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IN THE SUPREME COURT OF FLORIDA

Case No. SC 11-2568

Florida Board of Bar Examiners	)
Re: Question as to Whether Undocumented	)
Immigrants Are Eligible for Admission to	)
The Florida Bar	)
	)

BRIEF OF *AMICUS CURIAE* DREAM BAR ASSOCIATION IN SUPPORT OF BAR APPLICANT'S *AMICUS* BRIEF ON ISSUES PRESENTED BY THE FLORIDA SUPREME COURT

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STATEMENT OF INTEREST OF *AMICUS CURIAE* DREAM BAR ASSOCIATION

Amicus curiae, the DREAM Bar Association (DBA), previously filed an *amicus* brief in this Court on March 22, 2012, in support of applicant José Godiñez-Samperio's admission to The Florida Bar. The interest of the DBA remains the same for this filing: DBA's purpose is to provide a support network for DREAMers that provides its members with information related to financial aid, the Law School Admission Test (LSAT), the law school application process, the bar exam, admission into the legal profession, and passage of the DREAM Act.

DBA asserts the further interest that many of DBA's members, like José Godiñez-Samperio, are eligible for Deferred Action for Childhood Arrivals (DACA). On June 15, 2012, the Department of Homeland Security (DHS) and the White House announced DACA, a new, expanded and formalized plan for DHS to grant deferred action under its administrative authority to certain immigrant youth and young people residing in the United States who meet specific requirements.[1]

[1] DHS guidelines published on its website state that individuals who may request consideration of DACA: (1) were under the age of 31 as of June 15, 2012; (2) came to the United States before reaching the age of 16; (3) have continuously resided in the United States since June 15, 2007, up to the present time; (4) were physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with U.S. Citizenship and Immigration Services; (5) entered without inspection before June 15, 2012, or had lawful immigration status that expired as of June 15, 2012; (6) are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate or are an

The Florida Supreme Court on April 18, 2013, ordered the Florida Board of Bar Examiners (Board) and requested of the United States Department of Justice to each file a brief addressing certain issues, including how 8 U.S.C. section 1621 may affect the Court's admission of an undocumented immigrant to The Florida Bar. It allowed José Godiñez-Samperio to file an amicus brief. The issues presented directly affect the membership of DBA. *Amicus curiae* respectfully submits the following points and authorities to amplify the reasons why José Godiñez-Samperio and others similarly situated are eligible for admission to The Florida Bar.

SUMMARY OF THE ARGUMENT

To uphold a policy or adopt a rule that bars or has the effect of barring undocumented immigrants from joining The Florida Bar due to their immigration status is inconsistent with federal law. The provisions of 8 U.S.C. § 1621 do not apply to a law license. A law license is different from other professional licenses because the judicial branch issues such licenses, not a State agency, and because

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honorably discharged veteran of the Coast Guard of Armed Forces of the United States; and (7) have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety. U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process*, (updated Jan. 18, 2013), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD .

law practice is a part of the exercise of judicial power. Also, the provisions of 8 U.S.C. § 1621 do not apply because bar membership is not granted using appropriated funds and because the Florida Supreme Court is not an agency of the State.

ARGUMENT

I. 8 U.S.C. § 1621(c) Does not Prohibit Admission to The Florida Bar

A. The Florida Supreme Court Is Not "an Agency of a State" Within the Meaning of 8 U.S.C. § 1621(c)

8 U.S.C. § 1621 bars states from awarding certain "state or local public benefits" to immigrants who are not "qualified aliens" and defines "state or local public benefits" as:

> (A) 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; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

Florida has stated clearly that encompassing the judicial branch within the definition of "state agency" violates the constitutional doctrine of separation of powers. *Chiles v. Children A, B, C, D, E, and F, etc.*, 589 So.2d 260, 269 (Fla. 1991) ("The judicial branch cannot be subject in any manner to oversight by the

executive branch."). In Florida, this constitutional doctrine is codified in article II, Section 3 of the Florida Constitution:

> Branches of Government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Fla. Const. art. II, § 3. *See also Bush v. Schiavo*, 885 So.2d 321, 331 (Fla. 2004) (concluding that Act and executive order "constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary.")

Because attorney licenses are issued by the judicial, not executive or legislative, branch of State government, attorney licenses are easily distinguished from other professional licenses. *See Ippolito v. State of Fla.*, 824 F.Supp. 1562, 1570 (M.D. Fla. 1993) ("[T]he legal profession is self-regulating and outside the purview of the legislature.").

The legal profession, though subject to professional regulation similar to other professionals, such as accountants, doctors and nurses, is treated differently from professions regulated by the legislative and executive branches. *Id*.

