

I TOO CAN PRACTICE LAW: THE LEGAL HURDLES OF DACAMENTED ATTORNEYS

BY: ALYNE SANCHEZ*

I. Introduction	2
II. Implications of Immigration Law in the Practice of Law	4
A. Immigration Law and Its Unique Terminology	5
B. Before DACA, there was the DREAM Act.....	6
C. Deferred Action for Childhood Arrivals (“DACA”).....	7
D. DACA’s Failed Expansion: DAPA.....	9
E. DACA Since Trump & the New Biden Administration	10
III. Legal Hurdles and Success Stories of Becoming A DACAmended Attorney	11
A. Section 1621(a): The Public Benefit Rule.....	12
B. State Laws: A Significant Shift In Law License Requirements	12
C. Good Moral Character: A Last-resort Attempt to Prevent Undocumented Individuals From Pursuing Legal Careers.....	16
IV. The Effects of DACA for Undocumented Attorneys	17
V. The Need For Uniformity Throughout the Nation	18
VI. Conclusion	20

* Alyne Sanchez is a Willamette College of Law graduate of 2022. She was born in Mexico and raised in Seattle, Washington. She is the co-founder of Undoculaw Northwest, an organization dedicated to promoting education and support to undocumented individuals pursuing a legal career. She is a constant advocate for the undocumented community and other marginalized groups. Thanks for Professor Keith Cunningham-Parmeter for his support in making this paper happen.

I. INTRODUCTION

She came to the United States when she was eight years old. By twelve, she knew she wanted to be an attorney. Completely oblivious to her immigration status, she worked hard to learn English, get good grades, and graduate high school. By the time she applied to college, she learned what being undocumented really meant: no scholarships, no job, no security. Somehow, the first one in her family, she made it happen, still adamant to pursue her dream to become a lawyer. She eventually made it to law school, still struggling to finance her education, she worked hard and she pushed. Unfortunately, as she was getting close to the finish line, once again, her immigration status abruptly disrupted everything she had worked for. Would she even be allowed to practice? The exact number of undocumented law school graduates and current law school students is unknown, but it may be hundreds. When these students graduate, even with DACA, their futures as attorneys are uncertain. Until Congress decides to act and adopt a permanent solution, those individuals protected under DACA will continue to be in peril at the hands of the political process. The Biden administration, on its first day, issued a memorandum to preserve and fortify DACA.¹ This of course, was the exact opposite of the Trump Administration, and the opposite of what a future conservative administration could do.

Deferred Action for Childhood Arrivals, commonly known as “DACA,” was issued through an executive order in 2012 by President Barack Obama, to protect undocumented youth from deportation and to provide them with the ability to seek lawful employment within the United States.² DACA has opened the doors for people to pursue their dream careers as attorneys. In 2017, President Donald Trump attempted to rescind the program, leaving thousands of “DACAmended” (those protected under DACA) individuals in limbo regarding their status and their ability to seek lawful employment in the

¹ Joseph R. Biden, Jr., Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), Memorandum For the Attorney General The Secretary of Homeland Security (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/>.

² Janet Napolitano, Memorandum for David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. (hereinafter Napolitano Memorandum)(June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

United States.³ His actions exposed the vulnerability of DACAmented individuals. Thankfully, through the judicial process, his actions were struck down and DACA was able to survive his presidency. However, unless some action for a permanent solution is taken, DACAmented individuals will continue to struggle with the insecurity of the future. After a 2020 United States Supreme Court decision, DACA was reinstated to its 2012 status and USCIS began accepting new applications, but only a few months later, DACA was once again held invalid, though existing DACA recipients were allowed to maintain their status.⁴

DACA recipients currently work in almost every field of employment available within the United States, including the legal profession. Despite their ability to be lawfully employed, DACAmented individuals continue to be limited by their immigration status. While some states have admitted undocumented immigrants into the practice of law and their state bars, both with and without DACA, there is no consistency among the states. Consequently, there is a gaping hole for people who are legal professionals but cannot become lawyers. These people continue to be limited in their ability to practice law because of the disparate treatment by different states.

This paper will first discuss the background of DACA and relevant legislation. It will explain relevant immigration laws, historical information regarding the legal profession, and immigration. It will then discuss the current status of individuals protected by DACA and their ability and limitations to practice law across the United States. Under federal law, certain categories of immigrants, which DACA individuals fall into, are ineligible to obtain a professional license, including a law license. However, the section of the federal law includes a savings clause, allowing states to overcome this restriction.⁵ This exemption has allowed several states to issue law licenses, but a majority continue to oppose the licensure of capable DACA individuals. Lastly, this paper will discuss potential solutions that could help remove the legal hurdles and create uniformity to allow DACA recipients to become attorneys. Primarily, under the new Biden administration, Congress should take action to allow DACAmented individuals to practice law nationwide.

³ Elaine C. Duke, Memorandum for James W. McCament, Acting Director, U.S. Citizenship and Immigration Services (hereinafter Duke Memorandum) (September 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

⁴ Dep't. of Homeland Security v. Regents of the Univ. of California, 240 S.Ct. 1891 (2020); Texas v. United States, 549 F. Supp. 3d 598 (S.D. Tex. 2021).

⁵ 8 U.S.C. § 1621(d) (1998).

