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# A Pathway to the Legal Profession

Chelsea Sylvia

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# A Pathway to the Legal Profession

Chelsea Silvia<sup>1</sup>

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## PART I: INTRODUCTION

The Florida Supreme Court is currently faced with a highly contentious and unprecedented issue: Whether an undocumented immigrant is eligible for admission to the Florida Bar. Several factors will likely influence the Court's decision, including policies driving President Obama's "Deferred Action" program,<sup>2</sup> existing federal legislation on immigration,<sup>3</sup> and procedural constraints imposed on the Florida Board of Bar Examiners ("Board").<sup>4</sup> The Florida Supreme Court is the first court in the United States to be faced with the issue of whether an undocumented immigrant is eligible for admission to a state Bar.<sup>5</sup> Since the Board brought this

1. Chelsea Silvia is a third-year student at the University of Miami School of Law and serves as an Articles and Comments Editor for the *University of Miami Inter-American Law Review*. She would like to thank her family and friends for their constant support, and she gives special thanks to Professor Cheryl Zuckerman, who provided extensive and valuable guidance throughout this process.

2. *Deferred Action for Childhood Arrivals*, DEPT. OF HOMELAND SECURITY, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Feb. 7, 2014) [hereinafter Department of Homeland Security].

3. See 8 U.S.C. §§ 1324a, 1621 (2012).

4. See Fla. Bar Admiss. R. 1-13; see also § 120.52, Fla. Stat. (2013).

5. Lorelei Laird, *The Dream Bar: Children Living in the United States Illegally Grow Up—and Some of Them Want to Be Attorneys*, A.B.A. J., Jan. 2013, at 55,

issue before the Florida Supreme Court, California and New York have been faced with an identical question.<sup>6</sup>

Jose Manuel Godinez-Samperio arrived in the United States when he was 9 years old.<sup>7</sup> When he arrived in this country, Mr. Godinez-Samperio only spoke Spanish.<sup>8</sup> However, he quickly and successfully immersed himself into American society, not only learning English, but also excelling academically.<sup>9</sup> While in law school, Mr. Godinez-Samperio received several book awards for receiving the highest grades in his classes, and was awarded a privately funded scholarship to pay for his education.<sup>10</sup> He attended high school in Florida, where he graduated valedictorian of his class and earned a private scholarship to New College.<sup>11</sup> Thereafter, Mr. Godinez-Samperio attended law school at Florida State University and graduated with honors.<sup>12</sup> Mr. Godinez-Samperio passed the exam portion of the Florida Bar Exam, but has not yet been admitted to the Florida Bar because the Board has determined that he is not eligible for admission because he is not a legal citizen of the United States.<sup>13</sup> Based on its review of Mr. Godinez-Samperio's personal credentials, the Board has confirmed Mr. Godinez-Samperio would have passed the character and fitness portion of the Bar Exam if he was authorized to reside in the United States.<sup>14</sup> He is now contesting the Board's determination that he is ineligible for admission to the Florida Bar, and is requesting that the Court recognize his hard work and accomplishments by directing the Board to admit him to the Florida Bar.<sup>15</sup>

Part II of this note contextualizes Mr. Godinez-Samperio's

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available at [http://www.abajournal.com/magazine/article/the\\_dream\\_bar\\_some\\_children\\_living\\_in\\_the\\_united\\_states\\_illegally/](http://www.abajournal.com/magazine/article/the_dream_bar_some_children_living_in_the_united_states_illegally/).

6. See *In re Garcia*, 315 P.3d 117 (Cal. 2014); see also Kirk Semple, *Bar Exam Passed, Immigrant Still Can't Practice Law*, N.Y. TIMES, Dec. 3, 2013, at A30, available at [http://www.nytimes.com/2013/12/04/nyregion/for-immigrant-passing-the-bar-exam-wasnt-enough.html?\\_r=0](http://www.nytimes.com/2013/12/04/nyregion/for-immigrant-passing-the-bar-exam-wasnt-enough.html?_r=0).

7. Laird, *supra* note 5, at 51.

8. See Applicant's Resp. to Pet. of Board at 2, Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar, No. 11-1631 (Fla. filed Dec. 13, 2011) [hereinafter *Undocumented Immigrant Eligibility Case*], available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_03-07-2012\\_Respondent\\_Brief.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-07-2012_Respondent_Brief.pdf).

9. *Id.*

10. *Id.*

11. Laird, *supra* note 5, at 51.

12. See Applicant's Resp., *supra* note 8, at 2.

13. *Id.* at 3-4.

14. See *id.* at 4.

15. *Id.* at 19.

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plight by providing a summary of the case's history. Part III of this note discusses federal legislation that could potentially inform the Florida Supreme Court's opinion as to whether Mr. Godinez-Samperio should be admitted to the Florida Bar. Most importantly, Part III analyzes the Personal Responsibility and Work Opportunity Act, ("PRWORA"),<sup>16</sup> an instrument of federal legislation prohibiting states from extending a state or local benefit to an ineligible undocumented immigrant.<sup>17</sup> Part IV analyzes the argument proffered by Mr. Godinez-Samperio, who argues that the Board does not have the authority to enter a policy, which has the effect of a rule, without going through the formal rulemaking process.<sup>18</sup> Part IV discusses and evaluates this argument under Florida's Administrative Procedure Act and current administrative law doctrine.<sup>19</sup> Further, Part IV also assesses the legal validity of the Mr. Godinez-Samperio's argument, because the outcome of this issue will determine what standard of review the Court will apply to the Board's policy determination regarding Mr. Godinez-Samperio's admission to the Florida Bar. Once the standard of review is determined, it will be easier to make an accurate prediction as to whether the Court will direct the Board to admit Mr. Godinez-Samperio and other similarly-situated applicants to the Florida Bar, or affirm the Board's determination that undocumented immigrants are ineligible for admission to the Florida Bar. In Part V, this note discusses the constitutional implications of the Florida Supreme Court's decision as well as the potential outcome of this case if the Court is influenced by policy considerations, rather than by federal or state legislation. Finally, Part VI offers some concluding thoughts and predictions about the future of Mr. Godinez-Samperio's case.

## PART II: BACKGROUND

The Board is an administrative agency of the Florida Supreme Court, which was created by the Court to enforce rules related to bar admission.<sup>20</sup> The Board has the responsibility to "ensure that each applicant has met the requirements of the rules with regard to character and fitness, education and technical com-

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16. 8 U.S.C. § 1621(d) (2012).

17. *Id.* at § 1621(c) (defining a state or local benefit as a grant, contract, loan, or professional license).

18. Applicant's Resp., *supra* note 8, at 5.

19. *See* Fla. Stat. § 120.52 (2013).

20. Fla. Bar Admiss. R. 1-13.

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petence prior to recommending an applicant for admission.”<sup>21</sup> The Florida Supreme Court is directly responsible for determining the requirements of eligibility for admission to the Florida Bar because the admission of attorneys to the practice of law is a judicial function.<sup>22</sup> The Court has delegated regulatory authority to the Board, but has retained authority to approve changes to the rules.<sup>23</sup> Thus, all rules related to the admission of attorneys to the Florida Bar must be reviewed, approved, and promulgated by the Florida Supreme Court.<sup>24</sup> To modify a rule, a petition must be filed to the Court for its approval.<sup>25</sup> Any applicant who is not satisfied with an administrative decision of the Board may file a petition seeking a waiver of the rule if the decision is not related to character and fitness matters.<sup>26</sup> The Florida Supreme Court can render advisory opinions addressing the validity of a petition or general law, and has inherent authority to answer requests for advisory opinions by agencies acting on its behalf.<sup>27</sup>

In 1986, the Florida Supreme Court adopted procedures for issuing advisory opinions on the unlicensed practice of law.<sup>28</sup> Although advisory opinions were originally intended to inform legislators and lower courts on the constitutionality of a proposed law or statute, the advisory opinion procedure had “developed far differently from its original intent” because Florida courts have now begun to “restate and redefine the prohibition on unauthorized practice of law, thereby raising new questions for both lawyers and nonlawyers.”<sup>29</sup>

In compliance with the waiver rule,<sup>30</sup> Mr. Godinez-Samperio filed a petition with the Board on March 4, 2011, to waive the rule that required him to provide proof of his immigration status.<sup>31</sup> On April 28, 2011, the Board advised Mr. Godinez-Samperio that his

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21. *Id.* at R. 1–14.2.

