

PROFESSIONAL LICENSING AND TEACHER
CERTIFICATION FOR NON-CITIZENS: FEDERALISM,
EQUAL PROTECTION AND A STATE'S SOCIO-
ECONOMIC INTERESTS

Janet M. Calvo¹

Some states have recently addressed the integration of their non-citizen populations and their socioeconomic needs by expanding the eligibility of professional licensing to non-citizens. Changes made in 2016 in the two states with the largest immigrant populations, California and New York, were extensive and comprehensive. California removed immigration status requirements for licensing through legislation that covered all occupations regulated by the California Department of Consumer Affairs. The New York Board of Regents and Commissioner of Education expanded the categories of non-citizens eligible for professional licensing and teaching certification through administrative regulations, including all non-citizens permanently residing in the state under color of law. The changes in these two states required consideration of state sovereignty and equal protection. California treated all state applicants equally by removing any citizenship or immigration status requirements. New York determined that its state sovereignty allowed the state-designated agency to set licensing criteria for non-citizens despite a federal statute that purported only to allow

¹ Janet M. Calvo is a Professor of Law at CUNY School of Law. Some of this Article reflects collaboration with the Center on Latino and Latina Rights and Equality (CLORE), Professor Natalie Gomez-Velez of CUNY School of Law, Jose Perez of LatinoJustice PRLDEF, Annie Wang of AALDEF, and Steven Choi of the New York Immigration Coalition, with whom the author worked to advocate for a change in the New York Regulations. This Article was written with the research assistance of CUNY School of Law students Bianca Granados, Cheryl Walker, Lourdes Cajamarca, Lauren DiMartino, Marcella Marucci, Nathalie Varela, and Nealraj Bhushan, and with the assistance of Maggie Ruperto of the CUNY School of Law staff. Professors Natalie Gomez-Velez, Ruthann Robson, Rick Rossein, and Stephen Loffredo provided helpful insights.

such licensing through state legislation. Both states concluded that an expansion of the eligibility of non-citizens for licensed professions allowed them to maximize the benefits of their in-state tuition policies and provided economic and social advantages for their communities.

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I. INTRODUCTION

Recently, some states have allowed non-citizens in various categories to obtain professional licensing.² Most of the states’ recent changes affect particular professions or particular categories of non-citizens, but the 2016 changes in New York and California were extensive and comprehensive. This is significant because they are the two states with the

² *Professional Licenses for Immigrants*, NAT’L CONF. ST. LEGISLATURES (Jan. 17, 2017), <http://www.ncsl.org/research/immigration/professional-and-occupational-licenses-for-immigrants.aspx> (reporting changes in New York, California, Florida, Illinois, Minnesota, Michigan, Nebraska, Nevada, South Dakota, Utah, West Virginia and Wyoming).

largest immigrant populations.³ California addressed the issue through legislation that covered all occupations regulated by the California Department of Consumer Affairs.⁴ The New York Board of Regents and Commissioner of Education addressed the issue through administrative regulations that apply to the professions and teacher certifications regulated by the New York Department of Education.⁵

The changes in these two states involved confrontation with the legal issues of state sovereignty and equal protection, and an assessment of the value of the economic and social contributions of their non-citizen populations. This Article describes the issues resolved by these two states as useful information to address the most effective ways to recognize and integrate non-citizen populations and to meet states' economic and social needs for qualified professionals. While affecting all states, the issue of non-citizens' licensing is of particular import in the states that afford in-state tuition to non-citizens for higher education,⁶ since these states have a particular interest in gaining the benefits of that state-supported education.⁷

³ *U.S. Immigrant Population by State and County*, MIGRATION POLY INST., <http://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county> (last visited Oct. 21, 2017). The Migration Policy Institute indicates California as the state with the largest immigrant population with New York as second and Texas as third. *Id.* The Pew Research Center states that Texas is tied with New York as the state with the second largest immigrant population. Renee Stepler, *Texas Immigrant Population Now Rivals New York's in Size*, PEW RES. CTR. (Apr. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/04/21/texas-immigrant-population-now-rivals-new-yorks-in-size/>. However, New York's immigrant population is more diverse than either the California or Texas populations. *Id.*

⁴ CAL. BUS. & PROF. CODE § 135.5(b) (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

⁵ N.Y. COMP. CODES R. & REGS. tit. 8 § 59.4 (2017); N.Y. COMP. CODES R. & REGS. tit. 8 § 80-1.3 (2017).

