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In re: Mary Doe and Jane Doe. Petition to Allow Bar Admissions for Undocumented Immigrants, Proposed Rule 14-721, Petitioners. : Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

In re: Mary Doe and Jane Doe. Petition to Allow Bar Admissions for Undocumented Immigrants, Proposed Rule 14-721, Petitioners.	Case No. 20180806-SC

BRIEF IN SUPPORT OF PETITIONERS BY LATINOJUSTICE AMICI

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LIST OF ALL PARTIES

1. Mary Doe and Jane Doe, Petitioners
2. LatinoJustice Amici, *Amicus Curiae*
3. Parr Brown Gee & Loveless, P.C., *Amicus Curiae*
4. Ad Hoc Coalition of Utah Law Professors, *Amicus Curiae*
5. Utah Minority Bar Association, *Amicus Curiae*
6. U.S. Department of Justice, *Amicus Curiae*
7. Office of the Utah Attorney General, *Amicus Curiae*
8. Utah State Office of Legislative Research & General Counsel, *Amicus Curiae*
9. American Civil Liberties Union, *Amicus Curiae*

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LatinoJustice PRLDEF, The DREAM Bar Association, and individuals Sergio C. Garcia, Cesar Adrian Vargas, Jose Manuel Godinez-Samperio, Karla Q. Perez Ramirez, Denia C. Perez, Marisol Conde-Hernández, Kelsey C. Burke, and Jackeline Saavedra-Arizaga (collectively "the LatinoJustice Amici"), hereby respectfully submit this *amicus curiae* brief in support of Petitioners Mary Doe and Jane Doe, who seek a rule change that would "allow Bar admission for undocumented immigrants who otherwise meet Utah standards for admission." Petition ("Pet.") 1. This Court's November 19, 2018 order invited briefing on whether this Court may "'enact[] … a [S]tate law' under 8 U.S.C. § 1621(d) permitting membership in the Utah State Bar for undocumented immigrants; and, if so, whether it would be appropriate for this Court to do so." On January 17, 2019, this Court granted the LatinoJustice Amici leave to file this brief.

INTRODUCTION AND *AMICI'S* INTEREST IN THIS MATTER

Petitioners[1] were brought to the United States as children and know only the United States as their home. Pet. 2. And they are not alone—hundreds of

[1] Petitioners filed the petition under the pseudonyms "Mary Doe" and "Jane Doe" to preserve their privacy. Pet. 1. Consequently, this brief uses the generic term "Petitioners" to describe the two individuals seeking admission to the Utah Bar under the proposed rule change, despite Rule 24(d). *See* Utah R. App. P. 24(d) (stating this Court's preference that parties in a case "not be described solely by the party's procedural role").

thousands of people share this story.[2] Some, like Petitioners, aspire to be lawyers. Through hard work and dedication, they graduate high school, college, and law school, often excelling far beyond their peers. Federal law, however, purportedly prohibits states from providing any benefits including professional licenses to these praiseworthy individuals unless "a State" expressly opts out of the prohibition. 8 U.S.C. § 1621(d). The Petition asks this Court, as the constitutionally authorized arm of the State, to "opt out" by adopting proposed Rule 14-721, which would expressly allow Petitioners and those law graduates similarly situated to "be admitted to the Bar." Pet. Ex. A.

The Petition presents two major issues: whether this Court is the appropriate branch of government to opt out, and whether opting out is the appropriate thing to do. For the reasons set forth below, this Court has the authority to opt out under § 1621(d), and it should grant the Petition and adopt a rule authorizing unauthorized immigrants[3] to "be admitted to the Bar." Pet. Ex. A. The LatinoJustice Amici agree with *amicus curiae* Ad Hoc Coalition of Utah Law Professors that this Court should adopt a rule that allows "the

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[2] As of July 31, 2018, there were just over 700,000 active DACA recipients. UCSIS, *Approximate Active DACA Recipients: Country of Birth*, at 1 (Aug. 31, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_July_31_2018.pdf.

[3] This brief uses the term "unauthorized immigrants" to be consistent with this Petition's chosen term. Pet. Ex. A.

admission of otherwise eligible unauthorized immigrants to the practice of law in Utah," regardless of their precise immigration status. Br. of Ad Hoc Coalition of Law Professors 25–28. In this Brief, the LatinoJustice Amici refer to this broader rule as the "Proposed Rule."

The LatinoJustice Amici are especially interested in the outcome of this proceeding. Founded in 1972 as the Puerto Rican Legal Defense Education Fund, LatinoJustice PRLDEF works to create and protect opportunities for the greater pan-Latinx[4] population, particularly for its most vulnerable members, including recent immigrants. For forty-seven years, a core and unique focus for LatinoJustice has been its efforts to diversify and improve the legal system by increasing law school admissions opportunities for students of color and enhancing diversity within the legal profession. To that end, LatinoJustice has counseled, mentored, supported, and advocated for or litigated on behalf of many DREAMers[5] and DACAmented[6] law students working toward becoming

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[4] "Latinx" is the "gender-neutral alternative to *Latino* or *Latina*." *Latinx*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/Latinx (last visited Mar. 26, 2019).

[5] "DREAMers" refers to those who would likely benefit from the Development, Relief, and Education of Alien Minors ("DREAM") Act, should it become federal law.

[6] "DACAmented" is a play on the term "documented" as used in the immigration context, and the term is commonly used to refer to the work authorization documents provided to beneficiaries of the Deferred Action for Childhood Arrivals ("DACA") policy.

lawyers. Among them are DREAMer law graduates who have been admitted to practice in New York, Florida, California, New Jersey, Connecticut, Pennsylvania, and Texas among other states, including those individuals discussed in the Petition. *See* Pet. 7–12.

Of particular relevance in the instant proceeding, LatinoJustice represented Cesar Vargas, a DREAMer and a 2011 City University of New York law graduate, in his successful New York bar admission effort. His case, *In re Vargas*, 10 N.Y.S.3d 579, 582 (App. Div. 2015), is one of the leading cases in the country addressing the eligibility of DACAmented law graduates for state bar admission. As discussed below, the New York court determined that a DACAmented law graduate like Vargas could fulfill the requisite character and fitness and requirements for bar admission and be granted a professional law license. *Id.* at 587–89, 597. LatinoJustice has been involved with several other bar admission cases throughout the country, either representing individuals seeking admission or filing *amicus* briefs on their behalf. LatinoJustice thus has a long, well-established interest in the issue facing Petitioners, as well as significant experience in the issues facing this Court.