22. *See id.* at R. 1–11, 1–12.

23. *Id.* at R. 1–12, 1–13.

24. *Id.* at R. 1–12.

25. *See id.*

26. Fla. Bar Admiss. R. 2–30.

27. Fla. Const. art. V, § 3(b)(1); *see also* In re Advisory Opinion Concerning Applicability of Chapter 119, Florida Statutes, 398 So. 2d 446, 447 (Fla. 1981).

28. The Florida Bar Re Rules Regulating the Florida Bar, 494 So. 2d 977, 1115–16 (Fla. 1986).

29. Robert M. Sondak, *Access to Courts and the Unauthorized Practice of Law*, FLA. B.J., Feb. 1999, at 14, 15 (examining the “opinions and other activities which have grown out of the court’s 10 years of advisory opinions.”).

30. *See* Fla. Bar Admiss. R. 2–30.

31. Resp. to Applicant’s Mot. to Conclude Invest. at 2, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), *available at* <http://www>.

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petition for waiver of the rule had been granted.<sup>32</sup> Relying on the waiver, Mr. Godinez-Samperio studied for three months for the July 2011 examination, and subsequently took and passed the exam.<sup>33</sup> However, on November 23, 2011, Mr. Godinez-Samperio was notified that the Board was postponing its consideration of his qualifications for admission to the Bar so that it could request an advisory opinion from the Florida Supreme Court regarding eligibility of bar applicants based on their immigration status.<sup>34</sup> On December 13, 2011, the Board filed a petition for an advisory opinion with the Florida Supreme Court to inquire as to whether Mr. Godinez-Samperio and future similarly-situated applicants are eligible for admission to the Florida Bar.<sup>35</sup>

Several amicus curiae briefs have been filed on behalf of Mr. Godinez-Samperio in support of his admission to the Florida Bar.<sup>36</sup> Notably, the DREAM Bar Association, which Mr. Godinez-Samperio co-founded,<sup>37</sup> is “an unincorporated organization that welcomes undocumented and allied legal professionals, law students, and aspiring law students.”<sup>38</sup> The DREAM Bar Association filed a particularly compelling amicus brief on behalf of Mr. Godinez-Samperio.<sup>39</sup> The DREAM Bar Association’s purpose is to provide a forum for undocumented professionals and students to find opportunities to develop skills necessary for the legal profession through volunteer and pro bono activities.<sup>40</sup> On behalf of Mr. Godinez-Samperio, the DREAM Bar Association’s brief asks the

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floridasupremecourt.org/pub\_info/summaries/briefs/11/11-2568/Filed\_08-06-2012\_Response\_Motion\_Conclude\_Investigation.pdf.

32. *See id.*

33. Br. of Dream Bar Ass’n in Support of Applicant’s Resp. to Pet. at 13, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_03-22-2012\\_Amicus\\_Dream\\_Bar.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-22-2012_Amicus_Dream_Bar.pdf).

34. Reply to Applicant’s Resp. to Board’s Pet. at 5, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_03-29-2012\\_Reply.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-29-2012_Reply.pdf).

35. Pet. for Advisory Op. at 1, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_12-13-2011\\_Petition.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_12-13-2011_Petition.pdf).

36. Laird, *supra* note 5, at 52.

37. *See id.*

38. Dream Bar Ass’n Mot. to File Br. at 2, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_03-19-2012\\_Dream\\_Bar\\_Amicus\\_Motion.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-19-2012_Dream_Bar_Amicus_Motion.pdf).

39. *See* Br. of Dream Bar Ass’n, *supra* note 33, at 1.

40. *Id.*

Court to “(1) issue an advisory opinion directing or otherwise direct the Board of Bar Examiners to conclude its assessment and submit its recommendation to the Court concerning [Mr. Godinez-Samperio], and (2) affirm the ability of [Mr. Godinez-Samperio] and all future similarly-situated applicants to be admitted to The Florida Bar.”<sup>41</sup>

Proponents of Mr. Godinez-Samperio’s admission to the Florida Bar, including the DREAM Bar Association, Congressional member Kathy Castor, and former Florida Bar Association Presidents, contend that the Florida Supreme Court should decide this question narrowly because the Board will only be extending a professional license to a single individual to practice law in the state of Florida.<sup>42</sup> Furthermore, the proponents and Mr. Godinez-Samperio argue that the policy advocated by the Board does not have a valid purpose and is procedurally invalid because it was not set forth through the formal rulemaking process.<sup>43</sup> Whether this argument is valid depends on current administrative law doctrine and the Administrative Procedure Act because: 1) the Board is an agency that is governed by the Administrative Procedure Act,<sup>44</sup> and 2) this is a rule that will significantly affect the substantive rights of future undocumented immigrants similarly situated to Mr. Godinez-Samperio.<sup>45</sup> Most importantly, the Court’s assessment of Mr. Godinez-Samperio’s argument—that the Board’s determination that the Applicant is ineligible for admission to the Bar is a procedurally invalid determination—will dictate the standard of review that the Court must apply to the Board’s decision as to whether undocumented immigrants are eligible for admission to the Florida Bar.<sup>46</sup>

Because of the Florida Legislature’s silence regarding whether it is permissible to extend a professional license to prac-

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41. *Id.* at 18.

42. *See* Applicant’s Resp., *supra* note 8, at 10 (asserting that the Board should only be concerned with the narrow issue before it, which was whether Mr. Godinez-Samperio is eligible for admission to the Florida Bar, not where he can practice law if he is deemed eligible).

43. *Id.* at 5.

44. Fla. Bar Admiss. R. 1-13.

45. David Dickson, et al., *Administrative Agencies and Judicial Control: Towards a Florida Abstention Doctrine*, 17 STETSON L. REV. 1, 8 (1987) (discussing amendment to Florida’s Administrative Procedure Act that gave a person with a substantial interest in an agency rule the right to petition the agency to “adopt, amend, or repeal the rule.”).

46. *Id.* at 36 (“The Florida Constitution provides that the district courts shall have the power of direct review of administrative action, as prescribed by general law.” (quoting Fla. Const. art. I, § 4(b)(2))).

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tice law to an undocumented immigrant and the vague language of applicable federal legislation,<sup>47</sup> the Board has requested guidance and direction from the Court.<sup>48</sup>

Briefs filed by both the Board and Mr. Godinez-Samperio seem to brush that significant factor aside, perhaps because the initial determination of whether undocumented immigrants are eligible for admission is complicated enough on its own. Notably, if Mr. Godinez-Samperio is eligible to be a member of the Florida Bar, there is federal legislation that explicitly prevents him from gaining employment in the United States.<sup>49</sup> Mr. Godinez-Samperio argues that the directive set forth by Department of Homeland Security Secretary Napolitano creates a “pathway to employment.”<sup>50</sup> However, he fails to discuss the Immigration Reform and Control Act,<sup>51</sup> which prohibits employers in the United States from hiring undocumented immigrants.<sup>52</sup>

This matter arose before the Court because the Board was faced with a highly contentious and public decision to which no clear legislation or case law applies. Even though the Board is merely requesting an advisory opinion, the Board has already decided without the Court’s direction that undocumented immigrants are not eligible for admission to the Florida Bar.<sup>53</sup> The Board argues that undocumented immigrants are ineligible for admission to the Bar, and that it completely complied with all procedural requirements when it requested Mr. Godinez-Samperio verify his immigration status as part of its admissions process.<sup>54</sup>

When applying to law school and to the Florida Bar, Mr. Godinez-Samperio always revealed his status as an undocumented immigrant residing in the United States.<sup>55</sup> Prior to this question being certified to the Court, Mr. Godinez-Samperio responded to all of the Board’s inquiries and had not been notified of any issues with the character and fitness portion of his applica-

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47. See 8 U.S.C. § 1621(d) (2012).