⁶ See generally *Table: Laws & Policies Improving Access to Higher Education for Immigrants*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/wp-content/uploads/2017/04/table-access-to-ed-toolkit-2017-04.pdf> (last

Professor Michael Olivas' forthcoming article points to a need for thoughtful consideration of these issues. After presenting and analyzing national research on business and occupational licensing for non-citizens, particularly the undocumented and those with Deferred Action for Childhood Arrivals ("DACA"), he concludes that the developments in this area are complex, confusing, ineffective, and in great need of improvement.⁸ The relevant legal issues need to be sufficiently considered.⁹ The socio-economic considerations are also important as they affect states' and localities' integration of their non-citizen populations and non-citizens' participation in their communities' economic and social progress.

updated Apr. 2017) (listing laws and policies of states allowing students who meet certain criteria, regardless of immigration status, to pay in-state tuition); *Undocumented Student Tuition: Overview*, NAT'L CONF. ST. LEGISLATURES (Oct. 29, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx> (providing background on states with in-state tuition rates for undocumented students).

⁷ For discussions of issues underlying in-state tuition and higher education aid for non-citizens, see generally Stephen L. Nelson et al., *Administrative DREAM Acts and Piecemeal Policymaking: Examining State Higher Education Governing Board Policies Regarding In-State Tuition for Undocumented Immigrant Students*,

28 GEO. IMMIGR. L.J. 555 (2014); 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 (2012); Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

⁸ See Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. L. REV. (forthcoming 2017) (manuscript at 3, 48), <https://ssrn.com/abstract=2997713>.

⁹ The legal issues discussed below focus on state sovereignty and equal protection. See Jennessa Calvo-Friedman, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597 (2014), for an analysis that demonstrates how preemption bars states from limiting the licensing of non-citizens with federal employment authorization.

The object of this Article is to examine how these underlying issues were addressed in the two states that took a comprehensive approach. California's broad legislation and New York's administrative regulations based in state sovereignty under the Tenth Amendment and equal protection for its non-citizen population provide alternative pathways that recognize the value of non-citizen participation in a state's regulated professions and teaching.

Part I describes the California legislation, and its stated purpose and reasoning. It relates the reported comments made about the legislation, including its social and economic effects. California decided that it was in its best economic and social interest to focus on competency qualifications for professionals, regardless of immigration status.¹⁰ The Article describes the occupations to which the legislation applies and the California administrative process that regulates and issues licenses and teacher certifications. Appendix 1 details these occupations and their statutory and regulatory basis.

Part II describes the regulatory changes made in New York. Appendix 2 details the covered professions and their state statutory basis. It explains the New York regulatory system, New York's final regulations, the professions to which they apply, and the non-citizen categories that are now eligible for licensing and teacher certification. New York chose to allow licensing to a broad category of non-citizens not unlawfully present, including those permanently residing in the state under color of law ("PRUCOL"), and those with DACA.¹¹

¹⁰ CAL. BUS. & PROF. CODE § 135.5(a) (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

¹¹ *Memorandum from Douglas E. Lentivech & John L. D'Agati to Bd. of Regents Prof'l Practice Comm., Higher Educ. Comm.* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

Part III details the federalism and equal protection issues involved in the state regulation of licensing. The New York Board of Regents confronted both of these issues in the consideration of regulatory change.¹² Part IV reviews and responds to the issues raised by the comments made in New York's regulatory process. These issues include the socio-economic advantages of the regulations to the State and its residents, the question of whether the regulations should have removed any restrictions based on immigration status, as did the California statute, and whether the regulations benefited or disadvantaged members of military families. Part V discusses the insights for other states and their residents from the New York and California experience. The Article concludes that a comprehensive approach to the inclusion of non-citizens in a state's professions and teaching provides economic and social advantage for a state and its communities, and that state sovereignty allows states to regulate the eligibility of non-citizens.

II. CALIFORNIA'S LEGISLATIVE APPROACH

A. The California Legislation

The California legislation addressed the issue of professional licensing for non-citizens for numerous professions.¹³ The legislation was signed by Governor Brown in 2014 and made effective as of January 2016.¹⁴ The California Business and Professions Code clearly stated its purpose. The statute states,

The Legislature finds and declares that it is in the best interests of the State of California to provide persons who are not lawfully present

¹² *Id.*

¹³ See *infra* Appendix 1.

