No. SC11-2568

IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS RE: QUESTION AS TO WHETHER UNDOCUMENTED IMMIGRANTS ARE ELIGIBLE FOR ADMISSION TO THE FLORIDA BAR

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

STUART F. DELERY
Acting Assistant Attorney General

MARK B. STERN
DANIEL TENNY
(202) 514-1838
Attorneys
Civil Division, Room 7215
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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INTRODUCTION AND SUMMARY

The United States respectfully submits this brief as *amicus curiae* to address questions of federal law raised by this Court's Order of April 18, 2013.

In the view of the United States, 8 U.S.C. § 1621 prohibits this Court from issuing a law license to an unlawfully present alien. That federal statute operates to limit the categories of aliens who may receive a "professional license" that is "provided . . . by appropriated funds of a State." 8 U.S.C. § 1621(c). This Court, its Justices, and its staff are funded through appropriations, and this Court's issuance of a license to practice law therefore falls within the prohibition set out in the federal statute.

The Court need not reach any questions regarding the authorization of aliens to work in the United States. The federal statutes that govern an alien's eligibility for employment in the United States operate independently of 8 U.S.C. § 1621. As

the Supreme Court recently reiterated in *Arizona v. United States*, 132 S. Ct. 2492, 2504–05 (2012), Congress has comprehensively regulated the field of alien employment. Under the governing federal statutes, an alien's employment authorization is determined solely by reference to federal law, and licensing decisions of the kind at issue here have no effect on authorization to work.

Deferred action is an exercise of prosecutorial discretion. In the civil immigration enforcement context, deferred action recognizes that an alien represents a lower removal priority, but it does not confer any immigration status. The exercise of prosecutorial discretion through deferred action does not affect an alien's right to professional licenses, and the concept of deferred action thus has no bearing on the question before this Court.

STATEMENT OF THE FACTS

I. Statutory Framework

A. Alien Eligibility for State and Local "Public Benefits"

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996). Title IV of the PRWORA prohibits certain categories of aliens from obtaining certain public benefits, unless a state enactment directs otherwise.

The statute first states that aliens are not "eligible for any State or local public benefit" unless they are "qualified alien[s]" (as defined in 8 U.S.C. § 1641), nonimmigrant aliens (a term defined in 8 U.S.C. § 1101(a)(15)), or aliens who are "paroled" into the United States (under 8 U.S.C. § 1182(d)(5)) for less than one year. 8 U.S.C. § 1621(a). Other categories of aliens, including those who lack lawful immigration status, are ineligible for such benefits unless the State takes action as discussed below.

The federal statute then defines the "State or local public benefit[s]" for which these other categories of aliens are ineligible. That category of benefits includes, subject to certain exceptions that are not relevant here, "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* § 1621(c).

The statute also provides that a State may make additional categories of aliens eligible for public benefits. 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." *Id.* § 1621(d). The statute clarifies, however, that a State may do so "only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." *Id.*

To make eligibility determinations, States and localities may obtain information from the federal government about the immigration status—including, where relevant, employment authorization—of aliens who seek benefits. *See* 8 U.S.C. § 1373(c). The federal government provides information for these purposes through a system known as Systematic Alien Verification for Entitlements (SAVE). *See* 76 Fed. Reg. 58525, 58526 (Sept. 21, 2011).

B. Employment of Aliens

An alien's authorization to work in the United States is determined solely with reference to federal law. *See, e.g.*, 8 U.S.C. §§ 1184(a)(1), 1324a; 8 C.F.R. §§ 214.1(e), 274a.12–274a.14. Among other things, federal law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers, *see* 8 U.S.C. § 1324a(a)(1)(A) and (a)(2), or to fail to comply with a statutory requirement to verify the employment authorization status of those they hire, *id.* § 1324a(a)(1)(B). These requirements are enforced through civil and criminal penalties on employers who knowingly hire, recruit, or retain unauthorized aliens. *See id.* § 1324a(e)(4), (f); 8 C.F.R. § 274a.10. Unauthorized employment can also result in civil consequences for an alien, including removal from the United States and, in certain cases, ineligibility to obtain lawful status. *See, e.g.*, 8 U.S.C. §§ 1227(a)(1)(C)(i), 1255(c)(2), (8). "This comprehensive framework does not impose federal criminal sanctions on the employee side,"

however, merely for the act of obtaining or engaging in unauthorized employment. *Arizona*, 132 S. Ct. at 2504.