The DREAM Bar Association has a keen interest in this case as well, and for largely the same reasons. The DREAM Bar Association is an unincorporated organization that welcomes undocumented and allied legal professionals, law students, and aspiring law students. The Association

collects no dues or other monies. Its members include individuals similarly situated to Petitioners—otherwise qualified individuals who hope to graduate law school and be admitted to the bars of their respective states. The DREAM Bar Association has a deep interest in ensuring its members and the broader community receive the chance to become successful members of the bar in all states.

Finally, several individuals join LatinoJustice and the DREAM Bar Association as *amici* in this brief. They include DREAMer and other immigrant law graduates from other states, including Cesar Vargas, Sergio Garcia, and Jose Manuel Godinez-Samperio, whose "test" bar admission cases in New York, California, and Florida have previously addressed the very issues presented herein. They also include immigrant law graduates who became members of the bars in Texas, Florida, New Jersey, New York, and Connecticut. These individuals have a unique, real-world perspective on the legal and practical issues surrounding the bar admission of immigrant law graduates, as discussed more fully below.

STATEMENT OF THE ISSUES

Federal law prohibits states from providing certain "professional license[s]" to immigrants who are "not lawfully present in the United States." 8 U.S.C. § 1621. But states may opt out of this prohibition "through the enactment of a State law." *Id.* § 1621(d). Petitioners ask the Court to adopt

Rule 14-721 as part of this Court's Rules of Professional Practice. It would allow "[u]nauthorized immigrants" to be admitted to the Bar if they (1) otherwise qualify, (2) were brought to the United States as children and have lived here ever since, and (3) received "documented employment authorization from the United States Citizenship and Immigration Services." Pet. Ex. A. The issues presented by the instant petition are whether this Court is the appropriate authority to "enact[] … a State law" under § 1621(d), and whether this Court *should* enact such a law.[7] *See* Order dated 11/20/2018, Case No. 20180806-SC.

STATEMENT OF THE CASE

I. The Department of Homeland Security Established Deferred Action for Childhood Arrivals in 2012.

In 2012, the Department of Homeland Security ("DHS") established Deferred Action for Childhood Arrivals ("DACA"), under which DHS may exercise its discretion in refraining from deporting or removing from the country certain unauthorized immigrants.[8] DACA is one of several forms of

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[7] But, as explained by *amicus* Ad Hoc Coalition of Utah Law Professors, there is a compelling argument that a Utah bar license does not fall within § 1621's prohibition. Br. of Ad Hoc Coalition of Law Professors 7–15. Thus, this Court need not "opt out" under § 1621(d) if § 1621 does not apply to Utah bar licenses.

[8] *See* DHS, Memorandum from Janet Napolitano (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

"deferred action" that federal executive authorities have offered to individual immigrants, or groups of immigrants, for humanitarian or other reasons.[9]

DHS considers recipients of deferred action lawfully present in the U.S. for certain purposes.[10] For example, if DACA recipients eventually leave the country and seek re-admission to the United States, their time as DACA recipients will not count as time in "unlawful presence," which otherwise might have counted against their future admissibility.[11] Similarly, the federal Real ID Act, under which states may issue drivers' licenses only to immigrants

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[9] For a review of federal use of deferred action before the DACA policy was announced, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Intl. L. J. 243 (2010).

[10] *See* USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit*, at 10–11 (July 29, 2014), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA_Toolkit_CP_072914.pdf; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1059 (9th Cir. 2014) ("DHS considers DACA recipients not to be unlawfully present in the United States because their deferred action is a period of stay authorized by the Attorney General.").

[11] *See* 8 C.F.R. § 214.14(d)(3) (providing that deferred action does not count as "unlawful presence"); 8 U.S.C. § 1182(a)(9)(B)(ii) (an alien is deemed "unlawfully present" for purposes of ineligibility for future admission if the alien is present beyond a "period of stay authorized by the Attorney General" or without being admitted or paroled).

"authorized [to] stay in the United States," expressly identifies deferred action as a "period of authorized stay."[12]

Although DACA does not confer "lawful status" on an individual (because only Congress can create or define an immigration status[13]), DACA recipients, like others who receive deferred action, are eligible for employment authorization. *See* 8 C.F.R. § 274a.12(c)(14).

To be eligible for DACA relief, an applicant must be an alien without lawful status who arrived in the United States before the age of sixteen and who is now less than thirty-one years old. Applicants must also have no significant criminal record, as well as a high-school education or service in the U.S. armed forces.[14]

II. DHS May Also Grant Temporary Protected Status to Certain Unauthorized Immigrants.

Besides DACA, DHS may also designate certain foreign countries for Temporary Protected Status ("TPS"). 8 U.S.C. § 1254a(b). For unauthorized immigrants from such designated countries, the Attorney General "may grant

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[12] Real ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(B)(viii), (C)(i)-(ii), 119 Stat. 302, 313; *see also Brewer*, 757 F.3d at 1074 n.9 (Christen, J., concurring).

[13] *See* DHS, Memorandum from Janet Napolitano, *supra* note 8.

[14] *See* USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)* (Feb. 14, 2018), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.

the alien temporary protected status in the United States." *Id.* § 1254a(a)(1)(A). A person granted TPS is protected from removal and may obtain authorization to work in the United States. *Id.* § 1254a(a)(1)–(2).

An unauthorized immigrant granted TPS is similar to a DACA recipient—the person is able to live and work in the U.S., but TPS "does not lead to lawful permanent resident status or give any other immigration status." *Temporary Protected Status: What is TPS*, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited Mar. 26, 2019). TPS, however, is not limited to those who were brought to this country as minors. *See id. Amicus* Kelsey Burke is an example of a person granted TPS who, as discussed below, was ultimately admitted to practice in Florida.[15]

III. The Personal Responsibility and Work Opportunities Reconciliation Act of 1996.

Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("the 1996 Act") in 1996, Pub. L. No. 104-193, 110 U.S. Stat. 2105. The 1996 Act prohibits states from conferring certain public benefits, including professional licenses, upon defined "aliens" unless they are exempted. 8 U.S.C. § 1621(a), (c)(1)(A). The stated goals of this prohibition are to promote self-sufficiency of residing noncitizens, and to prevent "the availability of

[15] The availability of TPS supports the argument that this Court should adopt a broader rule than the one Petitioners propose. Br. of Ad Hoc Coalition of Law Professors 25–28.

public benefits" from being "an incentive for immigration." 8 U.S.C.§ 1601. Immigrants are incentivized to rely on their own capabilities and not U.S. public benefit systems. *Id.* Despite these goals, the statute inexplicably includes certain professional licenses within the definition of a state public benefit. 8 U.S.C. § 1621. Nothing in the statute's text or legislative history indicates why professional licenses, which would promote self-sufficiency, are categorized as a public benefit.

