In the

Supreme Court

of the

State of California

IN RE SERGIO C. GARCIA ON ADMISSION

BAR MISCELLANEOUS 4186

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL *AMICUS CURIAE* BRIEF AND PROPOSED SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CALIFORNIA LATINO LEGISLATIVE CAUCUS IN SUPPORT OF SERGIO C. GARCIA

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 29.l(f) of the California Rules of Court, the California Latino Legislative Caucus ("CLLC") respectfully requests permission to file, pursuant to the Court's order of October 16, 2013, the accompanying supplemental *amicus curiae* brief in support of Applicant Sergio C. Garcia.

INTEREST OF *AMICUS CURIAE*

The interest of Amicus Curiae CLLC was set out in the in the initial application of the Caucus to file an amicus brief.

The Caucus is comprised of 23 members of the California State Legislature: 8 California State Senators and 15 California State Assembly Members, including the current Speaker of the Assembly. Founded nearly 40 years ago, the CLLC's mission is to represent and improve the lives of California's working families, support California communities, and increase educational and economic opportunities for all Californians. Throughout its history, CLLC has advocated for and endeavored to protect the rights *of* all Californians, regardless of citizenship, on issues of education, health care access, and civil rights.

Given its representation of diverse geographical regions and communities across California, its history of support for extending rights to all Californians, and its mission to address issues affecting California working families, the CLLC offers an important and unique perspective on California law and policy addressing immigrants, including undocumented individuals. For these reasons, the CLLC respectfully requested that the Court accept the initial brief for filing, which the Court did.

The interest of the Caucus is, if anything, even greater now. The Caucus was the prime sponsor of AB 1024, which supplemental briefs are to address. The Court may consider the Caucus's intention and understanding of the meaning and effect of AB 1024 to be relevant to the decisions it now faces.

The Caucus respectfully requests that the Court accept this application and the accompanying brief.

Other than counsel for CLLC, no party or counsel for any party has authored the proposed brief in whole or in part, or funded preparation of the brief.

Dated: November 13, 2013

Respectfully submitted,

GIRARDI | KEESE

By 

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Attorney for *Amicus Curiae,*
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CALIFORNIA LATINO LEGISLATIVE CAUCUS'S SUPPLEMENTAL *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANT SERGIO C. GARCIA

The Latino Caucus, whose members were the major sponsors of AB 1024 submit this supplemental Amicus Brief on their intention in supporting AB 1024.

AB 1024 passed the Legislature with a vote of 63-0 in the Assembly and 28-5. The language of the bill is clear:

> "Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court." (Cal. Bus. & Professions Code Section 6064(b))

That broad language of 6064(b) mirrors exactly the language of 6064(a), which applies to any other applicant for admission "to practice law", and therefore an applicant, though not lawfully present in the United States, has exactly the same right under the law of California "to practice law . . . as an attorney at law in all the courts of this state" as does any other member of the State Bar of California.

The intention of the Caucus in supporting AB 1024 was to authorize the full admission of Mr. Garcia and others covered by 6064(b) to the full scope of law practice in California.

Of course one not lawfully present may be subject to power of the United States to begin an administrative deportation proceeding, but the possible exercise of that power does not limit the right to practice law.

Nor is the right to be admitted to practice law limited by any potential future federal restrictions on practice relationships.

Even those regularly admitted under 6064(a) may be subject to federal restrictions on their right to practice. For example, they may not practice before the U.S. Patent and Trademark Office without having additional qualifications, nor represent veterans in certain administrative proceedings in the U.S. Department of Veterans Affairs without additional training and certification. But no one has ever suggested that because there might be some restrictions, including federal restrictions, on the scope of law practice that is reason to deny admission in California to the practice of law.

No matter what the restrictions, there are valuable parts of the practice of law Mr. Garcia could clearly do.

First, Mr. Garcia could practice law on a pro bono basis, which has meaning for access to justice for many in California. His personal experience and status would inspire a unique sense of trust and understanding with undocumented immigrants in California in need of legal help, and allow him to provide much needed legal assistance in a manner few other members of the Bar could match.