It is important to note that this paper focuses on people who are currently protected from deportation and authorized to work because of DACA. Nonetheless, DACA continues to be only a temporary fix for the immigration status of those protected by DACA. By primarily discussing the opportunities and limitations of those protected under DACA, hundreds, if not thousands, of undocumented individuals pursuing a career in the law are excluded from the conversation. Though “undocumented” and “DACAmented” are used interchangeably, DACA recipients carry a significant advantage over people who did not qualify under the program. As argued in this paper, because of this advantage, state and federal bars should universally admit DACA-eligible attorneys into practice.

II. IMPLICATIONS OF IMMIGRATION LAW IN THE PRACTICE OF LAW

The United States is a country that was built by immigrants. As cities and states developed, so did the laws, including changes in who was allowed to practice them. It was not until the 1970s that the U.S. saw a shift in treatment of non-citizen state bar applicants.⁶ In 1973, the United States Supreme Court held that a state bar rule requiring citizenship unconstitutionally discriminated against immigrants who were legal permanent residents under the Equal Protection Clause of the Fourteenth Amendment.⁷ States followed, allowing people with different immigration status to be admitted into the practice of law. Nonetheless, because the federal government holds exclusive plenary power over general immigration matters, immigration law affects those who wish to practice law within the United States.⁸

[P]ast decisions of the United States Supreme Court clearly establish that the federal government generally has ‘plenary authority’ over matters relating to immigration (including limitations on the conduct or activities of non-United States citizens who are present in this country without legal

⁶ Lindy Stevens, *Plyler Students at Work: The Case for Granting Law Licenses to Undocumented Immigrants*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 567, 577–78 (2015) (footnote omitted).

⁷ *In re Griffiths*, 413 U.S. 717, 718 (1973).

⁸ *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

authorization or documentation) and that provisions of federal law relating to immigration prevail over any conflicting state law.⁹

As part of that power, Congress has enacted several laws that control immigration, including the Immigration and Nationality Act of 1952 (INA) and the Immigration Reform and Control Act of 1986 (IRCA). Under current immigration laws, the federal government has chosen to limit the ability for undocumented individuals to receive professional licenses, arguably, law licenses.¹⁰ Because DACA recipients continue to hold “undocumented” status, DACA does not change their ability to hold professional licenses.

A. Immigration Law and Its Unique Terminology

The INA adopted specific terminology that is used within the context of immigration law.¹¹ Under the INA, an alien is defined as “any person not a citizen or national of the United States.”¹² Any person who seeks admittance into the United States is presumed to be an immigrant, until he establishes otherwise.¹³ Essentially, an immigrant is any alien “who cannot bring himself into an enumerated class of nonimmigrant.”¹⁴ In other words, if a person intends to enter the United States and remain here, under the law, that person will be considered an immigrant. On the other hand, a non-immigrant is a person who intends to return to their home country and is viewed as a temporary visitor to the United States.¹⁵

“Undocumented immigrant” is used “to refer to a non-United States citizen who is in the United States but who lacks the immigration status required by federal law to be lawfully present in this country and who has not been admitted on a temporary basis as a nonimmigrant.”¹⁶ While other terms have historically been used to refer to this group of people, such terms have been deemed inaccurate, derogatory, and

⁹ *In re Garcia*, 315 P.3d 117, 125 (Cal. 2014) (internal citations omitted).

¹⁰ 8 U.S.C. § 1621(a) (1998).

¹¹ 8 U.S.C. § 1101(a)(3) (2021).

¹² 8 U.S.C. § 1101(a)(3) (2021).

¹³ 8 U.S.C.A. § 1184 (2020).

¹⁴ *Saxbe v. Bustos*, 419 U.S. 65, 67 (1974).

¹⁵ *Elkins v. Moreno*, 435 U.S. 647, 665 (1978) (Certified question answered sub nom. *Toll v. Moreno*, 397 A.2d 1009 (Md. Ct. App. 1979)).

¹⁶ *In re Garcia*, 315 P.3d 117, 120 n. 1 (Cal. 2014) (citing *Mohawk Industries v. Carpenter*, 558 U.S. 100, 103 (2009)).

dehumanizing. As a result, there has been a significant shift in word usage when referring to undocumented immigrants.¹⁷ A subgroup of undocumented immigrants are known as “DREAMers.” These are people who “generally refer to themselves as ‘DREAMers’ based on proposed federal legislation known as the Development, Relief, and Education for Alien Minors Act (the “DREAM Act”).”¹⁸ Commonly understood, this subgroup of people are those who entered the United States at a young age and because they are not able to travel back to their home countries, tend to only know the United States as home. Further, after DACA was issued in 2012, a new subgroup within DREAMers was created. Those protected under DACA began to consider their immigration status as “DACAmended.” A play with words so as to distinguish between those who are undocumented and those protected under DACA, though they still do not hold any legal status.

B. Before DACA, there was the DREAM Act

The DREAM Act was first introduced to the Senate in 2001 by Senator Dick Durbin.¹⁹ The original DREAM Act, would have created a path to residency and eventually citizenship for undocumented youth brought to the United States as children.²⁰ Among the different versions of the DREAM Act, some common requirements are that applicants must have graduated high school or obtained a GED, demonstrate good moral character, and pass a criminal background check.²¹ The latest version of the DREAM Act was introduced in the Senate on May 11, 2011. Similarly to past versions, the 2011 Dream Act would have created a path to citizenship for students who entered the United States at a young age.²² It would also have given more leeway for states to allow students to pay in-state tuition without regard to their immigration status.²³ Unfortunately, Congress has been unable to pass

¹⁷ *Id.*

¹⁸ *Arizona Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 799 n.1 (D. Ariz. 2015), *aff'd*, 818 F.3d 901 (9th Cir. 2016), and *aff'd*, 855 F.3d 957 (9th Cir. 2017).

