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Pennsylvania Board of Law Examiners
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RE: Amicus Support for Application of Parthiv Patel to the Pennsylvania Bar

Dear Members of the Board of Law Examiners,

I am a lawyer duly admitted to the Pennsylvania Supreme Court since 1968 through the present. I am the Supervising Lawyer of the Ethics Bureau at Yale (EBaY). EBaY is a student clinic at Yale Law School that advises clients on issues relating to legal ethics and professional responsibility. In addition to supervising EBaY's work, I teach legal ethics and professional responsibility at Yale, and previously taught the same subjects at the University of Pennsylvania Law School. I served as Chair of the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility, and as chair, was the developer of the ABA's Ethics 2000 Commission, which conducted the most recent review of the Model Rules of Professional Conduct. I have written seven books on lawyer ethics, written well over one hundred articles and book chapters on the same topic, lectured at forty law schools, and participated in over three hundred continuing legal education programs. The State Department sent me to China, Argentina, Rome, and Moscow to lecture on rule of law requirements.

I am writing to offer my support for Mr. Patel's admission to the Pennsylvania Bar and to address two issues related to his application. I do not personally know Mr. Patel, but based on the facts of the record, I believe he should be admitted to the bar. I understand that, in order to reunite with his parents, Mr. Patel entered the United States without inspection when he was five years old. Since then, Mr. Patel has led his life with integrity and has overcome numerous obstacles facing immigrants who dream of becoming lawyers. I write to

express my opinion that (1) Mr. Patel's lack of lawful immigration status should not affect his character and fitness to serve as a lawyer, and (2) in accordance with the Supreme Court of Pennsylvania's exclusive control over bar admissions, the Board may and should lawfully exercise the opt-out provision of 8 U.S.C. § 1621 to admit him to the bar. I hope that the discussion below will aid your decision-making regarding Mr. Patel's application.

I. MR. PATEL'S LACK OF LAWFUL IMMIGRATION STATUS DOES NOT AFFECT HIS CHARACTER AND FITNESS TO SERVE AS A LAWYER.

The purpose of character and fitness review is to ensure that applicants possess the traits that are essential to fulfilling the duties of lawyers. *See What Are the Character and Fitness Standards?* Penn. Bd. L. Exam'rs (Feb. 2, 2017), https://www.pabarexam.org/c_and_f/cffaqs/2.htm (requiring that an applicant's "record of conduct justifies the trust of clients, adversaries, courts and others"). Both the national standard and the standard adopted by this Board identify four key traits: honesty, trustworthiness, diligence, and reliability. *See id.*; Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n, *Comprehensive Guide to Bar Admission Requirements*, at viii (Erica Moeser & Cynthia L. Martin eds., 2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf. Whether a person possesses lawful immigration status does affect any of these traits. *See In re Vargas*, 131 A.D.3d 4, 14 (N.Y. App. Div. 2015) (holding that an applicant's "undocumented immigration status, in and of itself, does not reflect adversely upon his general fitness to practice law"). In this case, Mr. Patel's record of conduct fully justifies his admission to the bar.

First, there is nothing in the record that calls Mr. Patel's honesty into question, beginning with his acknowledgement of his undocumented status. This Board emphasizes candor as essential to its screening process because "[h]onesty and integrity constitute the very foundation of the legal profession, and must serve as guideposts for the determination of good moral character." *Importance of Candor*, Penn. Bd. L. Exam'rs (Feb. 2, 2017), https://www.pabarexam.org/c_and_f/cfcandor.htm.¹ Mr. Patel disclosed his undocumented status to both Drexel Law School and this Board. Mr. Patel has also been fully forthright in his interactions with the federal government, which allowed Mr. Patel to receive a Social Security number, DACA status, and work authorization. Mr. Patel has never attempted to gain public or private benefits using another person's identification. In short, Mr. Patel has displayed exactly the type of candor that this Board requires of its applicants.

Second, Mr. Patel has proven himself to be trustworthy. The character and fitness standards of both the ABA and the Pennsylvania Bar Association emphasize trustworthiness to ensure "that those who are admitted to the bar are worthy of the trust and confidence

¹ Both the Pennsylvania and Model Rules of Professional Conduct similarly emphasize candor. *See* Model Rules of Prof'l Conduct pmb1.; Pa. Rules of Prof'l Conduct r. 3.3; Pa. Rules of Prof'l Conduct r. 3.4.

clients may reasonably place in their lawyers.” Comprehensive Guide to Bar Admission Requirements, *supra*, at vii.² Mr. Patel’s undocumented status is irrelevant to his ability to serve his clients faithfully. See *In re Vargas*, 131 A.D.3d at 15 (“[T]he undocumented status of an individual applicant does not, alone, suggest that the applicant is not possessed of the qualities that enable attorneys to vigorously defend their client’s interests within the bounds of the law, nor does it suggest that the applicant cannot protect, as an officer of the court, the rule of law and the administration of justice.”).