48. Pet. for Advisory Op., *supra* note 35.

49. See 8 U.S.C. § 1324a (2012).

50. Applicant’s Mot. for Conclusion of Invest. at 12, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_07-05-2012\\_Applicant\\_Motion.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_07-05-2012_Applicant_Motion.pdf).

51. 8 U.S.C. § 1324a (2012).

52. *Id.*

53. Pet. for Advisory Op., *supra* note 35, at 2.

54. See Reply to Applicant’s Resp., *supra* note 34, at 6.

55. Applicant’s Resp., *supra* note 8, at 3.



tion.<sup>56</sup> To contest existing rules requiring proof of citizenship and immigration status, Mr. Godinez-Samperio filed his “Petition for Waiver of Rule Requiring Immigration Status,” stating:

In the Rules of the Supreme Court Relating to Admissions to the Bar, no rule exists requiring proof of citizenship or immigration status. Therefore, making an exception from this policy would not be inconsistent with Court rules. However, according [to] the Florida Board of Bar Examiners web site, a bar application is incomplete without proof of citizenship or immigration status and it is a waiver from that requirement that this petition seeks.<sup>57</sup>

The Board approved the petition for a waiver of this rule, so the Applicant studied for the Florida Bar Exam in July 2011.<sup>58</sup> Subsequently, the Board conducted a background investigation of Mr. Godinez-Samperio and finished its investigation in November 2011.<sup>59</sup> After receiving approval from the Board of his petition to waive the rule, Mr. Godinez-Samperio took and passed the Florida Bar Exam, but was not admitted to the Florida Bar because the Board still contends that it must await the Court’s guidance on this issue.<sup>60</sup>

The Board filed a petition to the Florida Supreme Court to request guidance on December 13, 2011, as to whether Mr. Godinez-Samperio should be eligible for admission despite his undocumented status in the United States.<sup>61</sup> Among several other constitutional and procedural challenges, Mr. Godinez-Samperio fervently challenged the procedure surrounding the Board’s petition to the Florida Supreme Court.<sup>62</sup> He challenged the procedure because he was not given proper notice of the Board’s policy, which stated that proof of immigration status was a requirement for admission to the Florida Bar, nor was he given the opportunity to brief the matter or present evidence of how this question should be decided.<sup>63</sup> Ultimately, Mr. Godinez-Samperio requests that the Court decline to exercise jurisdiction over this matter, asserting that, “an advisory opinion rather than a rule-making proceeding

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56. *Id.* at 4.

57. *Id.*

58. *Id.*

59. Reply to Applicant’s Resp., *supra* note 34.

60. *Id.* at 5–6.

61. *Id.* at 6.

62. Applicant’s Resp., *supra* note 8, at 5.

63. *Id.* at 6.

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raises substantial constitutional questions.”<sup>64</sup> Thus, Mr. Godinez-Samperio requests that the Court direct the Board that he should immediately be admitted to the Florida Bar.<sup>65</sup>

PART III: FEDERAL LEGISLATION THAT MAY INFORM THE  
OPINION OF THE FLORIDA SUPREME COURT

A. *Executive Order Implementing DREAM Act of  
2012*

The policies driving the President’s Executive Order that implemented many aspects of the DREAM Act may have an effect on how strictly the Court should apply the text of the PRWORA to its determination of whether undocumented immigrants are eligible to be admitted by the Florida Bar.<sup>66</sup> The DREAM Act was first introduced by Senator Orrin Hatch and Representative Chris Cannon in 2001 as a way to “allow children who have been brought to the United States through no violation of their own the opportunity to fulfill their dreams, to secure a college degree and legal status.”<sup>67</sup> However, the DREAM Act never gained enough support from Congress to become law.<sup>68</sup> Most recently, 55 senators voted in favor of the bill, but it was ultimately blocked from passing as a result of a Republican filibuster on the Senate floor.<sup>69</sup> In 2012, when President Obama determined that he would not be able to muster enough support for the passage of the DREAM Act, he decided that an executive order was necessary to implement the policies underlying the DREAM Act.<sup>70</sup> Despite debates over the process in which it was adopted and the policies that it implements,<sup>71</sup> President Obama issued an executive order to be imple-

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64. *Id.*

65. *Id.* at 19.

66. See Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 HARV. J. ON LEGIS. 623, 624 (2011) (explaining that proponents of the Dream Act believe that this legislation would benefit the United States because well-educated young immigrants would be able to enlist in the Armed Forces and boost the economy through increased productivity).

67. *Id.* at 631–32.

68. See *id.* at 636–37.

69. Marshall Fitz et al., *The Early Success of the Deferred Action for Childhood Arrivals*, CTR. FOR AM. PROGRESS (Oct. 26, 2010), <http://www.americanprogress.org/issues/immigration/news/2012/10/26/43051/the-early-success-of-the-deferred-action-for-childhood-arrivals-policy>.

70. Jim Picht, *Obama on Guns: ‘So let it be Written, so let it be Done’*, WASH. TIMES CMTY. (Jan. 9, 2013), <http://communities.washingtontimes.com/neighborhood/stimulus/2013/jan/9/president-obama-america-so-let-it-be-written-so-le>.

71. See David Schwartz, *Jan Brewer Signs Executive Order Denying State Benefits*

mented in August of 2012, titled “Deferred Action for Childhood Arrivals.”<sup>72</sup> The Order states that the Department of Homeland Security will use its discretion to ensure resources are not wasted “on low priority cases, such as individuals who came to the United States as children and meet other key guidelines. Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals for a period of two years, subject to renewal, and may be eligible for employment authorization.”<sup>73</sup>

Following the President’s Order, Department of Homeland Security Janet Napolitano issued a directive that allowed eligible young people to request discretionary relief from removal.<sup>74</sup> This policy, which Mr. Godinez-Samperio attached as an exhibit to his Response to the Board’s Petition, is titled “Deferred Action for Childhood Arrival.”<sup>75</sup> In Mr. Godinez-Samperio’s Brief, Secretary Napolitano’s directive served as the basis for his argument that the Florida Supreme Court should decide the question before it, based on policies that expand, rather than restrict the rights of undocumented immigrants in the United States.<sup>76</sup> It is important to note that “deferred action” is merely a policy determination to “defer removal action of an individual as an act of prosecutorial discretion.”<sup>77</sup> However, “[d]eferred action does not provide an indi-

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to *Children of Undocumented Immigrants*, HUFFINGTON POST, Aug. 16, 2012, [http://www.huffingtonpost.com/2012/08/15/jan-brewer-executive-order\\_n\\_1785482.html](http://www.huffingtonpost.com/2012/08/15/jan-brewer-executive-order_n_1785482.html).

72. See Fitz, *supra* note 69 (explaining that the President’s deferred action program permits up to 1.76 million individuals within the United States to apply for this temporary relief from the fear of deportation).

73. Department of Homeland Security, *supra* note 2 (explaining that in order to be eligible for deferred action, the individual must: 1) have been under the age of 31 as of June 15, 2012; 2) have come to the United States before reaching his 16th birthday; 3) have continuously resided in the United States since June 15, 2007, up to the present time; 4) have been physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with UCIS; 5) have entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012; 6) currently be in school, have graduated or obtained a certificate of completion from high school, a GED, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; and 7) have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.).

74. See Memorandum from Janet Napolitano, Sec. of Homeland Security, to David Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Department of Homeland Security (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

75. See Applicant’s Mot. for Conclusion of Invest., *supra* note 50, at 18–20.

76. See *id.* at 12–13.

77. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 18, 2013), available at <http://www.dhs.gov/xlibrary/assets/consideration-of-deferred-action-for-childhood-arrivals-process.pdf>.