When hiring a new employee, employers must examine specified documents to verify the employee's identity and authorization to work in the United States. *See* 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2. When the Department of Homeland Security (DHS) grants an alien authorization to work, it provides appropriate documentation to the alien, which can be used in that verification process. *See* 8 U.S.C. § 1324a(h)(1) (describing requirements for such documentation); 8 C.F.R. § 274a.13(b). Employers may also, at their option, participate in a program known as "E-Verify" that allows them to electronically match the documents they have reviewed against government records. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 401–05, 110 Stat. 3009-546, 3009-655 to 3009-666, *as amended*, 8 U.S.C. § 1324a note.

Social Security cards do not themselves authorize individuals to work in the United States, although in some circumstances they may be used in the process of verifying employment authorization. The Social Security Administration (SSA) bases its decision on whether to issue a Social Security number and card—and, if so, the type of card to issue—on whether the applicant shows acceptable evidence of citizenship, or of alien work authorization provided by DHS. *See* 20 C.F.R. § 422.107. In particular, because Social Security numbers do not expire, while

alien work authorization in many cases *does* expire, the SSA makes distinctions based on whether an alien's immigration status generally provides permanent work authorization as long as the alien remains in that status.

The DHS regulations regarding the acceptance of Social Security cards as evidence of work authorization for employment verification correspondingly distinguish among categories of aliens. *See* 8 C.F.R. § 274a.2(b)(1)(v)(C)(1). Social Security cards issued to citizens are generally accepted as documentation of authorization to work, as are Social Security cards issued to lawful permanent residents and certain other categories of aliens whose authorization to work is not temporary. *Id.* Certain categories of aliens with temporary work authorization receive Social Security cards that are not, themselves, evidence of work authorization for verification purposes. Such Social Security cards may be marked "valid for work only with DHS authorization," indicating that the alien must prove work authorization with a different document issued by DHS. *See* Social Security Administration, *Types of Social Security Cards*[1]; *see also* 8 U.S.C. § 1324a(b)(1)(C)(i) (Social Security card "which specifies on the face that the issuance of the card does not authorize employment in the United States" may not be used to demonstrate employment authorization).

[1] http://ssa.gov/ssnumber/cards.htm

II. Factual Background

This matter arises from a petition for an advisory opinion from the Florida Board of Bar Examiners. The Board has asked this Court to determine, in particular, whether it should recommend for membership in the state Bar an applicant who is unlawfully present in the United States. This Court requested that the United States file a brief addressing certain questions of federal law that may arise in the Court's consideration of this matter.

ARGUMENT

I. Because this Court Is Funded Through Appropriations, 8 U.S.C. § 1621 Precludes Licenses Issued by this Court.

Congress made certain categories of aliens ineligible, absent an affirmative state enactment conferring eligibility, for "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c). A license to practice law is a "professional license." The narrow issue of statutory construction before the Court is therefore whether a state bar license is "provided by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* As explained below, because this Court is funded through appropriations, the licenses that it issues are "provided . . . by appropriated funds of a State." *Id.* Under federal law, undocumented aliens are

therefore ineligible for these licenses absent the "enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." *Id.* § 1621(d).

In the PRWORA, Congress created two parallel provisions that address issuance of licenses and benefits by federal and state agencies. In the first provision, Congress provided that aliens who are not in certain specified categories are ineligible for *federal* public benefits, which are defined to include "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States." *Id.* § 1611(c).

In the second provision, which is at issue here, Congress set a default rule (alterable by states) that makes certain aliens ineligible for *state* public benefits, similarly defined to include "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* § 1621(c).

These provisions were plainly designed to preclude undocumented aliens from receiving commercial and professional licenses issued by States and the federal government. Their sweeping language demonstrates that Congress intended to act comprehensively in prohibiting receipt of such benefits by undocumented aliens, and they should be construed in a manner that furthers that evident purpose. We are aware of no commercial or professional license that is not provided by an agency, provided by appropriated funds, or both.

It would be anomalous to suggest that Congress, despite explicitly including "any professional license" within the scope of the statute, nonetheless did not intend to include licenses to practice law. And Congress created no such anomaly. The issuance of a license to an unlawfully present alien would require an order of this Court. *See* Rules of the Supreme Court Relating to Admissions to the Bar, Rule 5-11 ("If the court is satisfied with the qualifications of each applicant recommended, an order of admission will be made and entered in the minutes of the court."). This Court and its officers are funded through appropriations. *See* Art. V, § 14(a), Fla. Const. ("Funding for the state courts system . . . shall be provided from state revenues appropriated by general law."). The bar admission sought is therefore "provided . . . by appropriated funds of a State or local government." 8 U.S.C. § 1621(c). Indeed, because the federal prohibition applies when appropriated funds are used whether or not the relevant benefit is directly conferred by the government, there is no basis for excluding a license issued by an organ of the State that is funded by appropriations.