¹⁴ Vote Smart, *SB 1159 - Authorizes Undocumented Immigrants to Receive Professional Licenses - Key Vote*, VOTE SMART, <https://votesmart.org/bill/19373/50908/69557/jerry-brown-signed-sb-1159-authorizes-undocumented-immigrants-to-receive-professional-licenses#50908> (last visited Oct. 22, 2017).

in the United States with the state benefits provided by all licensing acts of entities within the department¹⁵

The law provides that no entity within the California Department of Consumer Affairs (“DCA”) “shall deny licensure to an applicant based on his or her citizenship status or immigration status.”¹⁶ It also removes the citizenship and immigration status requirements for a physician and surgeon’s certificate.¹⁷ The law further requires that individuals applying for licenses have to provide either a federal tax identification number or a social security number, predominately for the purpose of identifying persons affected by state tax laws.¹⁸ The change from prior law now affords the option of using a federal tax identification number instead.¹⁹

B. The California System of Professional Licensing and Teacher Certification

The California statute applies to the professions regulated by the DCA.²⁰ The DCA issues licenses, certificates, registrations and permits in over 250 business and professional categories.²¹ There are several profession-

¹⁵ CAL. BUS. & PROF. CODE § 135.5(a) (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

¹⁶ CAL. BUS. & PROF. CODE § 135.5(b) (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

¹⁷ See CAL. BUS. & PROF. CODE § 2050 (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

¹⁸ S. 1159, 2013-2014 (Cal. 2014), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1159.

¹⁹ See *id.*

²⁰ CAL. BUS. & PROF. CODE § 135.5(b) (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

²¹ See *DCA Boards/Bureaus*, CAL. DEP’T CONSUMER AFF., http://www.dca.ca.gov/about_dca/entities.shtml (last visited Oct. 22, 2017).

specific regulatory boards under its supervision.²² These regulatory boards license, register, and certify individuals and businesses in particular occupations, and discipline license holders who violate practice requirements.²³ Boards are semiautonomous.²⁴ The Governor, the Senate Rules Committee, or the Speaker of the Assembly appoints members.²⁵ State law sets the number of board members and who they represent.²⁶

Members of a board include people representing the profession and people representing the public.²⁷ The Boards, with the assistance of their staffs, set the standards for licensing and renewal of licenses including education, experience, examination, and continuing education requirements.²⁸ They receive, review and issue licenses.²⁹

²² CAL. BUS. & PROF. CODE § 101 (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

²³ CAL. DEP'T OF CONSUMER AFFAIRS, 2016 ANNUAL REPORT 9 (2016), http://www.dca.ca.gov/publications/2016_annrpt.pdf.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See* CAL. DEP'T OF CONSUMER AFFAIRS, WHO WE ARE & WHAT WE DO 14 (2015), http://www.dca.ca.gov/publications/dca_booklet.pdf; CAL. BUS. & PROF. CODE § 101.6 (West, Westlaw through Ch. 467 of 2017 Reg.Sess.) stating that the Boards:

establish minimum qualifications and levels of competency and license persons desiring to engage in the occupations they regulate upon determining that such persons possess the requisite skills and qualifications necessary to provide safe and effective services to the public, or register or otherwise certify persons in order to identify practitioners and ensure performance according to set and accepted professional standards. They provide a means for redress of grievances by investigating allegations of unprofessional conduct, incompetence, fraudulent action, or unlawful activity brought to their attention by members of the public and institute disciplinary action against persons licensed or registered under the provisions of this code when such action is warranted. In addition, they conduct periodic checks of licensees, registrants, or otherwise certified persons in

They review complaints and engage in disciplinary actions.³⁰ They implement the legislation and regulations relevant to the supervised occupations.³¹

The DCA's Division of Investigation is the law enforcement branch that addresses misconduct by licensees or unlicensed activity.³² It works closely with the Boards that supervise particular professions. DCA's Office of Professional Examination Services ensures that licensing examinations are valid and occupation related.³³

The Department's responsibility is to protect and serve California's consumers.³⁴ It provides access to ethical and competent service providers by assuring that a person who holds a license has met California's competency

order to ensure compliance with the relevant sections of this code.

²⁹ *Id.*

³⁰ *Id.*

³¹ See CAL. DEP'T OF CONSUMER AFFAIRS, 2016 ANNUAL REPORT 9 (2016), http://www.dca.ca.gov/publications/2016_annrpt.pdf, which includes legislation and regulations relevant to each supervised occupation; see also CAL. DEP'T OF CONSUMER AFFAIRS, 2017-2020 STRATEGIC PLAN 3 (2017), <http://www.dca.ca.gov/publications/strategicplan.pdf>.

³² California Department of Consumer Affairs, *supra* note 22 at 4.

³³ See California Department of Consumer Affairs, *supra* note 25 at 4-5.