Second, though it may be a corporation could not hire Mr. Garcia in its in house counsel's department, absent that explicit relationship, a client, as such, with whom a retainer agreement is entered into, is not an employer. There is no provision of the California Labor Code, other statute or cases, or any other law that makes a client an "employer" of a lawyer. There are no employer obligations of clients regarding worker's compensation coverage, unemployment insurance, withholding of taxes, meal or rest breaks, or any other obligation that defines an "employer- employee" relationship. Absent an explicit employer-employee relationship Mr. Garcia would be as able to have clients, as any other person admitted "to practice law . . . as an attorney at law in all the courts of this state".

There is the presence of a broader principle at work here. Simply being in the country without legal immigration status is not a crime. The rights of undocumented persons to be free from discrimination in education and other public facilities, to enter into contracts, own and inherit property, and be protected in their civil rights are all well established.

AB 1024, about the practice of law, is intended to implement those broader principles, and subject only to the federal power of deportation and other narrow limitations, extend to undocumented persons "the blessings of liberty", among which are the right to have a profession, and provide for themselves, their families, and their communities.

SERGIO C. GARCIA, UNDOCUMENTED PERSONS AND THE PRACTICE OF LAW

Sergio C. Garcia's parents brought him to this country as a minor. Mr. Garcia, since the age of 17, has lived in the United States. He attended high school, college, and law school. Mr. Garcia sat for and passed the California Bar Examination. The California Committee of Bar Examiners found that Mr. Garcia is of good moral character and recommended him for admission to the practice of law. Because Mr. Garcia has not yet been granted permanent residence here in the United States, this Court on May 16, 2012 issued an Order to Show Cause to address the issue of whether his status as an undocumented person prohibited his admissions to the practice of law in California. Since he has met every other requirement for admission, Mr. Garcia's status is the only reason the recommendation of the Committee would be denied.

The Court also invited amicus curiae, either in support or opposition of Mr. Garcia's petition to address the following issues:

1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court's admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude this admission?

2. Is there any legislation that provides – as specifically authorized by 8 U.S.C. section 1621, subdivision (d) – that undocumented

immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance if any, should be given to the absence of such legislation?

3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?

4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant's ability to practice law?

5. What, if any, other public policy concerns arise with a grant of this application?

Petitioner, and the Committee of Bar Examiners, along with numerous Amici, submitted briefs in response to these questions. On September 4, 2013, this Court heard oral arguments on the matter. Much of the argument addressed a federal statute, 8 U.S.C. §1621, applicable to this very question. That statute, also known as the Personal Responsibility and Work Opportunity Reconciliation Act, prohibits certain categories of individuals not lawfully present in the United States from receiving specified public benefits, including "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)).

However, under federal law, a state may render "an alien who is not lawfully present in the United States . . . eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . through the enactment of a State law after the date of the enactment of this Act which affirmatively provides for such eligibility." (8 U.S.C. § 1621(d)).

At oral argument the Court asked whether § 1621(c) prohibited the Court from granting Mr. Garcia a law license and whether there was a California statute on point that would bring Mr. Garcia under the savings clause in § 1621(d).

Daniel Tenney, arguing on behalf of the United States, who opposed Mr. Garcia's admission, specifically acknowledged that Congress under § 1621(d), allowed states to legislate in this area, and effectively, by state statue, permit the admission to practice of undocumented persons

In response to oral argument, the California Legislature, drafted and passed AB 1024. On September 26, 2013, the Governor of California signed AB 1024. On October 16, 2013, this Court vacated its submission in this matter in light of AB 1024 and requested that the parties file supplemental briefs addressing the effect of the recently enacted legislation.

This Amicus brief by the California Latino Legislative Caucus ("CLLC") directly addresses that question.

A. The passage of AB 1024 answers all the issues set forth in this Court's initial Order to Show Cause of May 16, 2012.

AB 1024 expressly extends eligibility for those not present in the United States to obtain a license to practice law, thus definitively placing Mr. Garcia within the 8 U.S.C. § 1621(d) section of the statute.