> First, the Bar has historically determined its membership and qualifications and requirements for admission since the early thirteenth century. Second, the legal profession is charged with matters that result in the potential loss of life, liberty, and property. Lastly, the doctrine of separation of powers mandates that in order for the system of checks and balances to be effective, each co-equal branch of government—executive, legislative, and judicial—must remain independent. Implicit in the separation of powers doctrine established by the Constitution of the United States is the notion that a

> truly independent and separate judiciary must be able to prescribe rules and govern the conduct of its members and nonmembers who practice law.

Id. "The reason for judicial regulation, therefore, is to preserve the judiciary's integrity, independence , and autonomy." *Id*. at 1572 ("If the legislature were to regulate the practice of law, ethical issues would become political issues."). See also *Petition of Fla. State Bar Ass'n*, 40 So. 2d 902, 907 (Fla. 1949) ("[L]aw practice is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the government.").

Furthermore, this Court has recognized that lawyers have "a responsibility to the public that is unique and different in degree from that exacted of the members of other professions." *Petition of Fla. State Bar Ass'n*, 40 So. 2d 902 at 908. Attorneys are not officers of either the state or the county but are officers of the court and an integral part of the state judicial system. *Ippolito v. State of Fla.*, 824 F.Supp. 1562, 1567 (M.D. Fla. 1993).

The Supreme Court of Florida has exclusive authority to regulate the admission of lawyers. Art. V § 15, Fla. Const.; *see also* Fla. Bar Admiss. R. 1-11, 1-12 and 5-11; § 454.021, Fla. Stat. The Supreme Court of Florida is the only entity that "review[s], approve[s], and promulgate[s]" the rules relating to admission to The Florida Bar. Fla. Bar Admiss. R. 1-12; *accord* Fla. R. Jud.

Admin. 2.140 (specific and detailed process for amending rules of court). The Board evaluates the professional competence of an applicant for admission to practice, and the Court ultimately rules on the applicant's admission. Fla. Bar Admiss. R. 5-11; *see also Lopez v. Florida Bd. of Bar Exam'rs*, 231 So.2d 819, 821 (Fla. 1969) (visa overstay not a bar to admission). "This vested authority to regulate Bar members is not a legislative delegation of authority, but a constitutional assignment of power." *Ippolito v. State of Fla.*, 824 F.Supp. 1562, 1574 (M.D. Fla. 1993).

By contrast, the executive branch of state government regulates government licenses through the Florida Department of Business and Professional Regulation. § 455.01 *et seq.* (2012), Fla. Stat.; s*ee also* Florida Department of Business and Professional Regulation, http://www.myfloridalicense.com/dbpr/os/os-info.html (last visited May 15, 2013); *Ippolito v. State of Fla.*, 824 F.Supp. 1562, 1569 (M.D. Fla. 1993) ("Unlike attorneys who are regulated by the Florida Bar, the Department of Professional Regulation . . . under the auspices of the legislature, exercises regulatory authority over nonlegal professions). The executive branch agency investigates applicants for such licenses. *Id.* The agency makes decisions to grant or deny licenses with no need for court approval. § 455.213, Fla. Stat.; s*ee also* Consol. Answ. To Multi. Amicus at 4, In Re Sergio C. Garcia on Admission, Bar Misc. 4186 (Cal. Sept. 14, 2012) (S202512)

http://www.courts.ca.gov/documents/23-s202512-applicant-consolidated-resp-amicus-091412.pdf.

B. The Florida Supreme Court Does Not Use "Appropriated Funds" within the Meaning of 8 U.S.C. § 1621(c) to Admit Lawyers to The Florida Bar

In its amicus brief, the United States ("DOJ") offers the unsupported assertion that Florida bar admission "is 'provided . . . by appropriated funds of a State or local government'" and is thus prohibited by 8 U.S.C. § 1621(c). Brief for the United States of America as Amicus Curiae ("Br. for U.S.A. as Amicus Curiae") at 9 (quoting 8 U.S.C. § 1621(c)). In fact, the Florida Supreme Court does not use appropriated funds to determine whether individuals should be admitted to The Florida Bar.

As an initial matter, the admission process for the State Bar is funded by levying fees upon applicants and current members. See Fla. Bar Admiss. R. 2-20 (Applications and Fees); R. Regulating Fla. Bar 1-7.3 (Membership Fees). This Court has recognized that the judiciary has inherent power to regulate the bar, and as an incident to regulation it may impose a membership fee for that purpose. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902, 906 (Fla. 1949) ("A membership fee in the bar Association is an exaction for regulation only, while the purpose of a tax is revenue."). The board of governors, the governing body of The Florida Bar, adopts and approves a budget for each fiscal year. R. Regulating Fla.