The question whether the license is provided by appropriated funds does not turn on the amount of funds that must actually be used to provide the license, or the fact that other entities involved in the consideration of bar applications, such as the Board of Bar Examiners, may operate in whole or in part using fees instead of appropriations. The federal statute does not speak of funds appropriated for a

particular purpose, or set a threshold amount of appropriated funds before the prohibition takes effect. Rather, the statute speaks generally of appropriated funds. Prohibitions on the use of appropriated funds for a particular purpose prohibit the use of *any* appropriated funds for that purpose. *See, e.g., United States v. Bean*, 537 U.S. 71, 74–75 (2002). The prohibition on public benefits "provided . . . by appropriated funds of the United States," 8 U.S.C. § 1611(c), thus prohibits the use of any federal funds in the course of providing such benefits. There is no basis for interpreting the parallel state provision differently.[2]

II. The Question Whether a State Bar License May Be Issued Does Not Turn on Whether the Licensee May Be Legally Employed and Is Unaffected by Deferred Action.

Because 8 U.S.C. § 1621 precludes issuance of a bar license in these circumstances, this Court need not reach any of the additional questions posed in its Order. We nonetheless briefly discuss the additional questions posed by the Court.

A. The question of admissibility to the Florida Bar is independent of whether the applicant would have authorization to work in the United States. As

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[2] Because the license would be provided by appropriated funds, there is no need to reach the question whether this Court is an "agency" within the meaning of 8 U.S.C. § 1621. *Compare Hubbard v. United States*, 514 U.S. 695, 699 (1995) ("[I]t would be strange indeed to refer to a court as an 'agency.'"), *with* Webster's Third New Int'l Dictionary 40 (2002) (definition 2 of "agency": "a person or thing through which power is exerted or an end is achieved: INSTRUMENTALITY, MEANS").

discussed above, the question whether a State may issue a professional license to an alien is governed by 8 U.S.C. § 1621. An alien's authorization to work is governed by a separate set of provisions of federal law. A law license cannot permit an unauthorized alien to perform work if such conduct is prohibited by federal law. Similarly, authorization to work does not render an alien eligible for a professional license (with the exception, not at issue here, of certain categories of nonimmigrants who are admitted for the purpose of specific authorized employment, *see* 8 U.S.C. § 1621(c)(2)(A)).

Congress has comprehensively regulated the field of employment of aliens. *Arizona*, 132 S. Ct. at 2504. Federal law sets the terms of employment for aliens and imposes civil and criminal penalties on employers who attempt to recruit or hire an "unauthorized alien." *See, e.g.*, 8 U.S.C. § 1324a (defining "unauthorized alien" in the context of employment). A person's status as an "authorized" or "unauthorized" alien is determined solely by federal law, and, as noted, is distinct from the issuance of a state license. *See* 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12 (setting forth categories of aliens authorized for employment).

Authorization to work is not determined solely by a person's immigration status. U.S. citizens and lawful permanent residents, and certain other categories of aliens, are categorically eligible to work in this country. *See* 8 U.S.C. § 1324a(h)(3). Other categories of aliens may be authorized to work by DHS, *id.*,

and governing regulations authorize certain categories of aliens to file applications for employment to U.S. Citizenship and Immigration Services, a component of DHS. *See* 8 C.F.R. § 274a.12(c). That category includes some individuals without lawful immigration status, such as certain aliens with a final order of removal who cannot be removed, *id.* § 274a.12(c)(18). Conversely, some aliens with lawful status *cannot* legally be employed, such as spouses of academic students (although such persons are nonimmigrants and thus would not be ineligible for professional licenses under 8 U.S.C. § 1621). 8 C.F.R. § 214.2(f)(15)(i). In all instances, however, authorization to work is determined exclusively by reference to federal law.