Both in its brief and in its oral argument before the Court in September, the United States explicitly stated that federal law allows the California legislature to enact laws making undocumented immigrants eligible for the public benefit of law licensure. Br. for the Dep't of Justice as Amicus Curiae, p. 12, In Re Sergio C. Garcia on Admission, Bar Misc. 4186, S202512, S. Ct. Cal. (2013); Oral Argument at 58:20, In Re Sergio C. Garcia on Admission, Bar Misc. 4186, S202512, S. Ct. Cal. (September 4, 2013) (the United States, during oral argument stated that there would be no federal prohibition on issuing a law license – that 8 U.S.C. § 1621(d) provides an outlet in the event the state enacted such legislation) Given the United States position with regard to the enactment of state legislation conclusively placing the matter within the purview of 8 U.S.C. §1621(d), the passage of AB 1024, and this Court's authority to admit to the practice of law those recommended by the Committee of Bar Examiners, there should be no remaining question on this issue.

Further, the language of AB 1024, through what is now California Business and Professions Code § 6064(b) impacts every question asked by this Court in is Order to Show Cause

> "Upon certification by the examining committee that an applicant who is not lawfully present in the United States has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court." Cal. Bus. & Prof. Code § 6064(b).

That language is an ***exact mirror*** of the language of B & P § 6064(a), which governs the admission of all other persons to the practice of law in California:

> "Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law, the Supreme Court may admit that applicant as an attorney at law in all the courts of this state and may direct an order to be entered upon its records to that effect. A certificate of admission thereupon shall be given to the applicant by the clerk of the court." Cal. Bus. & Prof. Code § 6064(a).

Under both sections the examining committee (Committee of Bar Examiners) certifies that the "applicant has fulfilled the requirements for admission to practice law" and this Court then "may admit that applicant as an attorney at law in all the courts of this state".

The rights of an applicant admitted under 6064(b) are ***exactly the same*** as an applicant admitted under 6064(a). And *under California law*

there are no restrictions on the practice of law set out as part of the admission to practice by this Court.

Whatever the arguments before the passage of AB 1024 about any difference in California law between granting a license and the right to practice have been removed by AB 1024 using the mirror language in 6064(b) as in 6064(a). Nor do we need to engage in the dark arts of statutory interpretation. The language in the statute supported by the Amicus Latino Caucus, and adopted by over two-thirds of the legislature, is clear: Mr. Garcia, or anyone else admitted under 6064(b) can practice law, as a matter of California law, in the same way as any one admitted under 6064(a) – "as an attorney in all the courts of this state".

B. Any restrictions on Mr. Garcia for certain types of federal practice or other federal limits only operate as limited exceptions to Mr. Garcia's right in California to practice law under AB 1024 and B & P Code § 6064(b)

The Senate Judiciary Committee, in enacting AB 1024, considered the impact of federal law. Specifically, the Committee indicated that the ability of those not lawfully present in the United State who have been granted law licenses "may be automatically disqualified from representing certain clients and taking on some types of cases because of their immigration status. For example, federal law may preclude attorneys not lawfully present in the U.S. from representing others in matters before the U.S. Citizenship and Immigration Services agency." (Senate Judiciary

Committee, citing *In the Matter of Ravindra Singh Kanwal*, D2009-053 (OCIJ July 8, 2009).

But there are restrictions even on those admitted under Bus. & Prof. Code § 6064(a). Lawyers regularly admitted in California may not, for example, practice before the Unites States Patent and Trademark Office without having additional qualification and passing a separate exam; to represent veterans in administrative proceedings in the Veterans Administration requires separate certification; and there are restrictions in other states for attorneys admitted in California who did not graduate from ABA accredited law schools.

No one has ever suggested that restrictions on the practice of law that apply to those admitted under Bus. & Prof. Code § 6064(a) should be a basis for this Court to deny admission to practice law "as an attorney in all the courts of this state".

The United States, in its original opposition Amicus brief citing 8 U.S.C. § 1324(a), also claimed that attorneys not lawfully present in the United States but licensed to practice law may be precluded by federal law from being employed by a law firm, corporation, or public agency.

Whether that is accurate or not, certainly it would not prohibit Mr. Garcia from representing clients on a pro bono basis. The importance of this cannot be emphasized enough. Mr. Garcia would have a unique identity and trust with other undocumented persons who need pro bono

legal assistance and often find it difficult to obtain necessary legal help. Mr. Garcia, and others with his status, as members of the State Bar, can make a real difference in providing access to justice which, for practical reasons, often is otherwise denied.

Furthermore, even when fees are involved, the lawyer-client relationship is not one of "employment". The client is not an "employer" of the lawyer. There is no employer-employee relationship. There are no employer obligations of clients regarding worker's compensation coverage, unemployment insurance, withholding of taxes, meal or rest breaks, or any other obligation that defines an "employer- employee" relationship.