While the Board rightfully considers “unlawful conduct” in its evaluations, Mr. Patel has not committed the type of “unlawful conduct” that would cause the Board to question his trustworthiness. The only violation Mr. Patel has committed was entering the United States without inspection.³ That occurred when he was *five years old*, as he sought to reunite with his parents. The United States Supreme Court has concluded that children who enter the United States unlawfully do not bear the same culpability as individuals who enter as adults. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (“It is . . . difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”). The Court emphasized that “[v]isiting . . . condemnation on the head of an infant’ for the misdeeds of the parents is illogical and unjust.” *Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)); see also *Florida Bd. of Bar Exam’rs re Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar*, 134 So.3d 432, 441 (Fla. 2014) (Labarga, J., concurring) (noting that unlawful presence in the United States “does not involve moral turpitude”). Moreover, even if there were any issues raised by Mr. Patel’s conduct at age five, they have since been dispelled by Mr. Patel’s upstanding conduct. See *Why Is Evidence of Rehabilitation So Important?*, Penn. Bd. L. Exam’rs (Feb. 1, 2017), https://www.pabarexam.org/c_and_f/cffaqs/7.htm (emphasizing that the Board’s “standard for admission is *current* good character and fitness” (emphasis added)); see also Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 *Geo. J. Legal Ethics* 959, 971 (2013) (“The California and Florida State Bars have . . . found that the positive elements in [undocumented immigrants’] applications outweighed any adverse consequences that may have resulted from their immigration violations.”).

Finally, Mr. Patel’s undocumented status does not reflect negatively on his reliability and diligence. Competence is essential to meeting the demands of zealous advocacy. See Pa. Rules of Prof’l Conduct r. 1.1; Pa. Rules of Prof’l Conduct r. 1.3. Mr. Patel has persevered through the numerous obstacles facing immigrants in this country, thus showing incredible determination and discipline in becoming a lawyer. He succeeded in law school alongside

² The Pennsylvania Rules of Professional Conduct also emphasize trustworthiness. See Pa. Rules of Prof’l Conduct r. 1.6.

³ Merely being present as an undocumented immigrant is not a crime. See *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2013) (“[M]ere unauthorized presence in the United States is not a crime.”); *We Are America v. Maricopa County Bd. of Supervisors*, 297 F.R.D. 373, 392 (D. Ariz. 2013) (stating that criminalizing unlawful presence stands “plainly at odds with federal law”) (internal quotation marks omitted).

students with many advantages and privileges that he lacked. There is no reason to doubt his competence based simply on his immigration status.

In conclusion, Mr. Patel's immigration status cannot be viewed as somehow producing a deficiency in any of the character and fitness qualifications of the Pennsylvania Bar Admission Rules. To the contrary, Mr. Patel has led his life with honesty and integrity, proving that he is worthy of the trust placed in lawyers. For these reasons, I have concluded that Mr. Patel's immigration history, if anything, reflects positively on his character and fitness to serve as a lawyer.

II. IN KEEPING WITH THE STATE JUDICIARY'S EXCLUSIVE POWER TO REGULATE BAR ADMISSIONS, THE BOARD MAY EXERCISE THE OPT-OUT PROVISION OF 8 U.S.C. § 1621.

As you know better than I, regulating the admission of lawyers to the Bar is a vital function of each state's judiciary. The state judiciary has the power to regulate bar admissions in all fifty states and the *exclusive* authority to do so in forty-two states. *See* Comprehensive Guide to Bar Admission Requirements, *supra*, at viii. Judicial control over admission reflects the broader principle that "the practice of law 'is so directly connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate it naturally and logically belongs to the judicial department.'" *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 n.11 (1982) (quoting the ABA Standards for Lawyer Discipline and Disability Proceedings § 2.1 (Proposed Draft 1978)).

Few states have defended this principle of exclusive judicial control as staunchly as Pennsylvania, where our state Supreme Court is constitutionally vested with the exclusive power to prescribe rules for admission to the bar. *See* Pa. Const. art. V, § 10; *Laffey v. Court of Common Pleas of Cumberland Cty.*, 503 Pa. 103, 107 (1983). This exclusive power is a critical feature of Pennsylvania's fundamental separation of powers.⁴ Accordingly, Pennsylvania law requires that rules governing the admission of lawyers to the bar be promulgated by either the Court itself or "any agency or unit of the unified judicial system" to which the Supreme Court delegates its rulemaking authority, *see* 42 Pa. Cons. Stat. §§ 1721-22, or to simplify, this Board.

