpretation of 8 U.S.C. § 1621(c) in recent court cases).

⁵³ Id. at 7 (quoting *Hubbard v. United States*, 514 U.S. 695, 699 (1995)).

⁵⁴ Answer of the Committee of Bar Examiners of the State Bar of California to Amicus Brief of United States of America at 6, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (citing CAL. CONST. art. VI, § 1), available at <http://www.courts.ca.gov/documents/22-s202512-committee-bar-examiners-state-bar-ca-resp-amicus-united-states-america-090612.pdf>.

⁵⁵ See Application and Proposed Brief for Amicus Curiae the United States of America at 8 & n.2, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf> (citing several provisions of PRWORA where Congress distinguished between “a court [and] an administrative agency” (internal citations omitted)).

⁵⁶ Application and Proposed Brief for Amicus Curiae the United States of America at 2, 5–12, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-080312.pdf>.

⁵⁷ Id.

⁵⁸ See Answer of the Committee of Bar Examiners of the State Bar of California to Amicus Brief of United States of America at 7 & n.6, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/22-s202512-committee-bar-examiners-state-bar-ca-resp-amicus-united-states-america-090612.pdf> (arguing that “provided by appropriated funds of a State . . . relates to direct allocations by the State, in its budget, for a specific purpose” (internal quotation marks omitted)).

⁵⁹ *Id.* at 11 n.7 (noting that the fact that judges use appropriated funds in granting law licenses is, at best, “de minimis” and thus insufficient for purposes of § 1621).

⁶⁰ *Id.* at 7 n.7 (citing *Campos v. Anderson*, 57 Cal. Rptr. 2d 784 (Cal. Ct. App. 1997)).

⁶¹ *Id.* at 8 & n.8 (citing Merriam-Webster Online Dictionary; *Wilcox v. Jackson* 38 U.S. 498, 512 (1839) (“appropriation is nothing more nor less than setting apart the thing for particular use”)).

⁶² *Id.* at 8 & n.8 (citing Merriam-Webster Online Dictionary; *Wilcox v. Jackson* 38 U.S. 498, 512 (1839) (“appropriation is nothing more nor less than setting apart the thing for particular use”)).

⁶³ Brief of Amicus Curiae California Attorney General Kamala D. Harris in Support of Petitioner at 6, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/4-s202512-amicus-ca-atty-general-kamala-harris-071812.pdf>.

⁶⁴ *Id.* at 8–10.

⁶⁵ *Id.* at 10.

⁶⁶ See e.g., Application and Proposed Brief for Amicus Curiae the United States of America at 12, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/20-s202512-amicus-united-states-america-o80312.pdf> (“Congress has accommodated state interests by allowing States to enact measures that would provide benefits to unlawfully present aliens, and the State could do so here.” (citations omitted)).

⁶⁷ U.S. CONST. amend. X.

⁶⁸ Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of the DREAM Bar association et al. in Support of Sergio C. Garcia at 20, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (quoting *Unites States v. Bongiorno*, 106 F.3d 1027, 1033 (1st. Cir. 1997)), available at <http://www.courts.ca.gov/documents/17-s202512-amicus-dream-bar-assoc-072712.pdf>.

⁶⁹ *Id.*

⁷⁰ See, e.g., *id.* (citing *In re Attorney Discipline Sys.*, 19 Cal. 4th 582, 592 (Cal. 1998) (“[T]he power to regulate the practice of law, including the power to admit . . . attorneys, has long been recognized to be among the inherent powers of Article VI courts.”)).

⁷¹ *Id.* at 20–22.

⁷² *Id.* at 20.

⁷³ See *supra* Part I.B.ii (identifying state policies and regulations that raise obstacles for undocumented law graduates who seek to be admitted to the state bar).

⁷⁴ See *supra* Part I.B.ii (identifying state policies that provide financial aid to undocumented students and prohibit discrimination on the basis of alienage).

⁷⁵ U.S. CONST. amend XIV, 14th Amendment, § 1 (emphasis added).

⁷⁶ See *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citations omitted) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”). For a history on *Plyler* and related issues, see MICHAEL OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED CHILDREN* (NYU Press, 2012).

⁷⁷ See *Mathews v. Diaz*, 426 U.S. 67, 84-86 (1976) (distinguishing between federal policies that discriminate against immigrants, and which receive rational basis review, and state policies that discriminate against immigrants, which receive strict scrutiny).

⁷⁸ *Id.* at 85.

⁷⁹ Federal courts apply varying standards of review when considered Equal Protection challenges to state laws that discriminate against people based on the type or lack of immigration status. The Supreme Court has held that state policies that discriminate against lawful permanent residents (“LPRs”) on the basis of “alienage” receive strict scrutiny, which requires that the state policy be “precisely tailored to serve a compelling governmental interest.” *Graham v. Richardson*, 403 US 365, 372 (1971) (“[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate.”). In cases involving state policies that discriminate against undocumented immigrants, however, the Supreme Court’s approach has been less clear. If only rational basis review is applied, courts require only a “fair relationship to a legitimate public purpose.” *Plyler v. Doe*, 457 US 202, 216 (1982). In some exceptional cases, undocumented children have received heightened rational basis review, which requires not merely a “legitimate public purpose,” but a “substantial goal of the State.” *Id.* at 224. The lack of clarity has led some circuits to apply rational basis review rather than strict scrutiny to state laws that discriminate against immigrants who are not LPRs or U.S. citizens. See, e.g., *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 531-32 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 425 (5th Cir. 2005). Other courts, however, have applied strict scrutiny review to cases involving restrictions on temporary non-immigrant workers even though they do not have LPR status or U.S. citizenship. See *Dandamudi v. Tisch*, 686 F.3d 66, 78-79 (2d Cir. 2012) (applying strict scrutiny to non-immigrants so long as they have lawful presence and work authorization). This area of law is in flux and immigrant advocates continue to push for greater protections to be recognized under the law.