¹⁹ Lindy Stevens, *supra* note 6, at 573.

²⁰ *Civil Rights in the United States, A Brief History: Deferred Action for Childhood Arrivals (DACA)*, GEORGETOWN LAW LIBRARY, <https://guides.ll.georgetown.edu/c.php?g=592919&p=4170929> (last visited May 18, 2022).

²¹ *Id.*

²² *DREAM Act: Summary*, NATIONAL IMMIGRATION LAW CENTER (May 2011),

<https://www.nilc.org/issues/immigration-reform-and-executive-actions/dreamact/dreamsummary/>.

²³ *Id.*

either a DREAM Act or other type of immigration reform. As a response to Congress's failure to enact legislation, the executive branch took action and issued DACA in 2012.

C. Deferred Action for Childhood Arrivals ("DACA")

On June 15, 2012, the Obama administration through the Secretary of Homeland Security, Janet Napolitano, released a memorandum ("Napolitano Memorandum") giving authority for the Deferred Action for Childhood Arrivals, better known as DACA.²⁴ The Napolitano Memorandum lists several requirements for individuals to qualify under DACA. Applicants must (1) have arrived to the U.S. before the age of 16, (2) have continuously resided in the U.S. for at least five years prior to June 15, 2012, (3) be currently in school or have graduated high school or obtained a GED, (4) have not been convicted of any felonies, significant or multiple misdemeanors, (5) and must not be above the age of thirty.²⁵

Essentially, under DACA, individuals who met the criteria were no longer at risk of being placed in removal proceedings or removed from the United States.²⁶ Furthermore, it allowed individuals to apply for work authorization or work permits and if approved, lawfully seek employment in the United States.²⁷ It also allowed DACA recipients to qualify for "advance parole (i.e., preauthorization to travel to the United States without a visa), [8 C.F.R] § 212.5, and a limited class of public assistance, such as state and federal aid for medical emergencies, 8 U.S.C. §§ 1611(b)(1), 1621(b)(1)."²⁸ However, DACA did not grant legal immigration status or a path to citizenship.²⁹ It also continued to exclude DACAmented individuals from obtaining federal government benefits.³⁰ DACA recipients could now "work, travel abroad, access credit, and otherwise lead productive lives during their periods of deferred action."³¹

²⁴ Napolitano Memorandum, *supra* note 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Nat'l Ass'n for the Advancement of Colored People v. Trump, 298 F.Supp.3d 209, 216–17 (D.D.C. 2018), adhered to on denial of reconsideration, 315 F. Supp. 3d 457 (D.D.C. 2018), and aff'd and rem'd sub nom. Dept. of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020).

²⁹ Napolitano Memorandum, *supra* note 2.

³⁰ 8 U.S.C. § 1621 (1998).

³¹ Nat'l Ass'n for the Advancement of Colored People, 298 F.Supp.3d 209.

Though DACA was extremely beneficial for undocumented youth, it did not mean that those protected under the program had the same opportunities as citizens or immigrants with lawful status. One of the major hurdles in pursuing higher education is the prohibitive cost, even for those who have citizenship or legal status. In 1982, the United States Supreme Court held that public school districts could not deny access to primary and secondary public education to undocumented students.³² The Court held that denying access to K-12 public education based on immigration status was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.³³ Consequently, even undocumented students could pursue basic public education in K-12 schools, but no federal law or case law has established similar access to higher education that could create uniformity and inclusivity of in-state tuition rates for undocumented students.

Students who are undocumented, even those protected under DACA, do not qualify for federal financial aid including Federal Pell Grants, Federal Work-study, and Federal Direct Student Loans.³⁴ Fortunately, several states have taken the lead and have enacted laws that either allow undocumented individuals to pay the same tuition rates as residents, receive some form of state financial aid, or both.³⁵ For example, in 2003, the state of Washington signed into law HB 1079, which allowed undocumented students to pay in-state tuition at Washington state colleges and universities if they met certain criteria.³⁶ Then, in 2014, Washington passed SB 6523, known as the REAL Hope Act, which opened the doors for undocumented students to receive state financial aid through the Washington Application for State Financial Aid, commonly known as WASFA.³⁷ Though it is a significant step towards aiding undocumented students, this state aid is not comparable to what a student would receive in federal financial aid. Federal financial aid would provide a student with the opportunity for federal grants and student loans in significantly higher amounts than what a student receives through state aid. Other states that have enacted similar

³² Plyler v. Doe, 457 U.S. 202, 229 (1982).

³³ *Id.*

³⁴ 8 U.S.C. § 1621 (1998).

³⁵ See *Undocumented Student Tuition: State Action*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 2013), <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx> (reporting that the following states have equivalent in-state tuition rate laws for undocumented students: California and Washington).

³⁶ Wash. Rev. Code Ann. § 28B.15.012(2)(e) (West).