³⁴ See CAL. DEP'T OF CONSUMER AFFAIRS, 2017-2020 STRATEGIC PLAN 2 (2017), <http://www.dca.ca.gov/publications/strategicplan.pdf>. The DCA was created in 1876 to protect consumers. See CAL. DEP'T OF CONSUMER AFFAIRS, WHO WE ARE & WHAT WE DO 14 (2015), http://www.dca.ca.gov/publications/dca_booklet.pdf. The statutory purpose of the DCA is as follows:

[B]oards, bureaus, and commissions in the department are established for the purpose of ensuring that those . . . deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California.

CAL. BUS. & PROF. CODE § 101.6 (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

qualifications such as education, experience and examination requirements.³⁵ It further protects the health, safety and welfare of Californians by ensuring its boards and bureaus prevent harmful conduct by licensed professionals and eliminate unlicensed activity.³⁶ The change in the law removing restrictions based on immigration status allows the sole focus of the Department of Consumer Affairs and the Boards to be on applicants' expertise, the competency criteria for licensed professions, and the requirements and process to assure consumer protection through enforcement of competency and licensing requirements.

Lawyers and teachers are regulated by other California state entities. A statute in 2013 provided for bar membership by the California Supreme Court without regard to immigration status.³⁷ Teaching certification is regulated by the California Commission on Teacher Credentialing, which "serve[s] as a state standards board for educator preparation for the public schools of California, the licensing and credentialing of professional educators in the State, the

³⁵ See CAL. DEP'T OF CONSUMER AFFAIRS, 2017-2020 STRATEGIC PLAN 2 (2017), <http://www.dca.ca.gov/publications/strategicplan.pdf>.

³⁶ *Id.* at 6.

³⁷ CAL. BUS. & PROF. CODE § 6064(b) (West); CAL. BUS. & PROF. CODE § 6064(b) (West); CAL. BUS. & PROF. CODE § 6064(b) (West, Westlaw through Ch. 467 of 2017 Reg.Sess) (providing that the California Supreme Court may admit an applicant who is not lawfully present in the United States as an attorney at law if the applicant has fulfilled the requirements for admission to practice law) (amended 2013); *Accord In re Garcia*, 315 P.3d 117 (Cal. 2014) (holding that state law and state public policy do not preclude admitting undocumented immigrants to the state bar); *Accord Matter of Vargas*, 10 N.Y.S.3d 579 (App. Div. 2015) (holding that an undocumented non-citizen may be afforded bar membership in New York). For discussions of bar membership, see generally FRANCES DÁVILA ET AL., BICKEL & BREWER LATINO INST. FOR HUMAN RIGHTS AT N.Y. UNIV. SCH. OF LAW & LATINOJUSTICE PRLDEF, LIFTING THE BAR: UNDOCUMENTED LAW GRADUATES & ACCESS TO LAW LICENSES (2014), http://latinojustice.org/briefing_room/resources/REPORT_Lifting_the_Bar_Undocumented_Law_Graduates_Access_to_Law_Licenses_Feb_2014.pdf; Janet M. Calvo et al., Footnote Forum, *DACA and NY Bar Eligibility*, 17 CUNY L. REV. 47 (2013), <http://www.cunylawreview.org/wp-content/uploads/2013/11/14-Calvo-Lung-Newman.pdf>; Olivas, *supra* note 8.

enforcement of professional practices of educators, and the discipline of credential holders in the State of California.”³⁸ The California teaching license application requires applicants to provide either a social security number or tax identification number.³⁹

C. Professions Covered by the Legislation

The statute that precludes immigration category as a criterion for licensing covers numerous health-related professions.⁴⁰ These include: acupuncturists, clinical social workers, educational psychologists, marriage and family therapists, chiropractors, dentists, dental hygienists, doctors, research psychoanalysts, midwives, naturopathic doctors, occupational therapists, optometrists, dispensing opticians, osteopathic physicians and surgeons, pharmacists, physical therapists, physical therapist assistants, physician assistants, podiatric doctors, nurses, nurse midwives, nurse practitioners, audiologists, speech-language pathologists, veterinarians, and psychologists.⁴¹

Other occupations licensed by the DCA include a long list of professional and business-related occupations.⁴² Some of the professions included are accountants, architects, certified shorthand court reporters, engineers, land surveyors, geologists, geophysicists, landscape architects, professional fiduciaries, real estate brokers, and security and investigative services professionals. Appendix 1 includes a

³⁸ *About the Commission*, Cal. Comm’n on Teacher Credentialing, <https://www.ctc.ca.gov/commission/default> (last updated May 9, 2017).

³⁹ *Application for Credential Authorizing Public School Service*, CAL. COMM’N ON TEACHER CREDENTIALING, https://www.ctc.ca.gov/docs/default-source/leaflets/414.pdf?sfvrsn=24453907_2 (last modified Apr. 2017).