Regardless, the prohibition against professional licenses has an important exception rooted in federalism. Under § 1621(d), a state may give benefits to immigrants who are not lawfully present if it does so by "the enactment of a State law." The Petition refers to this exception as "the opt out" provision. Pet. 3–4. The opt out provision shows that, although Congress was concerned about public benefit access to unauthorized immigrants, Congress also recognized that each state has the right to make its own decisions about state-provided benefits.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE PROPOSED RULE AND ALLOW UNAUTHORIZED IMMIGRANT LAW GRADUATES BAR ADMISSION BECAUSE A BAR APPLICANT'S IMMIGRATION STATUS DOES NOT PREVENT THAT APPLICANT FROM ESTABLISHING CHARACTER AND FITNESS FOR PRACTICING LAW.

Petitioners, and other qualified immigrant law graduates, possess the qualities and traits necessary for the practice of law and can fulfill all the requirements for admission to the Utah Bar, were it not for their immigration status. This Court should adopt the Proposed Rule because this Court's character and fitness rules already ensure that only qualified applicants practice law in Utah. The Proposed Rule would not alter that requirement or enable an otherwise unqualified applicant from obtaining a bar license. Immigrant law graduates are undoubtedly capable of establishing the requisite character and fitness for practicing law in Utah. They possess the same personal qualities as any other non-immigrant law graduate. A bar applicant's immigration status does not inherently reflect anything negative about that applicant's character or fitness for practicing law. Inasmuch as there is no apparent valid reason for this Court to categorically preclude immigrant law graduates from practicing law, this Court should adopt the Proposed Rule.

A. The Character and Fitness Committee's Individualized Review of Bar Applicants Ensures that Only Qualified Applicants Obtain a Bar License.

This Court's rules governing admission to the Utah Bar already ensure that only well-qualified applicants of good moral character gain admission to the bar. A categorical ban on unauthorized immigrants from the practice of law would be inconsistent with the individualized review prescribed by this Court's current rules.

Among other things, law graduates applying to the bar must prove "by clear and convincing evidence" that they graduated from an approved law school, have good moral character, and have passed the MPRE and the bar exam. Utah R. Bar Admission 14-703. Attorney applicants, like Petitioners, must also prove their admission to another state's bar and that they are in good standing in all jurisdictions where they are admitted. *Id.* 14-704(a).

To prove sufficient moral character, all applicants must "pass a character and fitness investigation." *Admissions*, Utah State Bar, http://www.utahbar.org/admissions/ (last visited March 26, 2019); *see also* Utah R. Bar Admission 14-708. The Character and Fitness Committee's investigation is an individualized review of an applicant's background to determine if the applicant's "record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." Utah R. Bar Admission 14-708(a). As part of the process, the Character

and Fitness Committee can gain access to and review an applicant's prior employment records, school records, credit report, health care facility records, and records regarding formal or informal complaints or charges against the applicant. *Id.* 14-707(a) (requiring bar applicants to include in their applications "an authorization and release enabling the Bar to obtain information concerning the Applicant"); *Authorization and Release Form*, Utah State Bar, http://www.utahbar.org/wp-content/uploads/2017/09/Authorization-and-Release-1.doc (Utah Bar's notarized form indicating the full extent of the authorization an applicant provides the Character and Fitness Committee for its investigation). The process is thorough. It may include an informal investigative interview, a formal hearing, and a later review of a formal hearing decision. *Id.* 14-708(b)–(c).

Petitioners, like most other unauthorized immigrant law graduates in similar situations, are otherwise qualified for admission into the Utah Bar, and they would likely be admitted if Utah opted out of § 1621's broad, blanket prohibition. Pet. 2–3, 6. They have graduated from approved law schools, already passed rigorous bar and MPRE exams in other jurisdictions, and have otherwise proved their high moral character and fitness to practice law. Utah's current application process ensures only high-qualified individuals obtain a bar license, and categorically banning unauthorized immigrants from being eligible for the bar adds nothing to that process and robs Utah of legal talent.

Thus, adopting the Proposed Rule would have no adverse impact on the quality of attorneys admitted to the Utah Bar.

B. Unauthorized Immigrants Are as Capable of Practicing Law as Other Utah Attorneys.

A person's immigration status is not relevant to the key traits the Character and Fitness Committee considers in determining an applicant's character. In determining an applicant's character, the Character and Fitness Committee considers, among other things, evidence of an applicant's honesty, academic and work history, financial and professional responsibility, emotional and mental stability, drug or alcohol dependence, civility, diligence, reliability, and civil, criminal, or disciplinary charges. Utah R. Bar Admission 14-708(d), (f).

A person's immigration status does not affect these issues—unauthorized immigrants are equally able as other applicants to demonstrate they possess these traits and are honest, responsible, and civil. Thus, a complete ban of unauthorized immigrants will accomplish nothing more than preventing *highly qualified* and *morally fit* applicants from serving as upstanding Utah attorneys.

The experiences of the following LatinoJustice Amici prove the point.

Amicus Cesar Vargas came to the U.S. from Mexico at five years old, after his father passed away. *See In re Vargas*, 10 N.Y.S.3d 579, 582 (App. Div.

2015). After graduating from a New York public high school, Mr. Vargas attended St. Francis College in Brooklyn, *id.*, as an honors student. He then attended law school at the City University of New York, where he obtained valuable internships with Main Street Legal Services, Inc., the Office of the District Attorney of Kings County, and a New York State Supreme Court Justice. *Id.* He also worked as a legislative intern for a member of the United States Congress. *Id.* at 582–83. After graduation from law school, he took (and passed) the New York bar, applied for DACA, and then applied for admission to the New York Bar. *Id.* During all of this, Mr. Vargas also co-founded the Dram Action Coalition advocacy group. A subcommittee of New York's Character Committee found that Mr. Vargas "appears to have stellar character" and that, were it not for the legal issues surrounding his immigration status, it "would have no hesitation recommending Mr. Vargas' admission to the New York Bar." *Id.* at 584.