³⁷ Wash. Rev. Code Ann. § 28B.92.010 (West).

laws, sometimes known as that state's DREAM Act, include: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, and the District of Columbia. Although some of these laws have been challenged, courts have routinely upheld them.³⁸

On the other hand, there are also states that continue to make it even harder for undocumented students to pursue higher education. At least three states, Arizona³⁹, Georgia⁴⁰, and Indiana⁴¹ have all enacted laws that prohibit or limit undocumented students from receiving in-state tuition rates at public secondary institutions within that state.

Fortunately, many private scholarships have recognized the importance in supporting these students and have thus expanded their eligibility to include undocumented students. Other scholarships and different programs continue to exclude undocumented students but allow DACAmented students to apply. Furthermore, under DACA, students may also be eligible for work study programs through their institutions and some students have also managed to obtain private student loans. Though extremely difficult, many students have managed to pay for higher education.

D. DACA's failed expansion: DAPA

In November 20, 2014, the Obama administration attempted to expand the DACA program through Deferred Action for Parents of Americans, also known as DAPA.⁴² The memorandum issued by Jeh Charles Johnson (Johnson Memorandum), indicated that DAPA would have extended the benefits of DACA to parents of US Citizens who met similar requirements as those under DACA and it would have increased DACA work authorizations to three years instead of two years.⁴³ Texas and a handful of other states challenged the action by alleging that the program violated the Take Care Clause of the

³⁸ *Martinez v. Regents of Univ. of California*, 241 P.3d 855 (Cal. 2010) (holding that statute that exempted undocumented students from paying non-resident tuition satisfied § 1621(d)).

³⁹ *Arizona ex rel. Brnovich v. Maricopa Cmty. Coll. Dist. Bd.*, 416 P.3d 803, 807 (Ariz. 2018).

⁴⁰ *Alford v. Hernandez*, 807 S.E.2d 84, 91-92 (GA. 2017).

⁴¹ Ind. Code Ann. § 21-14-11 (West) (HB 1402 initially prohibiting undocumented students from receiving financial aid, and later amending in 2013 through SB 207 allowing undocumented students to pay-instate tuition if they started college before July 01, 2011).

⁴² Jeh Charles Johnson, Memorandum for Leon Rodriguez, Director of U.S. Citizenship and Immigration Services, et al. (hereinafter Johnson Memorandum) (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf

⁴³ *Id.*

Constitution and the Administrative Procedure Act (“APA”).⁴⁴ The challenge resulted in an injunction against the order that remains in place today.⁴⁵ Because of the injunction, the Johnson Memorandum essentially became moot and DACA benefits returned to their original form as established under the Napolitano Memorandum.⁴⁶

E. DACA since Trump & the New Biden Administration

On September 05, 2017 the Trump administration rescinded DACA in a memorandum issued by Acting Secretary of Homeland Security, Elaine C. Duke.⁴⁷ The rescission prompted several organizations and states to file suit to prevent the rescission from taking effect.⁴⁸ The Duke Memorandum used derogatory language to refer to undocumented individuals and reflected the policies enacted by the Trump Administration. After years of litigation and multiple injunctions preventing the rescission to take effect, on June 18, 2020, the United States Supreme Court issued a decision that saved DACA, temporarily.⁴⁹ The Court held that the decision to rescind the program was arbitrary and capricious.⁵⁰ Though DACA survived after the Supreme Court’s ruling, it left the door opened for future litigation.⁵¹

In what was considered a direct conflict with the Supreme Court’s decision, the Trump administration, through the Acting Secretary of Homeland Security, Chad Wolf, released another memorandum, “Wolf Memorandum,” on July 28, 2020.⁵² Most notably, the new Wolf Memorandum outlined that DHS would reject all initial applications and would limit current DACA protection to one year instead of two years.⁵³ In the nick of time, on November 14, 2020, Federal District

⁴⁴ *Texas v. United States*, 86 F. Supp. 3d 591, 608 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as rev’d* (Nov. 25, 2015).

⁴⁵ *Id.*

⁴⁶ *United States v. Texas*, 136 S.Ct. 2198, 2241 (2016).

⁴⁷ Duke Memorandum, *supra* note 3.

⁴⁸ Matt Zaptosky, *Attorneys general from 15 states, D.C. sue to save DACA*, WASH. POST (Sep. 6, 2017), https://www.washingtonpost.com/world/national-security/attorneys-general-from-15-states-dc-sue-to-save-daca/2017/09/06/98bca3b2-930f-11e7-aace-04b862b2b3f3_story.html.

⁴⁹ *Dept. of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891 (2020).

⁵⁰ *Id.* at 1912.

⁵¹ *Dept. of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891 (2020).

⁵² ⁵² Memorandum of Chad Wolf, Acting Secretary of Homeland Security, to Mark Morgan, Senior Official Performing the Duties of Commissioner U.S. Customs and Border Protection, et al. (July 28, 2020) [hereinafter Wolf Memorandum], available at https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

⁵³ *Id.*

Judge Nicholas G. Garaufis found that Chad Wolf had not been lawfully serving as Acting Secretary of Homeland Security when he issued the Wolf Memorandum.⁵⁴ This of course was a significant win for DACA. In his decision, Judge Garaufis directed DHS to reinstate DACA to its original form as issued by the Napolitano Memorandum, allowing for two-year work permits instead of one year. Around December of 2020, the United States Citizenship and Immigration Services (USCIS), the office responsible for processing DACA applications, reopened DACA to new applicants and increased the length of the work permits in accordance with the court ruling. Unfortunately, within a few months, on July 16, 2021, a Texas District Court once again held that DACA was invalid, closing once again applications for new applicants, but leaving current DACA recipients with their existing status.⁵⁵

The new Biden administration, on its first day, issued a memorandum to preserve and fortify DACA, which was part of his presidential campaign promise.⁵⁶ Still, said promise has remained just a promise as DACA continues to see strong opposition from several states and continued risk of rescission through the judicial process. While DACA is “safe” for the next couple of years, its long-term future is still up in the air.