Although a state legislature may expand eligibility for benefits under 8 U.S.C. § 1621(d), it has no similar power to expand the category of aliens authorized to work under federal law. If an unlawfully present alien were to obtain a law license, he or she would continue to have an obligation to abide by all federal laws governing the performance of work by aliens. *See, e.g.*, *In the Matter of Ravindra Singh Kanwal*, D2009-053 (OCIJ July 8, 2009) (disciplinary action against licensed attorney who filed petitions for immigration benefits, and appeared in immigration courts, on behalf of clients, even though he lacked

authorization to work in the United States)[3]; *People v. Kanwal*, No. 09PDJ071 (Colo. July 21, 2009) (same attorney subsequently suspended in Colorado)[4]; *Matter of Kanwal*, 24 So. 3d 189 (La. 2009) (reciprocal suspension in Louisiana); *Matter of Kanwal*, No. M.R. 23912 (Ill. Sept. 20, 2010) (reciprocal suspension in Illinois); *In the Matter of Noel Peter Mpaka Canute*, D2010-124 (OCIJ March 16, 2011) (disciplinary action against another licensed attorney who filed petitions for immigration benefits and appeared in immigration courts on behalf of clients, although he lacked authorization to work)[5]; *Matter of Noel P. Mpaka*, No. D-6-12 (N.Y. App. Div. Feb. 23, 2012) (finding attorney guilty of professional misconduct and imposing stayed suspension from practice of law).[6]

A State considering whether to grant a license thus has no reason to determine whether an alien has authorization to work in the United States, as opposed to determining whether the alien is within one of the categories described in 8 U.S.C. § 1621(a). The United States urges this Court not to base any decision about its authority to grant a license on assumptions about whether aliens would be

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[3] http://www.justice.gov/eoir/profcond/FinalOrders/KanwalRavindraS_FinalOrder.pdf

[4] http://www.coloradosupremecourt.com/PDJ/ConditionalAdmissions/Kanwal,Conditional%20Admission,09PDJ071,07-21-09.pdf

[5] http://www.justice.gov/eoir/profcond/FinalOrders/CanuteMpakaNoelPeter_FinalOrder.pdf

[6] http://decisions.courts.state.ny.us/ad3/decisions/2012/d-6-12%20mpaka.pdf

authorized to use that license to provide legal services in the United States in some form. Nor should the Court attempt to resolve any question about the types of legal services that aliens may provide if granted a license. Issuance of a license will not affect the enforcement of the federal provisions governing employment by aliens, which is a responsibility of the federal government.

B. The notion of "deferred action" has no bearing on the question presented here. The term "deferred action" refers to the exercise of prosecutorial discretion by DHS as to aliens who are subject to removal from the United States. As the U.S. Supreme Court has explained, "[a]t each stage [of the deportation process] the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act] was enacted the [Immigration and Naturalization Service] had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).

Although an alien who has been granted deferred action may apply for work authorization, *see* 8 C.F.R. § 274a.12(c)(14), deferred action is not an immigration status or category described in 8 U.S.C. § 1621(a). Neither deferred action nor employment authorization has any bearing on an individual's eligibility for state and local benefits under 8 U.S.C. § 1621.

Exempting additional categories of aliens from the operation of 8 U.S.C. § 1621 would require new legislation. Congress is currently considering proposed legislation that would make substantial changes to the immigration laws. *See* S. 744, 113 Cong. (2013). Such legislation could alter the operation of 8 U.S.C. § 1621. *Cf.* Coons Amendment 10 to S. 744, filed in Senate Judiciary Committee (2013)[7] (proposing that "[a]n individual who is authorized to be employed in the United States may not be denied a professional, commercial, or business license on the basis of his or her immigration status").

[7] http://www.judiciary.senate.gov/legislation/immigration/amendments/Coons/Coons10-(DAV13371).pdf

CONCLUSION

For the foregoing reasons, it is the view of the United States that 8 U.S.C. § 1621 precludes issuance of a law license to aliens, including unlawfully present aliens, who are not included within the specific categories of alien described in section 1621(a).

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

s/ Daniel Tenny
MARK B. STERN
DANIEL TENNY
(202) 514-1838
Attorneys
Civil Division, Room 7215
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
daniel.tenny@usdoj.gov

MAY 2013

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of May, 2013, via electronic mail, a copy of this document was filed with the Court (e-file@flcourts.org) and served on the following counsel:

Robert G. Blythe, blyther@flcourts.org

Talbot D'Alemberte, dalemberte@dalemberteandpalmer.com, dalember@fsu.edu

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2). This brief was prepared in Times New Roman 14-point font.

s/ Daniel Tenny
Daniel Tenny