The *Vargas* court ultimately held that the judiciary had the authority to opt out of the statute under § 1621(d), and determined that Mr. Vargas was eligible for admission to the New York Bar. *Id.* at 589–97. Since then, Mr. Vargas has had a successful legal career, including speaking at congressional hearings, volunteering at legal clinics to help immigrants learn their rights, and providing pro-bono representation to children facing deportation in

immigration court.[16] Recently, NY1, a New York cable television station, brought Mr. Vargas on board to answer questions from the public and discuss immigration law and issues.[17] Mr. Vargas is also a frequent political commentator on CNN, MSNBC, FOXNews, Univision, and Telemundo, and he is a columnist on The Hill, Washington Post, New York Times, Politico, and other top publications, where he writes on immigration issues. Mr. Vargas is now a lawful permanent resident, and just over a month ago, he enlisted in the U.S. Army and is currently in basic training at Fort Leonard Wood, Missouri.

Amicus Sergio Garcia grew up in both Mexico and the U.S. *In re Garcia*, 315 P.3d 117, 121 (Cal. 2014). His parents brought him to the U.S. when he was an infant but moved with him back to Mexico when he was nine years old. *Id.* His parents then brought him back to the U.S. when he was seventeen years old, at which time Sergio's father filed an immigration visa petition on Sergio's behalf. *Id.* But, due to the massive "backlog of persons of Mexican origin who are seeking immigrant visas," as of 2014, Sergio's visa number still had not

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[16] *See, e.g.*, Rebecca Klein, *An Undocumented Teen Gains Asylum With The Help Of His Undocumented Lawyer*, HUFFINGTON POST (July 22, 2017, 8:00 AM), https://www.huffingtonpost.com/entry/cesar-vargas-undocumented-lawyer-client_us_59727244e4b09e5f6ccf6cf6.

[17] An example of one such segment can be found at https://www.ny1.com/nyc/all-boroughs/news/2018/04/27/immigrant-advocate-discusses-nypd-partnership-ice-raids-.

come up—"more than 19 years" after his father submitted his visa petition.[18] *Id.* at 121–22. Sergio graduated high school in California and received offers to attend Stanford, University of California at Berkley, and University of California at Davis, but he was unable to accept those institutions' scholarships due to his immigration status. Instead, he attended Butte College, California State University at Chico, and Cal Northern School of Law, where he received his law degree in May 2009. *Id.* at 122. In July 2009, he passed the California bar examination on his first try.[19] *See id.* The California Committee on Bar Examiners found Sergio otherwise qualified for admission to the California bar, and after the California legislature opted out of § 1621(d), he was admitted to the California bar. *Id.* at 120. He now works as a California attorney. Paul Elias, Associated Press, *Immigrant California lawyer finally gets green card*, LAS VEGAS SUN, (June 4, 2015, 6:00 PM),

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[18] Sergio eventually received his green card after being admitted to the California bar as an unauthorized immigrant. Paul Elias, Associated Press, *Immigrant California lawyer finally gets green card*, LAS VEGAS SUN, (June 4, 2015, 6:00 PM), https://lasvegassun.com/news/2015/jun/04/immigrant-california-lawyer-finally-gets-green-car/.

[19] Passing the California bar is no easy feat—only 56.4 percent of Sergio's peers passed the July 2009 exam. Staci Zaretsky, *California's Bar Exam Passage Rate Reaches 32-Year Low*, ABOVE THE LAW (Nov. 21, 2016, 12:15 PM), https://abovethelaw.com/2016/11/californias-bar-exam-passage-rate-reaches-32-year-low/.

https://lasvegassun.com/news/2015/jun/04/immigrant-california-lawyer-finally-gets-green-car/.

Amicus Jose Manuel Godinez-Samperio came with his parents to the U.S. from Mexico in 1995, when he was nine years old. He arrived on a B-2 Nonimmigrant Visa[20], but then lost his visa status, thereby becoming an unauthorized immigrant. Still, he graduated as the valedictorian of his high school class and obtained a private scholarship to attend New College of Florida. After he graduated, he attended Florida State University College of Law, also on a private scholarship. He passed the bar in 2011 but was not initially admitted to the Florida Bar. *Florida Bd. of Bar Examiners re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar*, 134 So.3d 432, 433 (Fla. 2014) (per curiam). Instead, the Florida Board of Bar Examiners sought an advisory opinion from the Florida Supreme Court about admitting unauthorized immigrants. *Id.*

The Florida Supreme Court determined (incorrectly) that § 1621(d)'s opt out provision required the Florida Legislature to act. *Id.* at 435. Notably, the parties did not raise the Tenth Amendment issues posed by the court's interpretation of § 1621(d), and thus the court did not address that issue,

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[20] The B-2 visa is referred to as a "Tourism" visa. U.S. Department of State, *Visitor Visa Overview*, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html (last visited Mar. 26, 2019).

discussed more fully below. A few months later, Florida's legislature adopted legislation to opt out of § 1621, which paved the way for Mr. Godinez-Samperio's admission to the Florida bar. *See* The Florida Bar, *Godinez-Samperio Finally Becomes A Florida Lawyer*, FLORIDA BAR NEWS (Dec. 15, 2014), https://www.floridabar.org/the-florida-bar-news/godinez-samperio-finally-becomes-a-florida-lawyer/.

Amicus Kelsey Burke was initially denied permission to take the bar exam by the Florida bar examiners based on the Florida Supreme Court's incorrect interpretation of § 1621(d). *Florida Bd. of Bar Examiners*, 134 So.3d at 437. She came to the U.S. from Honduras when she was ten years old, making the trek by foot, and after graduation from high school, she obtained Temporary Protected Status [21] and work authorization. Frank Cerabino, *Legislators should act to help worthy Boynton immigrant be admitted to Florida Bar*, THE PALM BEACH POST (Mar. 12, 2014, 12:01 AM), https://pbpo.st/2JmaLwC. She worked her way through college at Florida Atlantic University, finishing her bachelor's degree in three years and graduating debt free. *See id.* She then graduated from law school at Florida

[21] As noted above, TPS is similar to DACA in that it grants deferred status on a person, protects that person from removal, and allows that person work authorization. USCIS, *Temporary Protected Status: What is TPS*, https://www.uscis.gov/humanitarian/temporary-protected-status (last visited Mar. 26, 2019).