III. LEGAL HURDLES AND SUCCESS STORIES OF BECOMING A DACAMENTED ATTORNEY

The survival of DACA has allowed some individuals to continue pursuing their dreams. Still, once a DACAmended individual is able to get through all the initial hurdles of finishing high school, getting in and paying for college, getting in and finding a way to pay for law school, and passing the bar, additional hurdles may prevent them from becoming attorneys.

⁵⁴ Vidal v. Wolf, No. 16CV4756, 2020 WL 6695076, at *14 (E.D.N.Y. Nov 14, 2020).

⁵⁵ Texas v. United States, 549 F.Supp.3d 572 (S.D. Tex. 2021).

⁵⁶ Lynn Sweet, ‘Dreamer’ protections to be reinstated by Joe Biden on day one: Incoming Chief of Staff Ron Klain, CHICAGO SUN TIMES (Nov. 15, 2020, 11:15 am), <https://chicago.suntimes.com/2020/11/15/21566075/dreamer-protections-reinstated-president-joe-biden-immigration>.

A. Section 1621(a): The Public Benefit Rule

Those who oppose undocumented people from becoming attorneys rely on 8 USC § 1621(a). Section 1621(a) states that an alien who does not fall under certain categories, such as DACAmented individuals, “is not eligible for any State or local public benefit (as defined in subsection (c)).”⁵⁷ Subsection 1621(c) includes “professional license” as part of the definition of “[s]tate or local public benefit.”⁵⁸ Hence, Section 1621 creates another hurdle for DACA beneficiaries to become attorneys. While the actual interpretation of 8 USC § 1621(a) has not been clarified by the Supreme Court as it pertains to undocumented attorneys, at least one state court has held that Section 1621 excludes undocumented individuals from obtaining a law license.⁵⁹ When interpreted so broadly, Section 1621 makes state bar admission difficult, if not impossible, for DACAmented individuals. However, Section 1621 does have a savings clause which states that “[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible ... only through the enactment of a State law... which affirmatively provides for such eligibility.”⁶⁰ DACA does not grant legal status therefore undocumented immigrants are not “lawfully present in the United States.” Accordingly, the only way for DACA recipients to be eligible for a state license is through enactment of a state law that specifically provides as such. Once a state satisfactorily enacts a law in compliance with Section 1621 (d), there is no other “federal statute that would render an undocumented immigrant ineligible to obtain a license to practice law...”⁶¹

B. State Laws: A Significant Shift In Law License Requirements

State laws have both the ability to hinder or further the ability for a DACAmented individual to practice law. As established in 8 USC § 1621(d), an immigrant may receive a professional license if state law permits it. On the other hand, because “every state in the United States recognizes that the power to admit and to discipline attorneys rests in

⁵⁷ 8 U.S.C. § 1621(a) (2006).

⁵⁸ 8 U.S.C. § 1621(c)(1)(A) (2006).

⁵⁹ Fla. Bd. of Bar Exam'rs, 134 So. 3d 432, 434 (Fla. 2014).

⁶⁰ 8 U.S.C. § 1621(d) (2006).

⁶¹ *In Re Garcia*, 315 P.3d 117 (Cal. 2014).

the judiciary[,]”⁶² state courts could also set rules that would specifically prohibit those protected under DACA from becoming attorneys.

Sergio C. Garcia was the first undocumented person to become a licensed attorney in California.⁶³ Mr. Garcia passed the California Bar in 2009, but was denied admission because of his undocumented status.⁶⁴ In 2014, after years of litigation and in response to Mr. Garcia’s case, California became the first state to pass legislation which allowed Mr. Garcia to become a licensed attorney in California.⁶⁵ As the judiciary is the ultimate decision maker as to the admittance of its bar, the Supreme Court of California decided that the new statute satisfied the § 1621(d) exception requirement because it was enacted after August 22, 1996, and it explicitly authorized undocumented people to obtain a law license.⁶⁶

Since Mr. Garcia’s case, a handful of states have now admitted undocumented people into their state bars. For example, in a 2014 opinion, the Florida Supreme Court stated that “unauthorized immigrants are ineligible for admission to The Florida Bar.”⁶⁷ That same year, the Florida legislature enacted a statute that would allow undocumented immigrants to practice law if they met certain requirements.⁶⁸ In 2015, Wyoming also enacted legislation, effectively removing its US Citizenship requirement for their state bar.⁶⁹ Illinois followed suit in 2016 by explicitly allowing undocumented individuals to obtain a law license within its state.⁷⁰

New York took a different approach. *In re Vargas*, the court held that because it is the judiciary’s discretion to admit or deny an individual to its bar, 8 U.S.C. § 1621 impedes the state’s sovereign, as

⁶² *Id.* at 452.