⁴⁰ CAL. BUS. & PROF. CODE § 135.5 (West, Westlaw through Ch. 467 of 2017 Reg.Sess.).

⁴¹ See *infra* Appendix 1 for a full list and for the relevant state statutes.

⁴² *Id.*

full list of the occupations licensed by the California DCA.⁴³

D. History of the Legislation and Positions in Favor and Opposed

California State Senator Ricardo Lara championed the California legislation that removed immigration category as a criterion for licensing.⁴⁴ He stated that the law creates new economic opportunities for California's immigrant workforce and also stimulates the California economy.⁴⁵ He noted that highly skilled immigrants would be able to contribute both their talents and their tax dollars.⁴⁶ He further pointed out that immigrants in California are entrepreneurial, thereby contributing to California's economic output, and that undocumented immigrants alone contributed about 130 billion of California's gross domestic product.⁴⁷

A California Senate Floor Bill Analysis stated the positions in support of the licensing legislation.⁴⁸ The Los Angeles Area Chamber of Commerce noted that many non-citizens come to California as children and are educated in elementary and secondary schools in the state. Many continue onto higher education, availing themselves of state laws that offer access to in-state tuition. They overcome many obstacles to succeed, but without access to professional licenses, they are limited in their ability to contribute to the

⁴³ *Id.*

⁴⁴ See Ricardo Lara, *Realizing the DREAM: Expanding Access to Professional Licenses for California's Undocumented Immigrants*, 27 HARV. J. HISP. POL'Y 26 (2014).

⁴⁵ *Id.* at 27.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Senate Floor Analyses*, Bill Analysis for *SB-1159 Professions and Vocations: License Applicants: Individual Tax Identification Number*, CAL. LEGIS. INFO. (Aug. 29, 2014) at 7-8 http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB1159.

state.⁴⁹ The California Immigrant Policy Center similarly stated that without access to professional licenses, individuals would be limited in their economic contributions to the State, because they would be restricted in their ability to participate in the workforce or start a business.⁵⁰ The National Association of Social Workers stated that it was in the best interest of the state to support efforts to educate its workforce and enable all residents to improve their economic mobility and self-sufficiency.⁵¹

Several other groups also supported the legislation including Educators for Fair Consideration, Pre-Health Dreamers, the American Civil Liberties Union of California, the Coalition for Humane Immigrant Rights of Los Angeles, and the Mexican American Legal Defense and Educational Fund.⁵² These organizations asserted that allowing professional licensure improves access to economic opportunities to immigrants in California.⁵³ Further, enabling more Californians to work as licensed professionals will increase immigrants' contributions to the State's economy.⁵⁴ They pointed out that California is currently home to more than 10 million immigrants, 1.85 million who are undocumented workers. These immigrant workers contributed an estimated \$2.7 billion in state taxes in 2010.⁵⁵ They also noted that by expanding eligibility for professional licenses regardless of immigration status, California was recognizing immigrant contributions and continuing immigrant integration efforts.⁵⁶

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Advocates Applaud Signing of Professional Licensing Bill for Immigrants*, ACLU NORTHERN CAL. (Sept. 28, 2014), <https://www.aclunc.org/news/advocates-applaud-signing-professional-licensing-bill-immigrants>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

The Federation of American Immigration Reform opposed the bill arguing that California should not obliterate the distinction between people legally present and those who are in violation of federal law.⁵⁷ The legislative record does not include a response to this objection. However, the California Supreme Court responded to a similar argument in the context of bar admission in the case *In re Garcia*.⁵⁸ The California state legislature passed a law allowing the bar admission of applicants “not lawfully present in the United States.”⁵⁹ The California Court examined whether there were any reasons under state law that undocumented immigrants, as a class or group, should not be admitted to the State Bar, and whether Mr. Garcia as an individual possessed the requisite character and fitness for bar admission.⁶⁰ The court concluded there was no state law or state public policy that would justify precluding undocumented immigrants, as a class, from obtaining a law license in California and that Mr. Garcia “met his burden of demonstrating that he possess[e]d the requisite good moral character to qualify for a law license.”⁶¹ Mr. Garcia was admitted to the California bar in January 2014.⁶²

The court responded to objections to the bar membership of undocumented non-citizens raised by Amicus.⁶³ The Amicus argued that an undocumented immigrant could not properly take the oath of office required of an attorney because an undocumented immigrant is in violation of federal immigration law simply by being present

⁵⁷ *Legislative Update: 5/21/2014*, FED’N FOR AM. IMMIGR. REFORM (May 21, 2014), <http://www.fairus.org/legislative-updates/legislative-update-5-21-2014>.