Agriculture and Mechanical University, for which she paid through a private loan with help of a generous family that took her in. *Id.* After the Florida Legislature opted out of § 1621's prohibition, Ms. Burke was eventually permitted to take the Florida bar exam and be admitted to the Florida bar. She is one of a handful of female personal injury attorneys in Palm Beach County, and she mentors students from middle school to law school, as well as young attorneys in the community through volunteering and pro-bono work.[22]

Amicus Denia Perez was born in Mexico and came to the U.S. with her parents when she was eleven months old. San Francisco State University, *Alum Denia Perez Becomes First DACA Recipient Admitted to Connecticut Bar* (Nov. 9, 2018), https://bit.ly/2YfbX8t. She is the first in her family to graduate from college and based on her experience (and her parents' experience) with the U.S. immigration system, Ms. Perez decided to attend Quinnipiac University School of Law. Soon after graduating law school, Ms. Perez spoke at a public hearing of the Connecticut Rules Committee, which was considering a change to Connecticut's bar admission rules to allow those like Ms. Perez admission to the Connecticut bar. Robert Storace, *This Undocumented Immigrant Just Graduated Law School. Now She Wants To Change Who Can*

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[22] Senator Durbin of Illinois shared Ms. Burke's story on the floor of the U.S. Senate in 2012, a video of which is available at https://www.youtube.com/watch?v=CNkhv7rZRpE.

Practice Law, CONNECTICUTLAWTRIBUNE (May 14, 2018, 3:27 PM), https://bit.ly/2FoVgi5. Connecticut adopted its new rule in June 2018, which allows admission to the bar so long as the applicant is "authorized to work lawfully in the United States." Robert Storace, *This Young Attorney Is the First DACA Recipient Admitted to Practice Law in Connecticut*, CONNECTICUTLAWTRIBUNE (Nov. 2, 2018, 6:50 PM), https://bit.ly/2YfcpUd. As of November 2, 2018, she was the first unauthorized immigrant granted admission to the Connecticut bar. *Id.* She is currently an Immigrant Justice Fellow at Make the Road New York, representing clients in immigration proceedings.

Amicus Karla Perez was born in Mexico and came to the U.S. with her parents when she was two years old. Elise Foley, *Court To Weight Fate Of Dreamers*, HUFFINGTON POST (Aug. 8, 2018, 5:45 AM), https://bit.ly/2OpLpgi. She graduated from the Bauer College of Business and the Honors College at the University of Houston, and she went on to get her law degree from the University of Houston Law Center. While a law student, she interned with the Mexican American Legal Defense and Education Fund, the Tahirih Justice Center, and Baker Ripley's Immigration and Citizenship Program. *See* Karla Perez, *Opinion: DACA let me serve Houston. Now Congress should make it permanent*, HOUSTON CHRONICAL (Feb. 14, 2019), https://bit.ly/2tnpoES. She passed the July 2018 Texas bar exam, was admitted to the Texas Bar in

November 2018, and works as an immigration attorney, "helping survivors of gender-based violence in underserved communities throughout Houston." *Id.* Ms. Perez is currently an Equal Justice Works Fellow sponsored by in part by Greenberg Traurig, LLP and The Texas Access to Justice Foundation and hosted by the Tahirih Justice Center in Houston, Texas. She also serves on the national board of United We Dream, which is the nation's largest immigrant youth-led organization. Ms. Perez has since become a lawful permanent resident.

Amicus Marisol Conde-Hernández was born in Mexico and, when she was one year old, her parents brought her to the U.S. Before going to law school, Ms. Conde-Hernández founded New Jersey's first undocumented, youth-led immigrant rights group. Elise Schoening, *Undocumented immigrant becomes activist*, THE SIGNAL (Mar. 27, 2017), https://bit.ly/2panvJ6. She graduated from Rutgers University New Brunswick *summa cum laude* before attending Rutgers Law School, where she was the Marsha Wenks Public Interest Fellow and Co-Chair of Rutger's Immigrant Rights Collective. Upon graduation, she became the first undocumented law graduate from a New Jersey law school. *See id.* She was admitted to the New Jersey bar in October 2018, becoming

New Jersey's first undocumented female attorney. She currently practices immigration law and criminal defense in New Jersey.[23]

Amicus Jackeline Saavedra-Arizaga came from Peru to the U.S. when she was fourteen years old. After graduating high school, Ms. Saavedra-Arizaga worked different jobs to pay for college, eventually graduating *cum laude* from the State University of New York at Stony Brook in 2007. *See* Chau Lam, *Mixed reaction to Obama immigration policy*, NEWSDAY (June 15, 2012, 10:37 PM), https://www.newsday.com/long-island/mixed-reaction-to-obama-immigration-policy-1.3785384. Ms. Saavedra-Arizaga then attended law school at Touro College. In law school, Ms. Saavedra-Arizaga was a legal fellow at SEPA Mujer, where she advocated for domestic violence survivors and others within the Latina community on Long Island. LONG ISLAND REGIONAL IMMIGRATION ASSISTANCE CENTER, *About*, http://www.longislandriac.com/about.html (last visited Mar. 26, 2019). She was also recognized in 2012 as one of the "40 under 40 Latino Rising Stars" by the Hispanic Coalition, New York. *Id.* In 2013, Ms. Saavedra-Arizaga received DACA status and graduated law school. Following the *Vargas* decision, Ms. Saavedra-Arizaga was admitted to the New York bar in 2015. She is now an attorney at the Immigration Unit at

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[23] Ms. Conde-Hernández's story was documented in *American Sueño: Onward*, a five-part documentary series, available at http://newestamericans.com/american-sueno-onward/.