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vidual with lawful status.”<sup>78</sup>

Although the policies driving the order and the changes implemented by the directive will certainly affect Mr. Godinez-Samperio’s status in the United States, it does not necessarily dictate to the Florida Supreme Court how it should decide the Board’s certified question. Mr. Godinez-Samperio applied for the President Obama’s program because he meets all of the criteria outlined in the directive.<sup>79</sup> On January 16, 2013, Mr. Godinez-Samperio notified the Florida Supreme Court that his federal application was approved, which allows him to remain and the United States and obtain a work permit.<sup>80</sup> Along with his federal application, Mr. Godinez-Samperio was given a Social Security card and a driver’s license.<sup>81</sup> Thus, Mr. Godinez-Samperio argues that he is “prima facie” eligible for admission to the Florida Bar as a result of the implementation of the President’s Executive Order.<sup>82</sup> However, the directive does not necessarily supersede the explicit language of the PROWRA, which precludes a state from issuing professional licenses to undocumented immigrants, because it will not change his status to legal; the directive merely gives Mr. Godinez-Samperio and others similarly situated temporary relief from the fear of being deported.

For supporters of the DREAM Act, the Order is a step in the right direction because it would allow undocumented immigrants to avoid deportation, gain employment, and eventually be eligible for citizenship. However, because the directive does not grant these individuals legal status, they are still forced to go through an extensive process just to be guaranteed the right to temporarily remain in the United States. Thus, supporters of these new policies will likely still advocate for the passage of a comprehensive DREAM Act.<sup>83</sup>

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uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD.

78. *Id.*

79. See Department of Homeland Security, *supra* note 2.

80. See Applicant’s Notice of Filing Additional Info. and Mot. for Admission at 2, Undocumented Immigrant Eligibility Case, No. 11-1631 (Fla. filed Dec. 13, 2011), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/11/11-2568/Filed\\_01-16-2013\\_Notice\\_of\\_Filing.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_01-16-2013_Notice_of_Filing.pdf).

81. *Id.*

82. Applicant’s Mot. for Conclusion of Invest., *supra* note 50, at 13.

83. See Elise Foley, *DREAM Act Students Push For Deferred Deportation Action*, HUFFINGTON POST, Aug. 3, 2011, [http://www.huffingtonpost.com/2011/08/03/dream-act-students-defered-deportation\\_n\\_917386.html](http://www.huffingtonpost.com/2011/08/03/dream-act-students-defered-deportation_n_917386.html) (“[e]ven if undocumented young people are eventually granted deferred action and allowed to stay in the United

Senator Marco Rubio has set forth his plan to reform immigration laws in a way that would postpone or eliminate the risk of deportation of certain undocumented immigrants in Florida.<sup>84</sup> Mr. Rubio takes a middle ground between the liberal and the conservative views of how to implement immigration reforms: he would “ease the way for skilled engineers and seasonal farm workers while strengthening border enforcement and immigration laws.”<sup>85</sup> His plan places “an emphasis on merit and skills.”<sup>86</sup> In an interview with the Wall Street Journal, Mr. Rubio expressed that he does not “think there’s a lot of concern in this country that we’ll somehow get overrun by PhDs and entrepreneurs.”<sup>87</sup> Thus, it is clear that Mr. Godinez-Samperio would be eligible under Mr. Rubio’s plan to “earn” a work permit and eventually, citizenship.<sup>88</sup>

Although this is merely a proposal by Senator Rubio, these policies may also inform the opinion of the Florida Supreme Court when it issues a decision as to whether undocumented immigrants are eligible for the Florida Bar. This proposed legislation focuses on whether the undocumented immigrant is deserving of citizenship and has an ability to use their skills legally in the United States.<sup>89</sup> Here, Mr. Godinez-Samperio has clearly demonstrated that he is the type of individual that has earned the right to be considered for immunity from deportation, eligibility for citizenship, and the ability to practice law in the United States.

### B. *The PRWORA*

The recent policies set forth in President Obama’s Deferred Action Program are in stark contrast to the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”).<sup>90</sup> The PRWORA was enacted in 1996 as a welfare reform act that barred

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States, the process costs thousands of dollars in legal fees and years of their lives—partially because Congress has failed to enact the DREAM Act or comprehensive immigration reform.”); see also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 474 (2012).

84. Jennifer Rubin, *Rubio Takes a Gamble*, WASH. POST (Jan. 13, 2013, 12:30 PM), <http://www.washingtonpost.com/blogs/right-turn/wp/2013/01/13/rubio-takes-a-gamble>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.*

89. *See id.*

90. See ROBIN COHEN, PRWORA’S IMMIGRANT PROVISIONS, OLR RESEARCH REPORT (Dec. 13, 2007), <http://www.cga.ct.gov/2007/rpt/2007-R-0705.htm>.

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immigrants who entered the country after August 22, 1996, from receiving means-tested, federally funded assistance for their first five years in the United States.<sup>91</sup> The PRWORA also redefined the term “qualified alien,” excluding individuals who had remained in the United States and had previously been considered to be “permanently residing under color of law (PRUCOL).”<sup>92</sup> In addition, undocumented immigrants were completely barred from receiving benefits under this legislation.<sup>93</sup> The PRWORA defines a benefit as “any grant, contract, loan, professional license, or commercial license provided by an agency of a State of local government or by appropriated funds of a State or local government . . . .”<sup>94</sup>

While the policies driving the President’s Order that implements several aspect of the DREAM Act promote the use of prosecutorial discretion when it comes to immigrants like Mr. Godinez-Samperio—who have no criminal record, are highly educated, and were brought as children into the United States by their parents—the PRWORA takes the opposite approach.<sup>95</sup> However, both the President’s Order and the PRWORA apply to the Court’s opinion regarding Mr. Godinez-Samperio. The PRWORA applies to Mr. Godinez-Samperio because he is seeking a professional license to practice law that is provided by an agency—the Board—and he was brought into and remained in the United States without authorization.<sup>96</sup>

However, when this same argument was raised against a similarly-situated applicant in California seeking admission to the California Bar, the applicant argued that the California Supreme Court actually issues the licenses to prospective attorneys and the court cannot be considered an agency.<sup>97</sup> There, the attorney gen-

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91. *Id.*

92. *Id.*

93. 8 U.S.C. §1621(a) (2012) (“Notwithstanding any other provision of law and except as provided in subsection (b) and (d) of this section, an alien who is not—(1) a qualified alien . . . , (2) a nonimmigrant under the Immigration and Nationality Act . . . , or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act . . . for less than one year, is not eligible for any State or local public benefit.”).

94. 8 U.S.C § 1621(c)(1)(A) (2012).

95. *See id.* at § 1621(a)–(c).

96. Laird, *supra* note 5, at 55 (quoting 8 U.S.C. § 1621(a)) (explaining that although Florida was the first state to face the issue of whether undocumented immigrants can be admitted to state bars to practice law, “it also left out an issue that may be dispositive in California and other states: whether bar admission is a ‘public benefit’ under the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, which makes ‘unqualified aliens’ ineligible for ‘any state or local public benefit.’”).

97. *See id.* at 56.

eral argued that because the California Supreme Court is the entity that issues licenses to practice law, the PRWORA applies to the applicant and precludes him from being admitted to the California Bar.<sup>98</sup> In Florida, unlike in California, the Board clearly constitutes an agency within the meaning of the PRWORA. Therefore, the Florida Supreme Court should apply the PRWORA to its determination of whether Mr. Godinez-Samperio is eligible for admission to the Florida Bar.

Although the Board is generally prohibited from granting Mr. Godinez-Samperio a license to practice law pursuant to the PRWORA, there is an exception that would allow the Florida Legislature to enact a law that would overturn the general prohibition.<sup>99</sup> Specifically, the PRWORA 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 be ineligible under subsection (a) only through enactment of a State law after the date of the enactment of this Act which, affirmatively provides for such eligibility.”<sup>100</sup> Unlike in California, where there was a state law that provides bar applicants with the opportunity to submit tax identification numbers if they are not eligible for Social Security numbers, the Florida Legislature has not acted upon this exception.<sup>101</sup> Despite the fact that neither party briefed the issue of whether the PRWORA applies to the issue of whether undocumented immigrants are eligible for admission to the Florida Bar, Laird reports that during oral arguments, Justice Charles Canady:

appeared very interested in whether Section 1621 applied, questioning at length the applicant’s attorney Talbot “Sandy” D’Alemberte, a former ABA president. Canady noted that the Florida Supreme Court uses appropriated funds—and because the Florida Board of Bar Examiners is an agency of the court, that may bring it under the auspices of Section 1621.<sup>102</sup>

Thus, it is likely that the Court will consider the PRWORA’s ban on extending professional licenses to undocumented immigrants when determining whether Mr. Godinez-Samperio is eligible for

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98. *See id.* at 55–56.