⁵⁸ *In re Garcia*, 315 P.3d 117 (Cal. 2014).

⁵⁹ CAL. BUS. & PROF. CODE § 6064(b) (West 2017).

⁶⁰ *In re Garcia*, 315 P.3d at 129–30.

⁶¹ *Id.* at 134.

⁶² *Undocumented Immigrant Granted Law License by Calif. Supreme Court*, CBS NEWS (Jan. 2, 2014, 6:34 PM), <https://www.cbsnews.com/news/sergio-garcia-undocumented-immigrant-granted-law-license-by-california-supreme-court/>.

⁶³ *In re Garcia*, 315 P.3d at 129–30.

in the country without authorization.⁶⁴ The court looked at the issue of conduct related to the oath broadly, and stated that the fact that a bar applicant's past or present conduct may violate some law does not invariably render the applicant unqualified to be admitted to the bar or to take the required oath.⁶⁵ The court concluded that the fact that an undocumented immigrant is present in the United States without lawful authorization does not involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.⁶⁶ In doing so, the court noted that an undocumented immigrant's presence in this country can result in a variety of civil sanctions, but is not a crime, and that federal law grants federal immigration officials broad discretion in determining under what circumstances to seek to impose civil sanctions upon an undocumented immigrant and in determining what sanctions to pursue.⁶⁷ The court concluded that the fact that an undocumented immigrant's presence in this country violates federal statutes is not a sufficient or persuasive basis for denying undocumented immigrants admission to the State Bar as a class.⁶⁸

III. NEW YORK'S REGULATORY APPROACH

A. The New York Regulations

On May 17, 2016, the New York State Board of Regents permanently adopted the Commissioner of Education's regulations to provide expanded categories of non-citizens' eligibility for professional licenses.⁶⁹ The New

⁶⁴ *Id.*

⁶⁵ *Id.* at 130.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 131.

⁶⁹ *Board of Regents Permanently Adopts Regulations to Allow DACA Recipients to Apply for Teacher Certification and Professional*

York Board of Regents also addressed teacher certifications required for public school teachers.⁷⁰ The regulations provide that no otherwise qualified individual shall be denied a professional license or teacher certification “if the individual is not unlawfully present in the United States, including but not limited to individuals granted DACA relief or similar relief from deportation.”⁷¹ The memorandum that responded to comments clarified that those with similar relief include non-citizens who are PRUCOL.⁷²

B. The New York System of Professional Licensing and Teacher Certification

The New York State Board of Regents has special authority over a combination of state education policy, educational institutions, and professional licensing.⁷³ The Regents provide guidance for and supervision of the New York State Department of Education and the University of

Licenses, N.Y. ST. EDUC. DEP’T (May 17, 2016), <http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher>.

⁷⁰ *Id.*

⁷¹ N.Y. COMP. CODES R. & REGS. tit. 8 § 59.4 (2017); N.Y. COMP. CODES R. & REGS. tit. 8 § 80-1.3 (2017)

⁷² *Memorandum from Douglas E. Lentivech to Professional Practices Committee & Higher Education Committee* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

⁷³ N.Y. EDUC. LAW § 201 (McKinney 2009), N.Y. EDUC. LAW § 207 (McKinney 2009), N.Y. EDUC. LAW § 6506 (McKinney 2016). This Article does not address all the occupations licensed or certified in New York State. According to the New York Department of Labor 130 occupations are licensed or certified by New York State’s different agencies. New York State Department of Labor, *Occupations Licensed or Certified by New York State*, <https://www.labor.ny.gov/stats/lstrain.shtm>. They have different criteria for non-citizens. For example, the New York State Department of State licenses numerous occupations. Its application forms do not generally inquire into citizenship or immigration category. See for examples, barber, https://www.dos.ny.gov/licensing/barber/barbering_faq.html#; <https://www.dos.ny.gov/licensing/lawbooks/barber.pdf>, real estate appraiser, <http://www.dos.ny.gov/forms/licensing/en/1432-f-a.pdf>, and athlete agent, <http://www.dos.ny.gov/forms/licensing/1640-a.pdf>.

the State of New York.⁷⁴ This includes the education department's Office of the Professions and the Office of Teaching Initiatives. The Board of Regents is a unique governmental entity established by the New York State Constitution.⁷⁵ The New York State Legislature elects the seventeen members of the Board of Regents, one from each of the state's thirteen judicial districts and four at large members.⁷⁶

The New York Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practices of the professions.⁷⁷ The New York Department of Education's Office of Professional Licensing is assisted by State Boards⁷⁸ and determines license eligibility for over fifty professions.⁷⁹ Specific qualifications are set for each profession and may require particular education and courses, examination scores, and experiential or clinical education.⁸⁰

C. Professions Covered by the Regulations

New York's system of professional regulation encompasses nearly 900,000 practitioners and over 30,000 professional practice business entities.⁸¹ Many of the licensed professions are health related, including medicine

⁷⁴ *About the University of the State of New York (USNY)*, <http://www.nysed.gov/about/about-usny>.