Suffolk County Legal Aid Society, where she provides advice to Suffolk Legal Aid attorneys and others about the immigration consequences of criminal charges for noncitizen clients. *Id.*

These are a few examples of the applicants who would be precluded from practicing law in Utah absent this Court's adoption of the Proposed Rule. These *amici* demonstrate that qualified DACA recipients and similar unauthorized immigrants are equally capable of establishing the "honesty, trustworthiness, diligence, [and] reliability" necessary to be a Utah attorney. Utah R. Bar Admission 14-708(a). Failing to adopt the Proposed Rule would be a disservice to the Utah Bar, which would benefit greatly from the diversity applicants like the above *amici* would bring to the bar, and the expected voluntary pro-bono representation they could provide to Utah's low-income population. One California court, considering a statutory exclusion that prevented a "permanent resident alien" from admission to the bar, put it eloquently:

> For a contemporary example we need only look to the case of the present petitioner. As noted above, he settled in California over a decade ago with the intent of becoming a permanent resident … ; he received both his undergraduate and legal education here, and took and passed the California Bar Examination. To suggest that such a person lacks "appreciation of the spirit of American institutions" merely because he is not himself a citizen demonstrates the irrationality of excluding aliens on this ground.

Raffaelli v. Comm. of Bar Exam'rs, 496 P.2d 1264, 1270 (Cal. 1972). In light of the many examples of unauthorized immigrants successfully and ethically practicing law in other states, it would be irrational for Utah to categorically bar qualified unauthorized immigrants simply because of their immigration status. *See id.*

C. A Person's Immigration Status Does Not Relate to That Person's Ability to Establish Character and Fitness.

A bar applicant's immigration status simply is not relevant to that person's character and fitness to practice law. First, unlawful presence within the U.S. has "always been a *civil*, not criminal, violation" of the Immigration and Nationality Act ("INA"). Congressional Research Service Report, *Immigration Enforcement in the United States*, at 8 (April 6, 2006), https://fas.org/sgp/crs/misc/RL33351.pdf (emphasis added); *see also Arizona v. United States*, 567 U.S. 387, 407 (2012) ("[I]t is not a crime for a removable alien to remain present in the United States.").

Second, the INA authorizes the Attorney General to cancel the removal of, and adjust a deportable immigrant's status if, among other things, the immigrant has had good moral character during his or her stay in the United States. *See* 8 U.S.C. § 1229b(b)(1). Thus, even the INA recognizes that unauthorized immigrants may still possess good moral character despite their immigration status, and this Court should not presume otherwise.

Based on the foregoing, this Court should adopt the Proposed Rule. It would benefit the bar, the community, and society. And as discussed next, this Court indeed has the authority to adopt the Proposed Rule.

II. THIS COURT HAS EXCLUSIVE CONSTITUTIONAL AUTHORITY GOVERNING BAR ADMISSIONS AND SHOULD ADOPT THE PROPOSED RULE UNDER THAT AUTHORITY.

As a preliminary matter, § 1621 does not make unauthorized immigrants ineligible for a Utah bar license, for the reasons already explained by other *amici*. *E.g.*, Br. of Ad Hoc Coalition of Law Professors 7–15; Br. of Parr Brown Gee & Loveless, P.C. 3–7. But even if § 1621 does apply here, this Court is the constitutionally mandated governmental branch to opt out of § 1621(a)'s prohibitions. Section 1621(d) authorizes this Court to grant Petitioners admission to the Utah State bar and it can do so because: (1) Utah's Constitution vests all power to regulate the practice of law with this Court and a contrary interpretation violates Utah's Constitution; (2) any contrary interpretation requiring Utah legislative action to opt out would violate principles of federalism embodied in the Tenth Amendment; and (3) an interpretation requiring Utah legislative action also violates the Fourteenth Amendment's Equal Protection Clause.

A. Section 1621(d) Authorizes This Court to Allow Unauthorized Immigrants Admission to the Utah State Bar, and a Contrary Interpretation Violates the Utah Constitution.

Section 1621 prohibits states from conferring certain benefits upon defined "aliens" unless the state enacts a law opting out of the federal restrictions. *In re Vargas*, 10 N.Y.S.3d at 589. Even if this Court were to find a Utah bar license is a "benefit" falling within § 1621's scope, this Court, and only this Court, may opt out of the federal restriction under § 1621(d).

The court in *Vargas* analyzed § 1621(d)'s opt out provision consistent with Utah's constitutional system for regulating the practice of law. The proper interpretation of § 1621(d) authorizes this Court to permit membership of unauthorized immigrants in the Utah State Bar because this Court is the constitutionally mandated coequal branch of government with exclusive responsibility for determining who can practice law in Utah. *See* Utah Const. art. VIII, § 4; *Injured Workers Ass'n of Utah v. Utah*, 2016 UT 21, ¶ 14, 376 P.3d 14 ("Because there is no limitation found within the constitution on our ability to govern the practice of law, we maintain the exclusive authority to do so."). From Utah's statehood, this Court has "always had the ability to regulate the admission and discipline of attorneys." *Injured Workers Ass'n of Utah*, 2016 UT 21, ¶ 17.

Before 1981, this Court's power was inherent and not exclusive—this Court and the legislature "concurrently governed the Utah State Bar." *Id.* at ¶ 19. That ended in 1985, "when the constitution was amended to explicitly grant the Utah Supreme Court the exclusive power to govern the practice of law." *Id.* ¶ 21; Utah Const. art. VIII, § 4 ("[T]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."). And this Court has since rejected any notion that it shares "power to regulate the practice of law with the legislature." *Id.* at ¶ 28.

For over thirty years, therefore, this Court has been the sole governmental branch with authority to determine whether persons are eligible to practice law in Utah. The framers of the 1985 amendment were wise in taking this power from the legislature and placing it with this Court because "[t]his power is considered essential to the [sic] maintaining an independent judiciary." *Id.* at ¶ 23 (internal alteration in original) (quoting Constitutional Revision Comm'n, *Report to the Governor and the 45th Legislature* 19 (1984)); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1066 (1991) ("[T]he courts have historically regulated admission to the practice of law before them.").

Pursuant to the Utah Constitution, this Court creates all rules governing the practice of law in Utah including rules governing the qualifications of applicants. For example, this Court establishes the Character and Fitness

requirements candidates must meet, and it establishes rules requiring the type of bar examination. Accordingly, as the result of the 1985 amendment, the legislature now lacks constitutional authority to opt out under § 1621(d).[24] Because Utah's legislature was stripped of its power to regulate the practice of law, this Court is Petitioners' only recourse. This Court should construe the phrase "enactment of a State law" to include any state action that has the force of law, including the orders of this duly empowered court. Under this reading, an order of this Court admitting Petitioners to the bar would satisfy the opt out provision.