⁶³ Jordan Fabian, *Sergio Garcia: USA’s First Undocumented Lawyer*, THE ATLANTIC (Jan. 6, 2014), <https://www.theatlantic.com/politics/archive/2014/01/sergio-garcia-usas-first-undocumented-lawyer/430509/>.

⁶⁴ *In Re Garcia*, 315 P.3d at 129.

⁶⁵ Cal Bus & Prof Code § 6064(b) (West):

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.

⁶⁶ *In Re Garcia*, 315 P.3d at 129.

⁶⁷ Fla. Bd. of Bar Exam’rs, 134 So.3d 432, 434 (Fla. 2014).

⁶⁸ Fla. Stat. § 454.021(3) (2014).

⁶⁹ W.S. § 33-5-105 (2015).

⁷⁰ 705 Ill. Comp. Stat. Ann. 205/2 (2016).

protected under the 10th amendment, to the extent that it prescribes the method for which an individual state may opt out of the restrictions imposed by § 1621(a).⁷¹

We hold that a decision to opt out from the restrictions imposed by 8 U.S.C. § 1621, to the limited extent that it governs the admission of attorneys as professional licensees, may be lawfully exercised by the judiciary in order to be consistent with the Judiciary Law of the State of New York and the sovereignty guaranteed by the Tenth Amendment.⁷²

In doing so, the Court effectively rejected the argument that the only way to circumvent the § 1621(a) requirements was through state legislature, and instead focused on the power of the judiciary to admit an undocumented individual.⁷³ Similarly, in 2017, Pennsylvania admitted its first undocumented applicant into the bar.⁷⁴ The Pennsylvania Board of Law Examiners adopted Rule 202 allowing those protected under DACA to be admitted to the bar as long as the applicant held a valid and current work authorization.⁷⁵ As a result, Parthiv Patel became the first DACA Dreamer to be licensed in Pennsylvania.⁷⁶ Shortly after, in 2018, his application to the New Jersey bar was also accepted.⁷⁷ Likewise, on January 29, 2020, the Utah Supreme Court adopted Rule 14-721, allowing DACA recipients to be eligible for admission to the Utah Bar.⁷⁸ Texas is also home to at least one undocumented attorney, who in 2019, began his career in the Travis County district attorney's office.⁷⁹

⁷¹ *In re Vargas*, 131 A.D.3d 4, 6 (N.Y. App. Div. 2015).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Pennsylvania Admits DACA Recipient to the Bar*, ACLU PENNSYLVANIA (Dec. 19, 2017), <https://www.aclupa.org/en/press-releases/pennsylvania-admits-daca-recipient-bar>.

⁷⁵ *Rule 202, Admission to the Bar*, Pennsylvania Board of Law Examiners, https://www.pabarexam.org/bar_admission_rules/202.htm (last visited November 7, 2020).

⁷⁶ *Pennsylvania Admits DACA Recipient to the Bar*, ACLU PENNSYLVANIA (Dec. 19, 2017), <https://www.aclupa.org/en/press-releases/pennsylvania-admits-daca-recipient-bar>.

⁷⁷ *DACA Recipient Sworn in as Lawyer By NJ Attorney General*, ACLU NEW JERSEY (Jan. 24, 2018), <https://www.aclu-nj.org/news/2018/01/24/daca-recipient-sworn-lawyer-nj-attorney-general>.

⁷⁸ Utah Ct. R. § 14-721.

⁷⁹ Michael Hall, *He's One of the Best Young Prosecutors in Texas. He also Could Get Kicked Out of the Country*, TEXAS MONTHLY (December 19, 2019), <https://www.texasmonthly.com/news-politics/hes-one-of-the-best-young-prosecutors-in-texas-he-also-could-get-kicked-out-of-the-country/>.

In other states, the status of admittance of undocumented individuals is unclear. An article written by Colton R. Overcash titled “Nevada Votes to Give Professional Licenses to Illegal Aliens” indicated that with the passage of AB275 in May of 2019, Nevada had extended law licenses to undocumented people. However, a closer look at AB275 does not include an amendment to NRS 7.030 which lists the prerequisites to receiving a license to practice law.⁸⁰ In fact, NRS 7.030(2) states that “[a]n application for a license to practice law must include the social security number of the applicant.” Of course, since DACA recipients do have a legal social security number, it does not necessarily mean that they are excluded from obtaining a law license in Nevada, although an undocumented individual without a valid social security number could be. In 2016, similarly to Nevada, Nebraska also enacted legislation extending professional licenses, for the duration of their valid work authorization, to undocumented individuals who held a valid work permit.⁸¹ Different news articles also list additional states that allow DACAmented individuals to obtain law licenses, however, their reliability is questionable without confirmed cases of admitted DACAmented attorneys, published court decisions, or affirmative state legislation.⁸² For example, Oregon, although not listed in any articles, admitted at least two known individuals, Michael Hsu and Thomas Kim, into its state bar in 2012 and 2018, respectively, though both applicants eventually obtained legal status.⁸³ Similarly, Denia Perez, another DREAMer and DACA recipient, became the first undocumented person to be admitted into practice in Connecticut.⁸⁴ As with much information related to the undocumented community, the ability to track the reliability of this information tends to be difficult to ascertain and to track. Those who are undocumented constantly live in the shadows, attempting to stay away from the public eye as to not call

⁸⁰ Nev Rev Stat Ann § 7.030 (West).

⁸¹ Neb Rev Stat Ann § 4-111 (West).