99. *See* 8 U.S.C. § 1621(d) (2012).

100. *Id.*

101. *See* Laird, *supra* note 5, at 57.

102. *Id.*

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admission to the Florida Bar in the absence of any clear state legislative direction.

Nevertheless, there are two opinions issued by Florida's Attorney General that illustrate how the state has dealt with the PRWORA when considering the eligibility of undocumented immigrants for public benefits.<sup>103</sup> In 1999, the Attorney General issued an opinion responding to an inquiry regarding whether the Department of Health had the authority to process license applications when the applicant does not have a social security number.<sup>104</sup> There, the Attorney General cited another opinion, where the amendment was interpreted to allow the clerk to issue marriage licenses to otherwise qualified aliens who do not possess a social security number.<sup>105</sup> Following that decision, the Attorney General expressed her view that "[n]othing in the legislative history surrounding the amendment indicates an intent to limit those persons who may obtain a professional license."<sup>106</sup> Although the Florida opinions referred to above involve different types of licenses than the one being sought by Mr. Godinez-Samperio, these decisions demonstrate how loosely other Florida agencies interpret the ban on issuing professional licenses under the PRWORA. Therefore, the Court may look to other agencies' loose interpretations and determine that the PRWORA does not prohibit the Board from issuing a professional license to Mr. Godinez-Samperio.

### C. *Other States' Treatment of the PRWORA*

Notably, the California Supreme Court is the only court in the country that has addressed whether an individual may obtain a license to practice law despite being an undocumented immigrant within the context of the PRWORA's ban on issuing professional licenses to undocumented immigrants.<sup>107</sup> However, other states have considered the PRWORA when deciding whether to extend health benefits, welfare, and access to education.<sup>108</sup> Some states have suggested that the proper approach to the PRWORA is to

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103. See Fla. Att'y Gen. Op. 99-71 (1999); see also Fla. Att'y Gen. Op. 97-74 (1997).

104. Fla. Att'y Gen. Op. 99-71 (1999).

105. Fla. Att'y Gen. Op. 97-74 (1997).

106. Fla. Att'y Gen. Op. 99-71 (1999).

107. Olivas, *supra* note 83, at 470 (explaining that as of 2012, seven states restrict undocumented immigrants' access to postsecondary education by statute).

108. See *Kaider v. Hamos*, 975 N.E.2d 667 (Ill. App. Ct. 2012); see also *In re Garcia*, 315 P.3d 117 (Cal. 2014).



strictly construe the intent of Congress through the text.<sup>109</sup> For example, in Illinois, the Appellate Court determined that although the PRWORA was enacted by Congress to discourage undocumented immigration, it contains an exemption that “strikes a balance between federal interests and state interests by giving the states authority to act.”<sup>110</sup> There, the court determined that the All Kids Act, which was designed to provide health insurance to all children, including undocumented immigrants, was evidence of positive legislative intent permitted by section 1621(d) to opt out of section 1621(a) and provide coverage for unlawful aliens.<sup>111</sup>

However, a strict constructionist approach of PRWORA may not be so open to broader policy implications such as an extension of the rights of undocumented immigrants who will have a positive impact in the United States. Notably, President Obama addressed his forthcoming policies that will be applied to new immigration legislation during his second inaugural address.<sup>112</sup> Specifically, he stated that:

Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity; until bright young students and engineers are enlisted in our workforce rather than expelled from our country.<sup>113</sup>

The Court may defer to President Obama’s ideals, rather than adhering to a strict interpretation of the PRWORA, given the positive policy implications of protecting successful and determined students who were brought to the United States without authorization and through no fault of their own.

In California, the legislature enacted legislation regarding

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109. See *Kaider*, 975 N.E.2d at 679.

110. *Id.*; see also Hector O. Villagra, *Arizona’s Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. C.R. & C.L. 295, 301 (2006) (determining that through PRWORA, Congress has effectively balanced the national interest in limiting undocumented immigration against the national interest in maintaining life, health, safety, and order); *In re Garcia*, 315 P.3d at 128 (“Section 1621(d) grants a state the authority to make . . . undocumented immigrants eligible for such benefits only through the enactment of a law . . . that ‘affirmatively provides’ that undocumented immigrants are eligible for such benefits.”).

111. See *Kaider*, 975 N.E.2d at 679.

112. Grace Wyler, *Full Text: Barack Obama’s Second Inaugural Speech*, BUSINESS INSIDER (Jan. 21, 2013, 12:01 PM), <http://www.businessinsider.com/full-text-obama-inauguration-speech-2013-1#ixzz2IfZtEZII>.

113. *Id.*

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the admission of undocumented immigrants to the California Bar, which provides that:

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. . . . A certificate of admission thereupon shall be given to the applicant by the clerk of the court.<sup>114</sup>

As a result, the California Supreme Court determined that “this enactment removed any obstacle to [the California applicant’s] admission to the State Bar that was posed by section 1621(a) and 1621(c)(1)(A).”<sup>115</sup> The court’s rationale relied on the express exception provided in section 1621(d), which grants states the authority to make undocumented immigrants eligible for public benefits.<sup>116</sup> In concluding that the applicant in California should be admitted to the California Bar, the court found that the new law satisfied both requirements of the PRWORA exception:

First, section 6064(b) was enacted after August 22, 1996. Second, by explicitly authorizing a bar applicant “who is not lawfully present in the United States” to obtain a law license, the statute expressly states that it applies to undocumented immigrants—rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented immigrants—and thus “affirmatively provides” that undocumented immigrants may obtain a professional license so as to satisfy the requirements of section 1621(d).<sup>117</sup>

Unfortunately for Mr. Godinez-Samperio, the Florida legislature has not enacted a law similar to the one passed in California. However, at the very least, the California Supreme Court’s opinion provides the Florida Supreme Court with some guidance on how to analyze the issue within the context of PRWORA.

**PART IV: JUDICIAL REVIEW OF THE FLORIDA BOARD OF BAR EXAMINER’S POLICY DETERMINATION UNDER THE ADMINISTRATIVE PROCEDURE ACT**

Not only will the Florida Supreme Court need to formulate an

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114. CAL. BUS. & PROF. CODE §6064(b) (2014).

115. *In re Garcia*, 315 P.3d at 129.

116. *See id.*

117. *Id.*

answer regarding whether an undocumented immigrant is eligible for admission to the Florida Bar absent any clear legislative direction, but it must first determine whether it is proper for the Court to render a decision. In other words, does the Florida Supreme Court have jurisdiction to decide an issue where an agency has created a policy but neglected to go through a formal rulemaking process?<sup>118</sup>

Mr. Godinez-Samperio argues that the Florida Supreme Court should dismiss the certified question presented by the Board because the Court does not have jurisdiction over this matter.<sup>119</sup> Although the Court does have jurisdiction to adopt a procedure that permits the Board to request advisory opinions from the Court,<sup>120</sup> Mr. Godinez-Samperio argues that because the Board did not enact a policy through the formal rulemaking process, the Court does not have a factual record or case law on which to premise its opinion.<sup>121</sup> As described above, there is little, if any, Florida law on which the Court can base its opinion in this matter. Because the Florida Supreme Court has the exclusive jurisdiction to admit lawyers to the Bar,<sup>122</sup> its opinion is significant for not only Mr. Godinez-Samperio, but also for all similarly-situated applicants. However, the Court may analyze the arguments proffered by Mr. Godinez-Samperio that the Board's promulgation of a rule requiring undocumented immigrants to show proof of citizenship is procedurally invalid because the Board failed to go through the formal process for notice and comment rulemaking.<sup>123</sup> The Court's opinion as to whether the Board promulgated a procedurally invalid rule that violated Florida's Administrative Procedure Act by requiring applicants to show proof of citizenship could ultimately determine whether Mr. Godinez-Samperio is admitted, and whether similarly-situated future applicants are eligible for admission to the Bar.