A narrower interpretation, like that adopted by the Florida Supreme Court, would not pass constitutional muster in Utah. The Florida Supreme Court construed § 1621(d)'s opt out provision to require the state legislature to pass a bill the governor would then sign into law. *See Florida Bd. of Bar Examiners*, 134 So.3d at 435. But, as discussed above, the Utah Constitution has now vested this Court with *exclusive* rule-making authority regarding bar admissions. The Utah State Legislature therefore cannot pass a law in the

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[24] It appears some Utah legislators agree. Dennis Romboy, *Utah legislators eye ways for law school grads with DACA status to take bar exam*, KSL (May 16, 2018), https://bit.ly/2JmTnaS (quoting state legislator as saying, "I don't know that there is a legislative remedy" for allowing DACA recipients admission to the Utah Bar, "given that the Supreme Court exclusively regulates the practice of law").

same way Florida did.[25] Also, the Florida court did not address whether its interpretation of § 1621(d) violates the Tenth Amendment. *See In re Vargas*, 10 N.Y.S.3d at 594 (explaining that no prior courts, including Florida, addressed whether § 1621(d) violates the Tenth Amendment). As discussed below, the Florida court's interpretation indeed violates the Tenth Amendment.

Accordingly, this Court should follow and adopt the *Vargas* court's interpretation to avoid the constitutional conflict. *See Nevares v. M.L.S.*, 2015 UT 34, ¶ 38, 345 P.3d 719 (explaining that under the canon of constitutional avoidance "courts may reject[] one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality").

B. Interpreting "Enactment of a State Law" to Require Utah Legislative Action Violates the Tenth Amendment.

A legislative enactment requirement, if § 1621(d) were read to impose one, would be unconstitutional because principles of state sovereignty under

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[25] To interpret § 1621(d) as requiring Utah's legislature to act would also result in absurdity, because such an interpretation would require the Utah legislature to do what the Utah legislature is forbidden from doing. *Injured Workers Ass'n of Utah*, 2016 UT 21, ¶ 21; Utah Const. art. VIII, § 4. For this reason as well, this Court should adopt the *Vargas* court's interpretation. *State ex rel. Z.C.*, 2007 UT 54, ¶ 15 n.5, 165 P.3d 1206 ("[W]hen the statutory language plausibly presents the court with two alternative readings, we prefer the reading that avoids absurd results."); *see also Turner v. Staker & Parson Co.*, 2012 UT 30, ¶ 12, 284 P.3d 600 ("Wherever possible, we give effect to every word of a statute, avoiding any interpretation which renders parts or words in a statute inoperative or superfluous").

the Tenth Amendment protect the integrity and independence of state governments against undue interference from the federal government. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). But that is exactly what a legislative enactment requirement would do here.

Under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the state's integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). The Tenth Amendment recognizes the historical fact that "States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991). And "inherent in the respect for state sovereignty is the recognition that 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *New York*, 505 U.S. at 162).

Federalism principles embodied in the Tenth Amendment bar both direct and indirect interference by the federal government. For example, Congress

may not direct a state to enact a specific law or implement a specific policy, and "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Congress also may not commandeer executive-branch officials. *Printz v. United States*, 521 U.S. 898 (1997). Even when Congress incentivizes the states to act in a certain way, it cannot unduly coerce the states into making choices in a way that undermines the independence of the decision-making process. *See New York*, 505 U.S. at 174–78; *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577–78.

Similarly, Congress violates federalism principles when it specifies which state official or which branch of state government may exercise the power of the state sovereign. Since "a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty." *Alden v. Maine*, 527 U.S. 706, 747 (1999). Accordingly, the United States Supreme Court has interpreted a statute contrary to its "plain language" to avoid interfering with state government decision-makers. *Gregory v. Ashcroft*, 501 U.S. 452, 465–66 (1991) (refusing to apply the federal Age Discrimination in Employment Act to a state's requirement that its supreme-court judges retire at the age of seventy, even though the "plain language" dictated otherwise). In doing so, the Court explained that it is "essential to the

independence of the States … that their power to prescribe the qualifications of their own officers [should be] exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Id.* at 460. *Gregory* dealt with the state's sovereign interest in determining who holds office. Under the Tenth Amendment a state has a similar interest in determining which of its branches makes governing decisions.

State sovereignty under the Tenth Amendment therefore protects a state's choice to allocate power among its coequal branches of government. Congress lacks authority to dictate to the states which governmental branch possesses power over a particular governmental function. "The ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment." *In re Vargas*, 10 N.Y.S.3d at 594. If the opt out provision were construed to impose a legislative enactment requirement, it would violate Utah's state sovereignty because it would dictate that Utah may only regulate legal practice through its legislature, and not through its courts.

But as discussed above, the Utah Constitution was amended to eliminate the legislature's power to regulate legal practice and to delegate all authority to this Court. *Injured Workers Ass'n of Utah*, 2016 UT 21, ¶¶ 19, 28. Were this Court to construe § 1621(d) to require a legislative enactment, the State's hands would be tied, because the Utah Constitution, as interpreted by this

Court, flatly prohibits the Utah Legislature from enacting any state law governing bar admissions.

In sum, Utah's distribution of responsibility for bar admission decisions represents a careful balancing that the federal government has no authority to disrupt. Utah has a fundamental interest in allocating power among its three coequal governmental branches and is in a unique position to determine how best to allocate responsibility for regulating the practice of law. Utah has clearly spoken that regulations governing the practice of law are best handled by the judiciary, and thus *only* handled by the judiciary. Construing § 1621(d) to require a legislative enactment means that Congress can substitute its preferences for the Utah Constitution. This, Congress cannot do. *See* U.S. Const. amend. X.

C. Interpreting "Enactment of a State Law" to Require Utah Legislative Action Violates the Fourteenth Amendment's Equal Protection Clause.

As explained above, interpreting § 1621(d) to require legislative enactment would have the practical result of ensuring bar applicants like Petitioners can never obtain a Utah bar license, because the Utah Constitution prohibits the legislature from enacting the law that § 1621(d) requires. *Injured Workers Ass'n of Utah*, 2016 UT 21, ¶ 21; Utah Const. art. VIII, § 4. Thus, a decision interpreting the opt out provision as requiring legislative enactment is a decision that those like Petitioners are categorically banned from the

practice law in Utah. Such a decision would violate the Constitution's Equal Protection clause.