⁸² Raquel Muñiz et al., *DACAmented Law Students and Lawyers in the Trump Era*, CENTER FOR AMERICAN PROGRESS (June 7, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/06/07/451613/dacamented-law-students-lawyers-trump-era/>; George Khoury, Esq., *Undocumented Immigrants Can Practice Law in the U.S.*, FINDLAW (August 18, 2017), https://blogs.findlaw.com/greedy_associates/2017/08/undocumented-immigrants-can-practice-law-in-the-us.html.

⁸³ Bruce Goldman, *How Unauthorized Immigrants Are Fighting to Practice Law*, LAW360 (August 11, 2019), <https://www.law360.com/articles/1186579/how-unauthorized-immigrants-are-fighting-to-practice-law>.

⁸⁴ Shannon Miller, *DACA Recipient Earns Right to Practice Law in Connecticut*, NBC CONNECTICUT (November 2, 2018), <https://www.nbcconnecticut.com/news/local/immigrant-earns-right-to-practice-law-in-connecticut/46723/>.

attention to their status. Thus, if there are any other undocumented attorneys in other states, their names are not readily available.

C. Good Moral Character: A Last-resort Attempt to Prevent Undocumented Individuals From Pursuing Legal Careers

Once a state has acknowledged compliance with Section 1621, an undocumented immigrant should have the ability to obtain a professional license. However, some argue that since undocumented people are in violation of federal immigration law,⁸⁵ an individual cannot properly take an oath to uphold and support the Constitution and laws of the United States.⁸⁶ Still, although an undocumented individual may be subject to civil sanctions under federal law,⁸⁷ it is not a crime for an undocumented individual to remain present in the United States.⁸⁸ Any state efforts to criminalize unlawful presence is preempted by federal law.⁸⁹ Furthermore, as noted by the *In Re Garcia* court, while undocumented people may be subject to removal, those protected under DACA have deferred prosecution in removal proceedings and therefore the concern regarding potential prosecution by immigration authorities is significantly diminished.

“[T]he fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States”⁹⁰

Fortunately, this argument has not been widely accepted by the courts. Most decisions and legislation which have excluded undocumented immigrants from practicing law focus on the exclusion set forth by Section 1621. Like with other bar applicants, DACAmented attorneys have been evaluated based on the same

⁸⁵ 8 U.S.C. §§ 1182, 1227.

⁸⁶ *In re Garcia*, 315 P.3d 117, 130 (Cal. 2014).

⁸⁷ 8 U.S.C. § 1227(a)(1)(B) (2011); 8 U.S.C. § 1225(i) (2019).

⁸⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

⁸⁹ *Arizona v. United States*, 567 U.S. 387, 406-07 (2012).

⁹⁰ *In re Garcia*, 315 P.3d 117, 130 (Cal. 2014).

standards of good moral character. Since most came to the United States at a young age, courts have held that DACA recipients are not in violation of the moral turpitude requirements.⁹¹

IV. THE EFFECTS OF DACA FOR UNDOCUMENTED ATTORNEYS

A major benefit of DACA, which has increased the accessibility of higher education, is the work authorization.⁹² This has meant that DACA recipients have the ability to seek lawful employment, earn money, and pay for school. Under federal law, those who are granted work authorization or work permits “are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes.”⁹³ Still, DACAmented people continue to see their opportunities limited by their inability to obtain certifications and licenses, including a law license. Additionally, many employers continue to include US Citizenship or lawful residence as a condition for employment. For example, while the Washington Department of Justice requires citizenship, even for law clerks, the Oregon Department of Justice does not. The inconsistency between agencies and employers serves as another hurdle that DACAmented law students and lawyers have to overcome.

While those protected under DACA may seek lawful employment, they may still be precluded from obtaining certain jobs, especially those working for the government or requiring international travel. While the legality of US citizenship requirement for employment could be questioned, many jobs do require US citizenship, which of course, DACAmented people do not have. For example, some jobs may require security clearance for which an undocumented individual is not eligible for. DACA individuals are also precluded from joining the armed forces, which means that DACAmented attorneys are also precluded for pursuing legal careers in the Judge Advocate General’s Corps, the legal arm of the armed forces.

⁹¹ *Id.*

⁹² Napolitano Memorandum, *supra* note 2.

⁹³ 8 C.F.R. § 274(a)(12).

V. THE NEED FOR UNIFORMITY THROUGHOUT THE NATION

As more states move towards admitting DACA recipients into their state bars, effectively allowing them to practice law, the more the lack of uniformity continues to affect DACAdmented attorneys. Though it may be expected that a majority of the states will eventually allow DACAdmented individuals to practice law, there will be a significant minority that will continue to hinder them from pursuing their dream. “A substantial body of United States Supreme Court jurisprudence supports the proposition that issuing law licenses is a traditional state function.”⁹⁴ While this proposition has been beneficial up to this point, because it has allowed states, on their own accord, to take the initiative and allow DACA recipients to become attorneys, it could also have negative repercussions in the long run. States will have the ability to deny law licenses to otherwise qualified individuals because of their immigration status. Consequently, a way to remove one of the main hurdles faced by DACAdmented individuals when pursuing a legal career would be for Congress to amend 8 USC § 1621(a) as to remove the professional licenses exclusion for undocumented individuals and clarify that undocumented immigrants are eligible to practice law. Additionally, a broad immigration reform that creates a path to citizenship for DREAMers would allow DACA recipients to eventually become citizens and have the same opportunities to pursue a legal career.