The power to regulate lawyers is designated to the courts and

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118. Applicant's Resp., *supra* note 8, at 5–6.

119. *See id.*; *but see* Pet. for Advisory Op., *supra* note 35, at 1 (“The Court has jurisdiction over this matter.”).

120. *See* Fla. Const. art. V., § 15.

121. Applicant's Resp., *supra* note 8, at 6 (“The mischief of the process attempted by the Board in this case is evident: Without a rule-making proceeding that provides notice to interested parties, there is not an opportunity to develop the full factual context of a rule or to examine the proposed rule under established case law.”).

122. *In Re Florida Board of Bar Examiners*, 353 So. 2d 98, 100 (Fla. 1977).

123. *See* § 120.54, Fla. Stat. (2013).

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is a constitutional mandate in Florida.<sup>124</sup> The Board “is an administrative arm of the Supreme Court of Florida created by the Court to handle matters relating to bar admission.”<sup>125</sup> The Board makes the ultimate recommendation to the Florida Supreme Court as to whether an applicant should be admitted to the bar.<sup>126</sup> In addition to the Court’s control over regulation of attorney practices, decisions made by the legislature influence the conduct of attorneys in Florida and the parameters by which they practice.<sup>127</sup> Thus, had Florida enacted legislation pursuant to the exception in the PRWORA,<sup>128</sup> it would be binding on the Board’s determination here as to whether Mr. Godinez-Samperio is eligible for admission to the Florida Bar.

The Board is an agency that falls under the definition provided by Section 120.52 of the Florida Statutes.<sup>129</sup> This statute provides a list of agencies that fit this definition of “officers or governmental entities if acting pursuant to powers other than those derived from the constitution.”<sup>130</sup> As the Board is an administrative “agency,” it is subject to the Administrative Procedure Act’s rule challenge proceedings and rulemaking requirements.<sup>131</sup>

Although the Board has been granted authority to regulate admission to the Florida Bar,<sup>132</sup> Mr. Godinez-Samperio contends that the Court retains the exclusive authority to promulgate rules under the Florida Constitution.<sup>133</sup> Therefore, Mr. Godinez-Samperio argues that the Board cannot promulgate a policy determination that undocumented immigrants must provide documentation that demonstrates that they are legal citizens as a prerequisite to admission to the Florida Bar, without having to go through a formal rulemaking process.<sup>134</sup> In order for this argument to prevail, Mr. Godinez-Samperio must establish the follow-

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124. See *Pet. of Fla. State Bar Ass’n*, 186 So. 280, 285 (1938); see also Fla. Const. art. V., § 15.

125. Fla. Bar Admiss. R. 1–12.

126. See *id.*

127. Timothy P. Chinari, *A Brief Overview of Lawyer Regulation in Florida*, SUNETHICS, <http://www.sunethics.com/lawregoverview.htm> (last visited Apr. 6, 2014).

128. See 8 U.S.C. § 1621(c) (2012).

129. § 120.52, Fla. Stat. (2013).

130. *Id.*

131. See *Booker Creek Preservation, Inc. v. Pinellas Planning Council*, 433 So. 2d 1306, 1307 (Fla. 2nd DCA 1983).

132. See Fla. Bar Admiss. R. 1–12.

133. See Fla. Const. art. V., § 15; see also *Applicant’s Resp.*, *supra* note 8, at 7–8 (quoting Fla. Bar Admiss. R. 1–12) (“Modifications to the rules require the filing of a petition with the Supreme Court of Florida and subsequent order by the order.”).

134. See *Applicant’s Resp.*, *supra* note 8, at 12.

ing: 1) that the policy of the Board is actually a rule such that a formal rulemaking proceeding is required for its promulgation; 2) that it is the province for the court and not the agency to decide whether undocumented immigrants are eligible for admission to the Florida Bar; and 3) that a certified question to the Court does not resolve this procedural flaw provided it actually does exist.

The history of Florida's Administrative Procedure Act is useful when determining whether this "policy" set forth by the Board is, or should be, subjected to the formal rulemaking process. In 1996, the Florida legislature adopted several amendments to the Florida Administrative Procedure Act ("APA").<sup>135</sup> These amendments were put into effect in order to increase agency accountability by utilizing the formal rulemaking process, rather than through the promulgation of less formal policies.<sup>136</sup> In response to the reliance on adjudication in informal policy making rather than formal rulemaking, the legislature has made clear that "[r]ulemaking is not a matter of agency discretion",<sup>137</sup> agencies are now required to adopt their policies through rulemaking as soon as "feasible" and "practicable."<sup>138</sup> In addition to strengthening remedies for those who can successfully argue that the agency should have gone through a formal rulemaking proceeding,<sup>139</sup> Florida's Administrative Procedure Act allows affected persons to petition the agency to initiate rulemaking for "an existing rule which the agency has not adopted by the rulemaking procedures or requirements [of the APA]."<sup>140</sup> If an agency has failed to initiate a rulemaking where it is practicable and feasible, a court may determine that the agency abused its discretion.<sup>141</sup> Under current legislation, "rulemaking is presumed by statute to be feasible and practicable, placing the burden on the agency to prove that it is

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135. See Wade L. Hopping et al., *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?*, FLA. B.J., Mar. 1997, at 20, 21.

136. See *id.*

137. § 120.54(1)(a), Fla. Stat. (2013).

138. *Id.*

139. Cathy M. Sellers & Lawrence E. Sellers, Jr., *Nonrule Policy and the Legislative Preference for Rulemaking*, FLA. B.J., Jan. 2001, at 38, 38 ("Accordingly, in 1996 the legislature again addressed the rulemaking mandate as part of comprehensive revisions to the Administrative Procedure Act. This time, the legislature further restricted the agencies' ability to rely on nonrule policy in adjudicatory proceedings, added new provisions under which agency nonrule policies may be challenged, and imposed stringent penalties for an agency's failure to comply with the rulemaking mandate.").

140. § 120.54(7)(b), Fla. Stat. (2013).

141. See Hopping et al., *supra* note 135, at 25.

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not.”<sup>142</sup>

Section 120.52 of the APA defines a rule as “an agency statement of general applicability that implements, interprets, or prescribes law or policy . . . .”<sup>143</sup> This definition is broad so that even an announced policy that has not yet been adopted falls within the bounds of what is considered a rule.<sup>144</sup> The alleged “rule” announced by the Board is that proof of citizenship is a prerequisite for admissions to the Florida Bar.<sup>145</sup> Based on the broad definition of a rule under the Florida Statutes,<sup>146</sup> it is likely that Mr. Godinez-Samperio will succeed in establishing that the Board has promulgated a rule in announcing its policy to deny admission to the Florida Bar to undocumented immigrants who cannot show proof of citizenship. The Court could quite easily determine that this is a statement made by an agency that has general applicability to future applicants to the Florida Bar and that it implements, interprets, or prescribes a law or policy. However, the Board argues that the requirement it imposed upon Mr. Godinez-Samperio to show proof of citizenship before being admitted to the Bar is merely a policy and not a rule, such that a formal rulemaking was not required under the APA.

The Board’s policy here will fail, assuming Mr. Godinez-Samperio can successfully establish that it is in fact a rule, if the Board has invalidly exercised authority delegated to it by the legislature.<sup>147</sup> Under Florida’s APA, an invalid exercise of delegated authority occurs when:

- (a) [t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
- (b) [t]he agency has exceeded its grant of rulemaking authority . . . ;
- (c) [t]he rule enlarges, modifies, or contravenes the specific provisions of law implemented . . . ;
- (d) [t]he rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; [t]he rule is arbitrary or capricious . . . .<sup>148</sup>

In order for the Court to overturn it, Mr. Godinez-Samperio must demonstrate that the Board’s policy to not admit him to the Florida Bar based on his legal status in the United States falls

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142. § 120.54(1)(a), Fla. Stat. (2013).

143. § 120.52(16), Fla. Stat. (2013).