Bar 2-3.1. For example, the total funds for 2012 were $ 67,094,042, with $24,270,633 deriving from annual fees; $3,555,386 from other regulatory fees; $3,189,377 from continuing legal education fees, and $1,241,792 from "other fees" undefined in the Bar proposed budget. State Bar of Fla., *The Fla. Bar Proposed Budget for Fiscal Year 2012-2013* (2012) *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/73A35E28803FF27C852579DB004EFDD8/$FILE/ProposedBudget12-13-n.pdf?OpenElement. The board of governors has exclusive power, "authority, and control over all funds, property, and assets of The Florida Bar and the method and purpose of expenditure of all funds." R. Regulating Fla. Bar 2-6.1.

Furthermore, the Florida Supreme Court receives funds that are technically appropriated by the Legislature but the funds are largely drawn from fees collected by court clerks and funneled through the Legislature's general revenue fund. Because "the court-related revenue flowing into the general revenue fund is roughly the same as the amount of general revenue appropriated to the courts, court users continue to pay for the court system." Florida State Courts, "Funding Justice," available at http://www.flcourts.org/gen_public/funding/.

The arrangement by which court-collected fees are routed to the courts through the general revenue fund does not change the fact that the judicial branch collects the funds that are subsequently expended by the judicial branch on its

activities. To understand otherwise, and deem court-collected funds to be legislative appropriations, would convert judicial activities into legislative ones and violate the separation of powers.

II. Section 1621 Has Not Preempted the Florida Judicial Branch's Traditional Power to Regulate Bar Membership

Mr. Godiñez-Samperio is a recipient of DACA and, as a matter of federal law, his presence is authorized by the United States, and he is authorized to work. *See* Memorandum from Sec. Janet Napolitano, U.S. Department of Homeland Security, for Acting Commissioner David Aguilar, U.S. Customs and Border Protection, Dir. Alejandro Mayorkas, U.S. Citizenship and Immigration Services, and Dir. John Morton, U.S. Immigration and Customs Enforcement on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. DOJ's persistent references to Mr. Godiñez-Samperio as "an unlawfully present alien" are incorrect and improper. The United States has approved Mr. Godiñez-Samperio's application to remain in the country and granted him permission to work. DACA ensures that "an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect." U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (last updated Jan. 18, 2013)

http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD.

Licensing qualified lawyers with authorization to remain and work in the United States under DACA is consistent with the rules of this Court and federal law. There is no question that licensing lawyers is an historical state power. *Hoover v. Ronwin*, 466 U.S. 558, 590 (1984). In determining whether Congress has preempted historical state powers, "the purpose of Congress is the ultimate touchstone." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted). "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. at 486. This Court has affirmed that when construing a statute, it strives to effectuate the Legislature's intent. *Kasischke v. State*, 991 So. 2d 803, 807 (2008). And to determine that intent, it looks first to the statute's plain language. *Id.* citing *Borden v. East-European Ins. Co.*, 921 So.2d 587, 595 (Fla. 2006).

Here, the statutory language of 8 U.S.C. § 1621 provides that an individual who is not a qualified alien, a nonimmigrant, or an alien paroled into the United States is not eligible for any "state or local public benefit." 8 U.S.C. § 1621(a). Contrary to DOJ's unsupported assertion that Congress intended to include law

licenses in the phrase "professional license," there is no way to read into the statute what is not written explicitly. *See* Br. for U.S.A. as Amicus Curiae at 9.

A. Law Licenses Are Not Explicitly Listed in 8 U.S.C. § 1621's Definition of a State or Local Public Benefit

In the context of 8 U.S.C. § 1621(c)(1)(A), a "professional license" cannot include a law license, because a law license is different from other professional licenses. *Supra* p. 4-6. To read section 1621 otherwise is to disturb the balance of power between the state branches of government. *Supra* p. 3-6. Also, even when a statute should be construed liberally, "such construction does not mean that this Court may rewrite the statute or ignore the words chosen by the Legislature so as to expand its terms." *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, 7 (Fla. 2004); *see also Germ v. St. Luke's Hosp. Ass'n*, 993 So. 2d 576, 578 (Fla. 2008) ("Courts . . . may not add words that were not included by the legislature."). The fact that law licenses are not included in 8 U.S.C. § 1621's definition of a State or local public benefit means that the term "professional license" encompasses "virtually all professionals practicing in the State," i.e. accountants, doctors, nurses, optometrists, chiropractors, podiatrists, pharmacists, engineers, and insurance agents. *Ippolito v. State of Fla.*, 824 F.Supp. 1562, 1568-69 (M.D. Fla. 1993) (noting the State of Florida's regulatory authority over nonlegal professionals). But "the legal profession is self-regulating and outside the purview of the legislature." *Id*. at 1570.

> [U]nlike accountants and other professionals, an attorney is an officer of the court, having duties that extend beyond loyalty to the client. As such, attorneys have a responsibility to the court and the public which includes providing affordable services and protecting the rights of all citizens in a rapidly changing society. Attorneys also have a responsibility to be ethical in their affairs, to refine the procedural and substantive law, and to update their skills through continuing education.