⁷⁵ N.Y. CONST. art. XI, § 2 (McKinney 2006).

⁷⁶ N.Y. EDUC. LAW § 201 (McKinney 2009); *see also* New York State Education Department, *About the Board of Regents*, <http://www.regents.nysed.gov/about>.

⁷⁷ N.Y. EDUC. LAW § 6504 (McKinney 2016).

⁷⁸ New York State Department of Education, *State Boards for the Professions* <http://www.op.nysed.gov/boards/>; New York State Department of Education, *State Boards for the Professions Statutory Composition & Current Membership*, <http://www.op.nysed.gov/boards/bdcomp.htm>

⁷⁹ New York State Department of Education, *The Licensed Professions in New York State*, <http://www.op.nysed.gov/profl>.

⁸⁰ *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, Part 60 (2015).

⁸¹ New York State Department of Education, *Office of the Professions*, <http://www.op.nysed.gov/>.

(physicians and physician assistants), nursing, dentistry, midwifery, pharmacy, occupational and physical therapy, acupuncture, behavior analysis, audiology, chiropractic, dietetics, laboratory technology, massage therapy, medical physics, mental health practitioners, optometry, perfusion, podiatry, psychology, athletic training, respiratory, speech and language therapy, and veterinary medicine. Other professions include social work, architecture, engineering, public accountancy, geology, land surveying, landscape architecture, interior design and shorthand reporters.⁸² Appendix 2 lists these professions, the applicable state statutes and links to the application forms.

The New York Education Law does not restrict licensure based on one's immigration category for a broad number of professions. Twenty-nine professions do not have any statutory requirements regarding citizenship, legal permanent residency, or any immigration category. Additionally, for nine occupations, the New York Education Law does not have any immigration category requirements and further specifically states that an individual does not need to meet any requirement of United States citizenship.⁸³

For thirteen professional licenses, the education law required legal permanent residence.⁸⁴ However, in *Dandamudi v. Tisch*,⁸⁵ the Second Circuit struck down as unconstitutional requirements in New York Education Law that a license applicant had to be a citizen or a legal permanent resident.⁸⁶ This decision applied to the statute regarding pharmacists and other New York statutes that similarly restricted licenses for twelve additional

⁸² New York State Department of Education, *The Licensed Professions in New York State*, <http://www.op.nysed.gov/profl>.

⁸³ See Appendix 2.

⁸⁴ *Id.*

⁸⁵ 686 F.3d 66 (2d Cir. 2012).

⁸⁶ N.Y. EDUC. LAW § 6805(1)(6) (McKinney 2016).

professions.⁸⁷ The *Dandamudi* decision resulted in the removal of all immigration category restrictions for professional licenses from these provisions of the education law, as they are all unconstitutional on the same reasoning.⁸⁸ After *Dandamudi*, the New York legislature did not impose any further restrictions on professional licensing for non-citizens.⁸⁹

The New York Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.⁹⁰ The Office of Teaching Initiatives is responsible for teacher certification.⁹¹ New York State teachers, administrators, and pupil personnel service providers are required to hold a New York State certificate in order to be employed in the State's public schools.⁹² The Office certifies that an individual has met required degree, coursework, assessment, and experience requirements. Certificates are issued in a number of titles in three major categories: classroom teaching, administrative and supervisory, and pupil personnel service (e.g., school counselor, psychologist,

⁸⁷ New York State Education Department, *U.S. Court of Appeals Decision on Litigation Involving 13 Professions that Require U.S. Citizenship or Permanent Lawful Residence for Licensure*, <http://www.op.nysed.gov/news/advisory-notice.html#appeals>.

⁸⁸ As the Second Circuit noted, similar provisions of the New York Education Law required non-citizens to be legal permanent residents to be licensed as physicians, chiropractors, dentists, dental hygienists, veterinarians, veterinary technicians, midwives, engineers, land surveyors, landscape architects, certified shorthand reporters and massage therapists. *Dandamudi*, 686 F.3d at 75–76.