And as a technical matter, Amicus agrees with the The Committee of Bar Examiners in its opening brief, which concludes "independent contractors" are exempted from §1324. (Opening Br. Of the Committee of Bar Examiners of the State Bar of California RE: Motion for Admission of Sergio C. Garcia to the State Bar of California pg. 28). The federal legal framework does not differentiate based on immigration status when it comes to contractual relationships. The framework of the Immigration Reform and Control Act (IRCA) is limited to regulating immigration status in the context of employer-employee relationships, and the statute's implementing regulations make explicit that it does not encompass other contractual relationships. See 8 C.F.R. § 274a.1(f) (specifically excluding independent contractors from the definition of "employee" in the statute**).**

C. AB 1024 and B & P Code § 6064(b) are consistent with rights generally accorded undocumented persons

Federal immigration law contains no provisions that address the ability of undocumented immigrants to make enforceable contracts outside the employment context. The Supreme Court has characterized the right to make contracts as a "great fundamental right." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968) (citing the legislative history of the Civil Rights Act of 1866). The statutory basis of the right, 42 U.S.C. § 1981, is explicitly not limited to citizens. On the contrary, it is phrased in terms of persons rather than citizens: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (emphasis added).

The Supreme Court has long held that § 1981 extends "to aliens as well as to citizens." *Takahashi v. Fish and Game Commn*., 334 U.S. 410, 419 (1948). The legislative history of the Reconstruction Congress that passed § 1981 indicates that it was "acutely aware of the despicable treatment of Chinese immigrant workers in California and elsewhere," and as a result, sought to provide protection from discriminatory state laws to immigrants as well as racial minorities. Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 Stanford L. Rev Online 1 (2012); see also *Anderson v. Conboy*, 156 F.3d 167, 178

(2d Cir. 1998) (concluding that the legislative history and structure of Section 1981 support the conclusion that the statute prohibits discrimination on the basis of alienage and finding no conflict with IRCA).

Recently, the Eleventh Circuit had occasion to consider the question of the relationship between contract law and immigration status, and found unequivocally no federal interest in discrimination in the enforcement of contracts. The Eleventh Circuit considered a state law that included, among other provisions, a section that sought to make nearly all contracts with undocumented people unenforceable. In voiding this portion of the statute on preemption grounds, the Eleventh Circuit described the restriction on contracting as "extraordinary and unprecedented" and noted that it would impose a "statutory disability typically reserved for those who are so incapable as to render their contracts void or voidable." *U.S. v. Alabama*, 691 F.3d 1269, 1293-94 (2012). The court found that enforcement of the provision would make "the ability to maintain even a minimal existence . . . no longer an option for unlawfully present aliens in Alabama." Id. This power of exclusion is reserved for the federal government. Since the federal government had not seen fit to impose this type of disability on undocumented immigrants, the court held that the State of Alabama could not take it upon itself to do so.

Alabama highlights the importance of the right to contract and the lack of any federal prohibition on that right. Similarly, in *Lozano v. City of*

Hazleton, 724 F.3d 297 (3d Cir. 2013), the Third Circuit considered an ordinance that, among other provisions, extended IRCA's employment verification requirements beyond employer-employee relationships to encompass independent contractors as well. The Supreme Court had remanded the Third Circuit's prior decision in the case, See *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011). On remand, the Third Circuit found the expansive employment-related provision preempted by IRCA, explaining, "We believe that prohibiting such a broad array of commercial interactions, based solely on immigration status, under the guise of a "business licensing" law is untenable in light of Congress's deliberate decision to limit IRCA's reach to the employer-employee relationship." *Lozano v. City of Hazleton,* 724 F.3d at 308.

Both *Alabama* and *Lozano* underscore the well-established principle that federal immigration law does not permit alien status to be relevant to the enforcement of contracts outside the employment context. Should Mr. Garcia decide to provide his professional services on a contractual basis, these cases suggest that this would be consistent with federal immigration policy. In fact, they go even further, and strongly indicate that it would be unlawful for a state to attempt to bar Mr. Garcia from establishing these types of contracts.

Granting Mr. Garcia the right to practice law would be harmonious with these stated federal policies and priorities.