The purpose of Section 1621(a)—the federal law that excludes issuance of professional licenses to undocumented individuals—was to prevent undocumented individuals from receiving public benefits.⁹⁵ Some argue that “the purpose of the Act was to increase accountability for the provision of welfare benefits to America's poor, and scale back governmental assistance to all recipients,”⁹⁶ not necessarily to stop undocumented students from pursuing professional careers.

Another take, along the same lines, is the argument made *In Re Garcia*:

⁹⁴ Lindy Stevens, *supra* note 6, at 585 (citing *N.Y. State Bar Ass'n. v. Fed. Trade Comm'n*, 276 F. Supp. 2d 110, 218 (2003); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)); See also *In re Garcia*, 58 Cal.4th 440; *Hoover v. Ronwin*, 466 U.S. 558, 569 & n.18 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977).

⁹⁵ *In re Garcia*, 58 Cal.4th at 456.

⁹⁶ Lindy Stevens, *supra* note 6, at 595.

The Committee and Garcia argued that the first clause of section 1621(c)(1)(A)—referring to any professional license “provided by an agency of a State or local government”—applies only to a professional license that is issued by a state or local *administrative* agency and does not apply to a law license that is issued by this court. The Committee and Garcia asserted that the second clause of section 1621(c)(1)(A)—referring to public benefits provided by “appropriated funds of a State ... government”—is inapplicable to this court's issuance of a law license either because the amount of funds expended by this court in the bar admission process should be considered “de minimis” or because the clause should be interpreted to refer only to public benefits that involve the payment of money or funds to undocumented immigrants and not to the issuance of a license to practice law.⁹⁷

By allowing undocumented immigrants to practice law, states are taking advantage of the skills and talent of these individuals. By becoming attorneys, DACAmented individuals can attain financial freedom, which may not otherwise be available.

Nonetheless, unless the United States Supreme Court is willing to answer these questions and interpret 8 U.S.C. §1621 as excluding a bar for the issuance of law licenses to DACAmented individuals, it may be up Congress to clarify its meaning. Alternatively, the executive branch, through its agencies such as the Department of Homeland Security or United States Citizenship and Immigration Services, could clarify the meaning of public benefit and thus exclude a law license under professional license in Section 1621.⁹⁸ Even if the exclusion under Section 1621 is removed, because of the long-standing power to control its bar, state courts would continue to explicitly exclude DACAmented and undocumented individuals. Following the argument made in the New York case, a new federal law expressly granting undocumented people the right or ability to practice law could potentially violate the 10th Amendment. Hence, a broader solution may still be needed.

A more effective solution could be broad immigration reform. During his presidential campaign, Joe Biden ran on the platform that

⁹⁷ *In re Garcia*, 58 Cal.4th at 456.

⁹⁸ 8 U.S.C. § 1621.

on day one of his presidency, he would push for immigration reform, including a path to citizenship for DREAMers, however that is yet to happen.⁹⁹ The United States is the only home DREAMers know. Their dream to become attorneys should not be hindered by their immigration status. Understandably, an immigration reform would be highly contentious. The last major reform was the Immigration Reform and Control Act of 1986. Over 30 years have passed and many say it is time to fix our immigration system. As with any legislation, it will be hard to determine who should be included or excluded from a comprehensive immigration reform, as it is highly unlikely that such a benefit would be boundless. This paper is limited in advocating for DACAmented immigrants to receive a path to citizenship which would enable them to uniformly obtain law licenses throughout the nation. However, this is not the only group of people who know and love this country as their home. A comprehensive immigration reform that creates a path to citizenship for the millions of undocumented immigrants would be the most humane and beneficial path Congress should take.

VI. CONCLUSION

DACA recipients came to this country as children. The United States is home for them. Here, they have developed their goals and dreams, many of whom wish to pursue a legal career as attorneys. The plenary power of the executive branch has both benefited and impeded undocumented individuals. The differing decisions on this topic by courts and administrations continue to create a turbulent situation for those protected under DACA. Federal statutory law, in an attempt to hinder an undocumented immigrant's ability to obtain public benefits, has instead diminished opportunities for success. This, along with state laws that require citizenship or lawful status, continue to prevent DACA individuals from becoming licensed attorneys. Fortunately, many states are moving away from such a restrictive system and have since opened their courtrooms to DACA recipients and some to undocumented immigrants in general. This shift is one in the right direction, but the lack of uniformity continues to add to the obstacles faced by DACAmented attorneys. We need significant change.

⁹⁹ Michael D. Shear, *Biden's Immigration Plan Would Offer Path to Citizenship for Millions*, NEW YORK TIMES, (Feb. 18, 2021), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news>.

Regardless of which path we take, public policy dictates that DACAmented individuals be allowed to become attorneys in this nation. Removing the federal statute that prevents them from obtaining law licenses or clarifying its meaning, as to indicate that law licenses are not a public benefit, would remove a hurdle for DACAmented individuals. And simply put, an immigration reform that creates a path to citizenship for DREAMers would not only remove the obstacle of the law license, but it would open the doors for many more opportunities. DACAmented attorneys bring a unique perspective to our legal system. Their experiences have made them resilient. Their abilities and skills will be an asset in our courtrooms.