Id. at 1572 (discussing the differences between lawyers and other professionals). These clear differences between the legal and nonlegal professions thus require that a law license be listed explicitly in 8 U.S.C.A. § 1621 if the term is to be read into the statute. The term "professional license" cannot include law license in the context of 8 U.S.C. § 1621.

B. The Purpose and Legislative Record of 8 U.S.C. § 1621 Does Not Indicate Congress Intended to Limit Florida's Regulation of Bar Membership

If this Court should conclude that there is ambiguity in whether Bar admission is covered under 8 U.S.C. § 1621(c), the Court should consider legislative history, which "may be helpful in ascertaining legislative intent." *Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000).

In 8 U.S.C. § 1621, which was passed as part of PRWORA, Congress explicitly focused on "end[ing] the dependence . . . on government benefits." PRWORA, 42 U.S.C. § 601(a)(2) (2012). Referring specifically to immigrants, Congress declared:

> Current eligibility rules for public assistance and unenforceable

> financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system. It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

8 U.S.C. § 1611. The repeated association between such "benefits" and individuals' dependence on "public resources to meet their needs" undergirds Congress' express intent to motivate individuals to rely upon "their own capabilities and the resources of their families, their sponsors, and private organizations." 8 U.S.C. § 1601(2)(A).

In the matter before this Court, issuing a law license to a DACA recipient and otherwise qualified individual such as José Godiñez-Samperio is consistent with the legislative intent of self-reliance expressed in the legislative history of PRWORA.

C. Florida Has Enacted Rules on Licensing of Non-citizens Which Are Not Preempted by 8 U.S.C. 1621

Of note, Florida Statute sections 455.10 and 455.11 provide for the licensing of noncitizens. Under § 455.10, Fla. Stat. "[n]o person shall be disqualified from practicing an occupation or profession regulated by the state solely because he or she is not a United States citizen." And § 455.11, Fla. Stat. declares its purpose to be "to encourage the use of foreign-speaking Florida residents duly qualified to become actively qualified in their professions so that all Florida citizens may receive better services."

Similarly, Florida Bar Admission Rules do not exclude noncitizens. In addition, among The Florida Bar objectives stated in the 2013-2016 Strategic Plan is the goal to "continue to encourage and promote diversity and inclusion in all aspects of the profession and the justice system." The Florida Bar, The 2013-2016 Strategic Plan for The Florida Bar, *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DEBE92EEA339478785257B0A005A3239/$FILE/2013-16%20Strategic%20Plan.pdf?OpenElement.

The Florida Bar expects the term "diversity" to have a "dynamic meaning that changes as the demographics of Floridians change." *Id.* Thus, The Florida Bar remains open to encompass differences (in addition to differences in race, color, gender, national origin, religion, age, sexual orientation, citizenship, and geography) that reflect "changes in thought, culture, and beliefs." *Id.* Immigration status is such a difference presented in this matter currently before this Court. This matter allows the Court to affirm the "commitment toward a diverse and inclusive environment with equal access and equal opportunity for all." *Id.*

III. Individuals with Work Authorization Should Not Be Excluded from Admission to The Florida Bar

Under PRWORA, individuals without legal permanent residence, asylum, or refugee status are generally disqualified from obtaining Federal and State professional licenses. H.R. Rep. No. 105-735, at 10 (1998), 1998 WL 655896, *10. One exception to this disqualification is for a "nonimmigrant whose visa for entry

is related to such employment in the United States." *Id*. The purpose of this exception is "to allow professionals with permission to work [in the U.S.] temporarily to obtain the licenses for which they are professionally qualified." *Id*. Similarly, DACA recipients and otherwise qualified individuals such as José Godiñez-Samperio should face no barriers to receiving a law license.

By receiving deferred action, a DACA recipient is authorized by the Department of Homeland Security (DHS) to be present in the United States; DACA recipients are also eligible for work authorization. U.S. Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals Process* (last updated Jan. 18, 2013) http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD#top. Work authorization allows a DACA recipient to engage in employment. Even when an individual lacks work authorization, federal prohibitions on employment do not apply to an individual working outside the employer-employee relationship as an independent contractor or as self-employed. *See* 8 C.F.R. § 274a.1(f)(specifically excluding "independent contractors" from the definition of "employee"); 8 C.F.R. § 274a.1(g) (specifically excluding a "person or entity using… contract labor" from the definition of "employer").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court affirm the ability of Respondent and all future similarly-situated applicants to be admitted to The Florida Bar.

Respectfully submitted this 28th day of May 2013,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF FONT COMPLIANCE

Undersigned counsel certifies that the typeface used in this document is 14-point, proportionately-spaced, Times New Roman.

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