⁸⁰ See Calvo, Lung, & Newman, *supra* note 53.

⁸¹ *Id.* (citing *Dandamudi v. Tisch*, 686 F.3d 66, 78-79 (2d Cir. 2012)); see also *Graham v. Richardson*, 403 US at 372 (“[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate.”).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *In re Garcia*, 315 P3d 117, 131 (Cal. 2014).

⁸⁶ *Id.* at 133.

⁸⁷ *Id.* at 131-32.

⁸⁸ *Id.* at 130.

⁸⁹ *Id.*

⁹⁰ See *id.* (discussing the federal government’s exercise of prosecutorial discretion in the immigration context).

⁹¹ Calvo, Lung, & Newman, *supra* note 53 (citing N.Y. Jud. Law § 460).

⁹² Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of the DREAM Bar Association et al. in Support of Sergio C. Garcia at 22–27, *In re Garcia*, 315 P.3d 117 (Cal. 2014), available at <http://www.courts.ca.gov/documents/17-s202512-amicus-dream-bar-assoc-072712.pdf>.

⁹³ U.S. CONST. art. I, § 10, cl.1.

⁹⁴ Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of the DREAM Bar Association et al. in Support of Sergio C. Garcia at 26, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)), available at <http://www.courts.ca.gov/documents/17-s202512-amicus-dream-bar-assoc-072712.pdf>.

⁹⁵ *Id.* (citing *State of New Employees Ass’n, Inc. v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1996)).

⁹⁶ *Id.* at 24–27.

⁹⁷ *Id.* at 25 (citing Com. Of Bar Examiners, The State Bar of Cal., Guidelines for Accredited Law School Rules 2 (2011)).

⁹⁸ *Id.* at 23–26.

⁹⁹ *Id.* at 26–27.

¹⁰⁰ Brief of Amicus Curiae Dream Bar Association in Support of Bar Applicant’s Response to Petition at 15–17, Fla. Bd. of Bar Exam’rs Re: Question As To Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC 11-2568 (Fla. filed Mar. 22, 2012), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-22-2012_Amicus_Dream_Bar.pdf.

¹⁰¹ U.S. CONST. amend. XIV, § 1.

¹⁰² Brief of Amicus Curiae Dream Bar Association in Support of Bar Applicant’s Response to Petition at 15, Fla. Bd. of Bar Exam’rs Re: Question As To Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, No. SC 11-2568 (Fla. filed Mar. 22, 2012), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-22-2012_Amicus_Dream_Bar.pdf (citing *Schwabe of Bd. of Bar Examiners*, 353 U.S. 232, 238–39 (1957)).

¹⁰³ *Id.* at 16 (citing *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (the essence of procedural due process is notice and opportunity to be heard)).

¹⁰⁷ See *Qu*, *supra* note 26, at 970–71; see also Reply to Bar Applicant’s Response to the Board’s Petition for Advisory Opinion, Fla. Bd. of Bar Exam’rs Re: Question As To Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar (Fla. 2012) (No. SC 11-2568).

¹⁰⁸ Brief for Americans for Immigrant Justice as Amici Curiae Supporting Bar Applicant's Response to Petition, at 6, Fla. Bd. of Bar Exam'rs Re: Question As To Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar (Fla. 2012) (No. SC 11-2568), available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-19-2012_AIJ_Amicus_Brief.pdf.

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 11–12; 2014 Comprehensive Guide to Bar Admission Requirements, National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar at 2–3, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (2014).

¹¹¹ Cal. Bus. & Prof. § 6067: "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license."

¹¹² Cal. Bus. & Prof. § 6068: "It is the duty of an attorney...(a) To support the Constitution and laws of the United States and of this state."

¹¹³ Amicus Curiae Brief of Larry DeShae at 13, *In re Garcia*, 315 P.3d 117 (Cal. 2014); 8 U.S.C. §1302 provides that: (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days. 8 U.S.C. § 1306 makes a failure to register a misdemeanor.

¹¹⁴ *In re Garcia*, 315 P.3d 117, 130 (Cal. 2014).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 122.

¹¹⁷ *Id.* at 130.

¹¹⁸ See Brief for Past ABA Presidents as Amicus Curiae Supporting Bar Applicant's Response to Petition at 4, Fla. Bd. of Bar Exam'rs Re: Question As To Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar (Fl. 2012) (No. SC 11-2568).

¹¹⁹ *Id.* at 5-6.

¹²⁰ Melanie Mason, Bill to allow noncitizens to obtain law licenses clears Legislature, L.A. TIMES, Sept. 12 2013, available at <http://www.latimes.com/local/political/la-me-pc-immigrant-law-license-20130912,0,7911553.story#axzz2pvSfPEm8> (reporting on Sergio Garcia's case in the California State Legislature).

¹²¹ *In re Garcia*, 315 P.3d 117, 141 (Cal. 2014).

¹²² Cal. Bus. & Prof. Code § 6064 (West 2013).

¹²³ Maura Dolan, California high court indicates it will deny law license to immigrant, L.A. TIMES, Sept. 4, 2013, available at <http://articles.latimes.com/2013/sep/04/local/la-me-immigrant-lawyer-20130905>.

¹²⁴ *In re Garcia*, at 121.

¹²⁵ *Id.* at 127.

¹²⁶ *Id.* at 122.

¹²⁷ *Id.*, at 128.

¹²⁸ *Id.*, at 134.

¹²⁹ *Id.* at 128.