144. *See id.*

145. Applicant’s Resp., *supra* note 8, at 9.

146. § 120.52(16), Fla. Stat. (2013).

147. *See* § 120.52(8), Fla. Stat. (2013).

148. *Id.*

into one of these categories. A party asserting that a statement made by an administrative agency constitutes an unadopted rule must prove that the statement is an unadopted rule by a preponderance of the evidence.<sup>149</sup> It is quite clear that Mr. Godinez-Samperio has argued that the agency has failed to follow these applicable rulemaking procedures in requiring him to show proof of his immigration status before being admitted to the Bar.<sup>150</sup>

Even though the APA strictly imposes the rulemaking requirement on agencies like the Board, the Board's determination that proof of citizenship is required as a prerequisite for being admitted to the Bar is a policy that escapes the general requirement. "An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law."<sup>151</sup> Proponents of Mr. Godinez-Samperio argue that this statement is actually a rule because it created or modified a preexisting rule.<sup>152</sup> The Board has actually implemented a policy and not a rule in requiring information from bar applicants demonstrating their citizenship and immigration status. This is a policy because the requirement is an explanation of a rule that already exists in the Florida Bar Admission Rules. Interested parties, including Mr. Godinez-Samperio, were on notice of this implicit requirement. Although a notice and comment rulemaking would be required if the Board had promulgated a rule in requiring bar applicants to show their immigration status before being admitted, it is not required when the agency can demonstrate that they promulgated a policy that falls under the exception to the formal rulemaking proceedings requirement. This is demonstrated by the court's holding in *Jenkins*, where the court held that "procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation."<sup>153</sup> Here, the Board's policy falls under this category of being merely is inciden-

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149. See § 120.56(1)(e), Fla. Stat. (2013).

150. Applicant's Resp., *supra* note 8, at 6–7.

151. *Jenkins v. State*, 855 So. 2d 1219, 1224 (Fla. 1st DCA 2003); see also *Balsam v. Dep't of Health & Rehabilitative Servs.*, 452 So. 2d 976, 977–78 (Fla. 1st DCA 1984) (determining that an agency is a rule when it either requires compliance or creates rights and adversely affects others).

152. Br. of Dream Bar Ass'n, *supra* note 33, at 5.

153. See *Jenkins*, 855 So. 2d at 1228 (explaining that to hold otherwise and force these procedures that are incidental to properly promulgated procedures to go through proper rulemaking proceedings would be contrary to statutory intent and common sense).

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tal to a previously promulgated rule. Therefore, the Court will likely accept the Board's policy determination that applicants to the Florida Bar must show proof of immigration status before being admitted.

Even if the Court does determine that this is a rule and not a policy, the success Mr. Godinez-Samperio may have in proffering the argument that the Board failed to adopt the "rule" through proper rulemaking proceedings, and the remedy he seeks and is entitled to under Florida's APA, is not entirely clear. Does he want the Florida Supreme Court to dismiss the action for lack of jurisdiction? If so, will the Board's policy then stand or be challenged in a subsequent action by the process provided for under the APA for challenging a rule?<sup>154</sup>

To challenge a rule, a person substantially affected by an unadopted agency statement of general applicability, including statements characterized as "policy," may seek an administrative determination that the statement should have been adopted as a rule.<sup>155</sup> A petition is filed with the Division of Administrative Hearings alleging that the person is substantially affected by the statement, the statement meets the definition of a rule, and the agency has not adopted the statement as a rule.<sup>156</sup> The petition must include the text of the statement or describe the statement in sufficient detail to provide the agency with adequate notice of the agency statements that are being challenged.<sup>157</sup> The initial burden is on the petitioner to prove that the statement meets the definition of a rule, and then the burden shifts to the agency to prove that rulemaking was not feasible or practical.<sup>158</sup>

In *Jenkins*, the court determined that where the agency failed to promulgate the rule properly, the appropriate remedy was "prohibiting an agency from relying on the unpromulgated rule or forcing the agency to go through the rule-making process."<sup>159</sup> In addition to the constitutional grounds on which he challenges the rule, Mr. Godinez-Samperio may be entitled to a remedy under administrative law if he can successfully argue that the Board failed to comply with the requirements for a rulemaking.

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154. See § 120.56(4)(a), Fla. Stat. (2013).

155. See *id.*

156. See *id.*

157. See *id.*

158. See *id.* at § 120.56(4)(b).

159. *Jenkins*, 855 So. 2d at 1230 (citing § 120.56(4)(e), Fla. Stat. (2011)).



## PART V: CONSTITUTIONAL IMPLICATIONS AND PREDICTIONS

The issue before the Florida Supreme Court regarding Mr. Godinez-Samperio's case is different from other states' attempts to deal with the extension of rights to undocumented immigrants. At a basic level, this issue is different because of what it does *not* involve. It does not involve deportation, education, health care, welfare benefits, or any other area where states have attempted to act. It involves the issuance of a professional license to a hardworking and otherwise eligible applicant to the Florida Bar, at a time when there is controversial federal legislation that may support his eligibility for admission. This particular issue is not explicitly addressed in federal or state legislation in Florida because it does not arise often. The federal government has attempted to deal with the issuance of work permits to those who are in good standing in the United States, and it has tried to halt deportations of such individuals. The Supreme Court has expressed its view in *Plyler v. Doe*, that "children should not be punished because of their parents' decision to bring them to the United States illegally."<sup>160</sup> The Florida Supreme Court faces the difficult task of deciding this matter with no guidance from U.S. courts or the legislature. If the Florida Supreme Court does reach the merits of the case, it will be forced to issue an opinion based on public policy considerations. In *Arizona v. United States*, the Court struck down Arizona's attempt to impose strict laws on undocumented immigrants.<sup>161</sup> Mr. Godinez-Samperio cites the Supreme Court's opinion to demonstrate that federal law, such as the PRWORA, should not apply to the Court's opinion.<sup>162</sup> In *Arizona*, the Court stated:

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. . . . The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" . . . .

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160. Paulo Edmundo Ochoa, *Education Without Documentation: As Plyler Students Reach New Heights, Will Their Status Make Them Morally Unfit to Practice Law?*, 34 T. JEFFERSON L. REV. 411, 413 (2012) (citing *Plyler v. Doe*, 457 U.S. 202, 220 (1982)).

161. *Arizona v. United States*, 567 U.S. 1, (2012).

162. See Applicant's Mot. for Conclusion of Invest., *supra* note 50, at 11–12.

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Second, state laws are preempted when they conflict with federal law. . . . [But] [i]n preemption analysis, courts should assume that the historic police powers of the States' are not superseded "unless that was the clear and manifest purpose of Congress."<sup>163</sup>

Here, the Court will decide only whether Mr. Godinez-Samperio can be admitted to the Florida Bar. Although, as discussed above, a federal law does explicitly prohibit states from issuing professional licenses to ineligible undocumented immigrants, the Florida Supreme Court may still decide to decide that Mr. Godinez-Samperio can be admitted to the Florida Bar based on policy reasons and the fact that this decision is so narrowly tailored to a single individual.<sup>164</sup> There are several reasons why the Florida Supreme Court's decision here can be distinguished from cases where the rights of undocumented immigrants have been restricted or expanded based on a strict interpretation of a law or statute. First, the federal government's current stance on the rights of undocumented immigrants, as exemplified by President Obama's order implementing policies driving the DREAM Act, demonstrates a willingness to expand the substantive rights of undocumented immigrants who will positively impact American society. Second, Mr. Godinez-Samperio is the type of immigrant that we would not want to deport based on policy considerations; therefore, it will likely be much more difficult for the Florida Supreme Court to deny him the benefits of his hard work and life accomplishments.<sup>165</sup>

On January 29, 2013, President Obama pressured Congress to enact comprehensive immigration reform legislation that will affect eleven million undocumented immigrants, including Mr. Godinez-Samperio, currently living in the United States and place them on a "clear path to citizenship."<sup>166</sup> He explained, "I'm here

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163. *Arizona*, 567 U.S. at 6–7.