Under the Equal Protection clause, "No state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* Utah Const. art. I, § 24 ("All laws of a general nature shall have uniform operation."). "The Equal Protection Clause directs that 'all persons similarly situated shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Bd. of Bar Exam'rs of State of N.M.*, 353 U.S. 232, 238–39 (1957). The Equal Protection Clause was adopted to abolish governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. *Plyler*, 457 U.S. at 221–22. "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware*, 353 U.S. at 239.

A decision that denies DACA recipients, those granted TPS, or unauthorized immigrants in general from admission to the Utah Bar would

unlawfully classify those groups for disparate treatment in at least three different ways. First, such a decision would treat DACA recipients who need a license for their profession differently from other DACA recipients who do not. Second, a decision banning unauthorized immigrants in general from obtaining a bar license treats them differently from citizens or other applicants. Third, and relatedly, a decision banning DACA recipients from obtaining a bar license would treat bar applicants differently on the basis of race. Although DACA is not solely limited to the Latinx population, the overwhelming majority of DACA recipients are from Mexico and Central and South America. UCSIS, *Approximate Active DACA Recipients: Country of Birth*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_July_31_2018.pdf (showing that, of about 703,000 active DACA recipients in July 2018, the top four most common countries of birth for such recipients were Mexico, El Salvador, Guatemala, and Honduras, which accounted for 623,000 of active DACA recipients, or about 89%).

Accordingly, for this Court to find that § 1621(d) requires legislative action, this Court would also have to find that there is at least[26] a rational basis

[26] A higher level of scrutiny would likely apply here, *see Graham v. Richardson*, 403 U.S. 365, 372 (1971) (applying strict scrutiny to a state law that created a classification based on alienage); *Application of Griffiths*, 413

for treating DACA recipients and unauthorized immigrants in general differently from other equally qualified bar applicants. *See Brewer*, 757 F.3d at 1065. But there is no such rational basis here, because a bar applicant's immigration status has nothing to do with whether the applicant is qualified to practice law.

Any disparate treatment by Utah of DACA recipients (or unauthorized immigrants) must be rationally related to a legitimate state interest to be constitutional. *City of Clerburne v. Clerburne Living Or.*, 473 U.S. 432, 440 (1985). Rational basis review is the most deferential level of review for the State. State action must be struck down unless there is some rational basis for it. *FCC v. Beach Comm.*, 508 U.S. 307, 315 (1993).

No doubt the State has a "legitimate interest in determining whether [an applicant] has the qualities of character and the professional competence

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U.S. 717, 721 (1973) (same): *Nyqusit v. Mauclet*, 432 U.S. 1, 7 (1977) (same), or possibly intermediate scrutiny, s*ee Plyer,* 457 U.S. at 214–20 (applying heightened scrutiny to children whose presence is unauthorized); *Bowen v. Gilliard*, 483 U.S. 587, 60–03 (1987) (explaining that intermediate scrutiny applies to quasi-suspect groups and those groups are discrete, obvious, immutable, or distinguishing characteristics, and are politically powerless). But because § 1621, if interpreted to categorically bar all unauthorized immigrants from receiving bar licenses, fails even rational basis review, this Court need not resolve which level applies. *Brewer*, 757 F.3d at 1065 (affirming a preliminary injunction against an Arizona policy that denied drivers' licenses to DACA recipients, finding it unnecessary to decide what standard of scrutiny applies because Arizona's "policy is likely to fail even rational basis review").

requisite to the practice of law." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971) (plurality opinion). This Court has stated "[t]he practice of law is so affected with the public interest that the state has both a right and a duty to control and regulate it in order to promote the public welfare." *Nelson v. Smith*, 154 P.2d 634, 637 (Utah 1944). The practice of law is regulated to ensure certain qualifications are met, such as good moral character, proficiency in the law, and possession of the requisite skill set to practice the profession. *Schware*, 353 U.S. at 238–39; *New Hampshire v. Piper*, 470 U.S. 274, 276 (1985); *Injured Workers Ass'n of Utah*, 2016 UT 21, ¶¶ 17–20. Ultimately, an applicant's conduct should demonstrate "honesty, trustworthiness, diligence, [and] reliability," and this Court has established seventeen factors to determine an applicant's character and fitness. *See* Utah R. Bar Admission 14-708.

The state's interest in regulating the practice of law is not advanced by treating unauthorized immigrants differently than other equally qualified bar applicants. A per se ban on unauthorized immigrants is not related to any of the factors used to determine a bar applicant's character and fitness. *See id.* 14-708(d). Nor is there any evidence that unauthorized immigrants are unqualified to be attorneys by virtue of their immigration status.

In sum, an applicant's immigration status simply has nothing to do with the purposes of licensing attorneys—immigration status has no bearing on whether an attorney graduated law school, passed the bar, or otherwise has

the qualifications necessary to be an attorney. This is especially true here, where Petitioners both graduated from ABA accredited Utah law schools, are members in good standing of the State Bar of California and otherwise appear to meet all of Utah's standards for bar admissions except for immigration status. Petitioners have already been admitted to practice law in California without incident, and Petitioners' non-citizen immigration status does not denigrate the standards of the bar, nor does it allow for others who may be unqualified to be admitted to the bar. The only distinction between Petitioners and every other member of the Utah Bar is that Petitioners, through no fault of their own, were brought to this country as children. This distinction has no bearing on Petitioners' ability to practice law, and a distinction on this basis is not rationally related to the state's interest.

CONCLUSION

Petitioners, as well as other DACA recipients, and unauthorized immigrants in general, should not be prejudged as morally unfit to be lawyers merely because of their immigration status. To the contrary, the experience of other states is that such individuals are a boon to the profession and a benefit to society. And because this Court is the only branch of government with the explicit authority to adopt such a rule under the Utah Constitution, this Court *can and should* adopt a rule allowing otherwise qualified unauthorized immigrants to be admitted to the Utah Bar.

DATED: March 26, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 8,924 words, excluding parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the requirements of Utah R. App. P. 21(g).

DATED: March 26, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2019, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF PETITIONERS BY LATINOJUSTICE AMICI** to be served via first-class mail, postage prepaid, on the following:

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