Title 8 U.S.C. § 1621 need not be read in a manner that conflicts with the judiciary's exclusive control over bar admissions. Section 1621 prohibits states from conferring "professional license[s]" on aliens who are not lawfully present, unless the state opts out "through the enactment of a State law." *See* 8 U.S.C. §§ 1621(c)(1)(A), (d). Interpreting this

⁴ *See Hoopes v. Bradshaw*, 231 Pa. 485, 487 (1911) ("Judicial powers and functions are to be exercised by the judiciary alone, and a century ago . . . it was held that the admission of an attorney to practice before a court is a judicial act." (internal citation omitted)).

statute to require an act by the state *legislature* is neither necessary nor prudent.⁵ Transferring regulatory power from the judiciary to the legislature would violate Pennsylvania's constitutionally mandated separation of powers.⁶ The judiciary's exclusive control over the criteria necessary for bar admission entails a right to deem characteristics *irrelevant* as much as it does a right to deem characteristics relevant. This control is a historic function of the state and a core sovereign duty of the Supreme Court of Pennsylvania. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984) (recognizing that "regulation of the bar is a sovereign function of the [state] Supreme Court."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."). If the Board were to interpret 8 U.S.C. § 1621 as requiring an act from the state legislature before Mr. Patel can be admitted, then the Board would be effectively relinquishing the Pennsylvania Supreme Court's right to decide whether immigration status is relevant. This is because, in exercising that power, the state legislature would be making a threshold decision about whether aliens *may* be admitted to the bar, when that threshold decision itself is exclusively one for the Pennsylvania Supreme Court.

Instead, the Board can follow the path taken by New York and itself exercise the power to opt out of 8 U.S.C. § 1621(a). In *In re Vargas*, the New York Appellate Division chose to admit an undocumented immigrant to the state bar without waiting for authorization from the state legislature. 131 A.D.3d at 27. The court interpreted 8 U.S.C. § 1621's opt-out provision as a grant of power to state governments, to be exercised by whichever body the states deemed appropriate. Thus, because of the judiciary's essential role in admitting lawyers, the court "declare[d] that such persons may be admitted to the practice of law provided they otherwise, each individually, meet the standards for admission by which all candidates for admission to the practice of law are judged." *Id.* at 27-28.

By following this approach, the Board of Law Examiners would respect both the separation of powers enshrined in Pennsylvania's Constitution and case law, and the limits

⁵ Such an interpretation could raise Tenth Amendment concerns. The federal Constitution prohibits Congress from interfering with the fundamental structure of state government. *See* U.S. Const. amend. X; *New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Allocating authority among the branches of state government is one of the reserved powers at the heart of state sovereignty. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign."); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). For these reasons, courts have been reluctant to construe congressional legislation as interfering with a state's choice of internal organization and officer qualifications. *See, e.g., Gregory*, 501 U.S. 452; *In re Vargas*, 131 A.D.3d at 26.

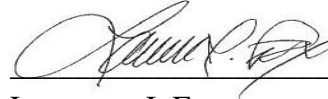
⁶ *See Maunus v. State Ethics Comm'n*, 518 Pa. 592, 597 (1988) ("No other component of our state government may impose duties applicable to every attorney admitted to practice in the Commonwealth, nor may another Commonwealth entity admit to practice or discipline an attorney. These prerogatives are within this Court's exclusive jurisdiction."); *Gmerek v. State Ethics Comm'n*, 751 A.2d 1241, 1250 (Pa. Commw. Ct. 2000) ("Under the principle of separation of powers of government, . . . no branch should exercise the functions exclusively committed to another branch." (quoting *Sweeney v. Tucker*, 473 Pa. 493, 508 (1977))).

on federal authority over the states. Admitting Mr. Patel would also further the mission of the Pennsylvania Board of Law Examiners, which is charged with preserving the integrity of the legal system and providing competent counsel to all individuals seeking legal representation.

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Accordingly, it is my opinion, to a reasonable degree of professional certainty, that Mr. Patel's lack of lawful immigrant status should provide no ethical or legal ground for denying him admission to the Pennsylvania Bar. I would be glad to extend these remarks if that would be helpful.

Respectfully yours,

A handwritten signature in cursive script, appearing to read "Lawrence J. Fox", is written over a horizontal line.

Lawrence J. Fox