164. See discussion *supra*, Part III (A).

165. See Plyler, 457 U.S. at 207-08 (determining that a denial of basic education to undocumented immigrant children would be to deny them "the ability to live within the structure of our civic institution, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation."); see also Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and in-State Tuition Rates for Students Without Lawful Immigration Status*, 15 *IND. INT'L & COMP. L. REV.* 257 (2005).

166. Mark Landler, *Obama Urges Speed on Immigration Plan, but Exposes Conflicts*, *N.Y. TIMES*, Jan. 29, 2013, at A1, available at <http://www.nytimes.com/2013/01/30/us/politics/obama-issues-call-for-immigration-overhaul.html?emc=tnt&tnte-mail=y>.

because business leaders, faith leaders, labor leaders, law enforcement and leaders from both parties are coming together to say now is the time to find a better way to welcome striving, hopeful immigrants who will see America as the land of opportunity.”<sup>167</sup> He went on to explain how immigrants have significantly improved the U.S. economy, have founded many small businesses and achieved great success in this country.<sup>168</sup> He discussed the “brilliant students” who “earn degrees in the fields of the future,” but may be forced to leave the country when they finish school.<sup>169</sup> Even though comprehensive immigration reform legislation has recently gained bipartisan support, President Obama announced that he would send his own specific measure for reforms to Congress and demand a vote if Congress does not write and agree on legislation quickly enough.<sup>170</sup> Florida Republican Senator Marco Rubio stated that he was “concerned by the president’s unwillingness to accept significant enforcement triggers before current undocumented immigrants can apply for a green card.”<sup>171</sup>

Nevertheless, President Obama has placed his plan to overhaul current immigration legislation at the top of his agenda during his second term.<sup>172</sup> In explaining his plans for immigration reform, he has stated that if an immigrant appropriately registers with authorities and pays back taxes from the time they arrived in the United States, they should expect to obtain legal status and eventually full citizenship.<sup>173</sup> It is quite evident that Mr. Godinez-Samperio falls within the class that President Obama and many members of Congress seek to protect with comprehensive immigration reform. He has successfully earned a law degree, no easy feat for any student, but especially one that had to overcome the obstacles Mr. Godinez-Samperio did as an undocumented immigrant. In fact, Mr. Godinez-Samperio applied, and was approved for, President Obama’s deferred action program, which may actually enable him to be eligible to obtain a work permit.<sup>174</sup> Fortunately for Mr. Godinez-Samperio, the current U.S. President has

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167. Wyler, *supra* note 112.

168. *Id.*

169. *Id.*

170. *Id.* (Republican support for President Obama’s comprehensive immigration reforms seems to remain contingent upon first securing the United States’ borders.)

171. *Id.* (internal quotation marks omitted).

172. *Id.*

173. Wyler, *supra* note 112.

174. Applicant’s Notice of Filing Additional Info. and Mot. for Admission, *supra* note 80, at 1–2.

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clearly demonstrated that he will advocate for the continued success of immigrants in his position.

## PART VI: CONCLUSION: WHAT NOW?

Provided that Mr. Godinez-Samperio is successful in arguing that the Board improperly issued a policy determination without initiating a formal rulemaking procedure, it is unclear what remedy will suffice. Mr. Godinez-Samperio's challenge to the procedure of this certified question, as well as to its substance, is premised on the idea that he has worked hard in school, deserves to be given the right to practice law, and has complied with all of the Board's requests. Although it is arguable that the PRWORA does not apply to this context,<sup>175</sup> there is clear federal legislation that prohibits employers in the United States from hiring undocumented immigrants.<sup>176</sup> Thus, the question arises, once Mr. Godinez Samperio is admitted to the Florida Bar, what will be his next move? Will he limit his law practice to pro bono projects? Or will he be successful in arguing that President Obama's Executive Order allows him to secure a work permit for at least two years to practice law and gain any type of employment?<sup>177</sup> Even better, will Mr. Godinez-Samperio be given a "pathway to citizenship" under a more comprehensive reform to the United States' immigration laws?<sup>178</sup>

In his motion, Mr. Godinez-Samperio argued, "it is clear that, under the terms of this new Executive Order, Mr. Godinez-Samperio is now prima facie eligible to attain both legal immigration status and work authorization here in the United States."<sup>179</sup> Mr. Godinez-Samperio urges the Florida Supreme Court to use a similar case regarding this matter as supplemental authority.<sup>180</sup> There, the applicant concedes that there is federal legislation that would prohibit him from being employed after being admitted to the California Bar, but argues that this legislation does not prohibit him from being eligible for admission to the bar.<sup>181</sup> Here,

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175. See Applicant's Mot. for Conclusion of Invest., *supra* note 50, at 8.

176. See 8 U.S.C. § 1324(a) (2012).

177. See Applicant's Mot. for Conclusion of Invest., *supra* note 50, at 13.

178. Julia Preston & Ashley Parker, *Immigration Hearings Set to Open in the House*, N.Y. TIMES, Feb. 4, 2013, at A14, available at, <http://www.nytimes.com/2013/02/05/us/politics/immigration-hearings-set-to-open-in-the-house.html?emc=tnt&tnte-mail=y>.

179. Applicant's Mot. for Conclusion of Invest., *supra* note 50, at 13–14.

180. See *id.*

181. Laird, *supra* note 5, at 54 (it was argued that if the applicant were to be

however, the issue has not been briefed. The Court will either ignore the law that prohibits Mr. Godinez-Samperio's from gaining employment in the future when issuing its opinion, or the Court will use this as a basis for deeming him ineligible for admission to the Bar. It will be interesting to see if Mr. Godinez-Samperio concedes this same point, as the applicant did in California, or if he intends to further litigate the issue of employment if he is deemed eligible for admission to the Florida Bar. According to an article by Laird, Mr. Godinez-Samperio aspires to become an immigration human rights lawyer.<sup>182</sup> He stated, "I knew that I was going to have a lot of problems, but I always think to myself: I need to take one step at a time."<sup>183</sup> For now, Mr. Godinez-Samperio says that he is just worried about being admitted to the Florida Bar.<sup>184</sup> Although the issue of employment after graduation seems to go hand-in-hand with his admission to the Florida Bar, neither Mr. Godinez-Samperio nor the Board have not explored the issue in the present litigation.

Even if the Court determines that the PRWORA and the IRCA are applicable here, precluding Mr. Godinez-Samperio from being eligible for a professional license to practice law, and from any opportunity for gainful employment in the United States, it is very likely that President Obama's immigration policies will be incorporated into comprehensive immigration reform. If such reforms are implemented, Mr. Godinez-Samperio will certainly be given a pathway to citizenship. That pathway means that any federal legislation that precludes him from being eligible for a license to practice law will no longer have that effect. For now, President Obama's Executive Order and the directive following has given Mr. Godinez-Samperio a chance to prolong his time in the United States without fear of deportation. However, his legal status has remained the same. The problem the Board saw with issuing Mr. Godinez-Samperio a professional license, and others similarly situated, is that they cannot show proof of citizenship. If the federal legislation is implemented, Mr. Godinez-Samperio will be able to demonstrate to the Board that he falls within the class of undocumented immigrants that President Obama is seeking to protect from immigration, and that his immigration status in the United

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admitted to the California Bar, it "would pose a risk to the public because [the applicant] is not eligible to work in the United States.").

182. *Id.* at 57.

183. *Id.*

184. *Id.*

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States has changed. Thus, the procedural issues with the Board's policy that applicants must show proof of immigration status will be moot. Any applicant that is considered to be on this "pathway to citizenship" will likely be deemed eligible for admission to the Florida Bar.

Nevertheless, the Florida Supreme Court faces a difficult task in deciding this thorny matter. Federal legislation is conflicting, state legislation is silent or inapplicable, and there are no other jurisdictions that have decided this particular issue. However, given the extent of the numerous arguments proffered by both the Board and Mr. Godinez-Samperio and his supporters, as well as the sensitivity of this issue, it is likely that the Florida Supreme Court will render an opinion that is narrowly tailored to the issue of whether immigration status can be the basis of an applicant's denial for admission to the Florida Bar.