D. AB 1024 and Bus. & Prof. Code § 6064(b) are consistent with California laws encouraging equal treatment of all residents, without regard to immigration status and the California legislative policy of inclusion of undocumented persons

Providing Mr. Garcia with the right to practice law would not conflict with any California state laws. On the contrary, it would further California's clear policy in favor of promoting the integration of immigrants, regardless of legal status, into the economy and society. Over the past ten years, and particularly in the last year, the California legislature has repeatedly emphasized the state's interest in providing undocumented residents with equal and fair treatment to the maximum extent possible within the contours of federal immigration policies.

At the same time that it passed AB 1024, the California legislature also passed the Trust Act, AB 4, which prohibits local law enforcement officials from holding immigrants for immigration enforcement purposes unless they have been charged with or convicted of serious criminal offenses. This law expresses the interest of the State of California in allowing undocumented immigrants who are not committing serious crimes to live free and prosper in the state.

Just days before these laws were passed, on October 3, 2013, the Governor signed into law AB 60, allowing people to receive drivers licenses without proof of lawful immigration status or a valid social security card if "he or she meets all the other qualifications for licensure

and provides satisfactory proof to the department of his or her identity and California residency." The law acknowledges that public safety is enhanced by allowing all people, without regard to legal status, to conduct their daily affairs in above-board transactions, including by lawfully obtaining drivers licenses.

The legislature has also passed a number of provisions to ensure that immigrant workers are not exploited in the state. See Civ. Code § 3339 (immigration status is irrelevant for purposes of enforcing state labor, employment, civil rights, and employee housing laws); Gov't Code § 7285; Lab. Code § 1171.5. Just recently, in October 2013, California passed additional measures to ensure that all California workers, including immigrant workers, who seek to exercise their workplace rights have strong protections against employer retaliation. AB 263, AB 524, and SB 666. These laws bolster the already existing federal framework that acknowledges that all workers are covered by substantive employment law protections, without regard to immigration status.

As it did in AB 1024, the State also expressed its support for furthering the ability of undocumented immigrants to prosper and contribute to the State in 2001, when it enacted Cal. Educ. Code § 68130.5. See *Martinez v. The Regents of the Univ. of California,* 50 Cal. 4th 1277, 241 P.3d 855 (2010) (rejecting arguments that the provision exempting undocumented persons from paying non-resident tuition rates was

preempted by federal law). This commitment was further bolstered when the State enacted Cal. Ed. Code § 66021.6, also called the California DREAM Act, which allows undocumented students to receive privately-funded scholarships and state-funded financial aid while attending public colleges and universities.

CONCLUSION

The California legislature has embraced a policy of inclusion with respect to all of its residents, regardless of immigration status. Granting Sergio Garcia the right to practice law would be consistent with the state's broad commitment to furthering the ability of all its residents to contribute as productive members of society.

These are, as the Preamble to our Constitution says, "the blessings of liberty", which under AB 1024 and the laws of California, have been worked for, earned, and are deserved, legally and morally, by Mr. Garcia.

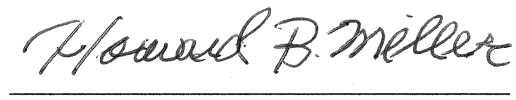
The California Latino Legislative Caucus urges this Court, consistent with the recommendation of the Committee of Bar Examiners, and pursuant to AB 1024 and the language of Bus. & Prof. Code § 6064(b), to admit Sergio C. Garcia to the practice of law "as an attorney in all the

courts of this state" with the same order and same language as admission to the practice of law under Bus. & Prof. Code § 6064(a).

Dated: November 13, 2013

Respectfully submitted,

GIRARDI | KEESE

By 

Howard B. Miller
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Supplemental *Amicus Curiae* Brief is produced using 13-point or greater Roman type, including footnotes, and contains 3,978 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 13, 2013

Respectfully submitted,

GIRARDI | KEESE

By 

Howard B. Miller
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Proof of Service by:
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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 11/15/2013 declarant served the within: Application for Leave to File Supplemental Amicus Curiae Brief and Proposed Supplemental Brief of Amicus Curiae California Latino Legislative Caucus in Support of Sergio C. Garcia

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I declare under penalty of perjury that the foregoing is true and correct:

Signature: Stephen Moore

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