⁸⁹ Proposed legislation would afford licensing to those who are New York state residents, who have requested a state identification number as citizens of the state. *New York Senate Bill No. 776A*, <https://www.nysenate.gov/legislation/bills/2015/S776>.

⁹⁰ N.Y. EDUC. LAW § 3001(2) (McKinney 2015).

⁹¹ New York State Education Department, Office of Teaching Initiatives, *Certification from Start to Finish* (2017), <http://www.highered.nysed.gov/tcert/certificate/certprocess.html>.

⁹² *Id.*

social worker).⁹³ The New York Education Law states a citizenship requirement as a qualification for teaching in the public schools of New York State. However, under the statute, the Commissioner of Education's regulations can authorize aliens to teach in the public schools.⁹⁴

D. Regulatory History

The regulations regarding non-citizen eligibility for professional licenses and teacher certification became effective on June 1, 2016, after a final vote by the New York State Board of Regents on May 17, 2016.⁹⁵ At its February 2016 meeting the Board of Regents Higher Education Committee and Professional Practice Committee discussed amending regulations relating to non-citizen's eligibility for professional licenses and teacher certification.⁹⁶ The proposed regulations were published in the New York State Register on March 9, 2016 designating a forty-five-day comment period.⁹⁷ The Board of Regents Higher Education Committee and Professional Practice Committee

⁹³ *Id.*

⁹⁴ N.Y. EDUC. LAW § 3001(3) (McKinney 2015).

⁹⁵ New York State Education Department, *Board of Regents Permanently Adopts Regulations to Allow DACA Recipients to Apply for Teacher Certification and Professional Licenses* (May 17, 2016), <http://www.nysed.gov/news/2016/board-regents-permanently-adopts-regulations-allow-daca-recipients-apply-teacher>.

⁹⁶ Memorandum from Douglas E. Lentivech & John L. D'Agati to Board of Regents Professional Practice Committee, Higher Education Committee (February 16, 2016), <https://www.regents.nysed.gov/common/regents/files/216heppcd1.pdf>; New York State Education Department, Report of Regents Higher Education/Professional Practice Joint Meeting Committee to The Board of Regents (2016), <https://www.regents.nysed.gov/report/feb-2016/higher-education-professional-practice>.

⁹⁷ MEMORANDUM FROM DOUGLAS E. LENTIVECH & JOHN L. D'AGATI TO BOARD OF REGENTS PROFESSIONAL PRACTICE COMMITTEE, HIGHER EDUCATION COMMITTEE (May 9, 2016), <https://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

recommended the amendment of the regulations⁹⁸ after the presentation of a review of the proposed amendments and the comments received.

The final vote of the Board of Regents approved amendments to two regulations. The first regulation applies to eligibility for the professional licenses supervised by the Department of Education's Office of Professional Licensing.⁹⁹ The second regulation applies to eligibility for teacher certification and registration.¹⁰⁰

⁹⁸ NEW YORK STATE EDUCATION DEPARTMENT, REPORT OF REGENTS HIGHER EDUCATION/PROFESSIONAL PRACTICE JOINT MEETING COMMITTEE TO THE BOARD OF REGENTS (May 2016), <https://www.regents.nysed.gov/report/may-2016/higher-education-professional-practice>.

⁹⁹ N.Y. COMP. CODES R. & REGS. tit. 8, § 59.4 (2017) "Notwithstanding any other provision of this Title to the contrary, no otherwise qualified applicant shall be denied a license, certificate, limited permit or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC section 1621 or any other applicable Federal law. Provided, however that pursuant to 8 USC section 1621(d), no otherwise qualified applicant alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to individuals granted Deferred Action for Childhood Arrivals relief or similar relief from deportation."

¹⁰⁰ N.Y. COMP. CODES R. & REGS. tit. 8, § 80-1.3 (2017) "Notwithstanding any other provision this Part to the contrary, no otherwise qualified applicant shall be denied a certificate under this Part, or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC section 1621 or any other applicable Federal law. Provided, however that pursuant to 8 USC section 1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to applicants granted Deferred Action for Childhood Arrivals relief or similar relief from deportation."

It also states that:

(b) The requirements of subdivision (a) of this section shall not preclude a candidate who is not a citizen of the United States from qualifying for a permit or other authorization to teach in the public schools of New York State, in accordance with specific provisions of the Education

E. The Non-Citizen Categories Eligible for Licensing and Certification

The regulations provide that no otherwise qualified alien shall be precluded if the individual is not unlawfully present in the United States, including but not limited to applicants afforded DACA, or similar relief from deportation.¹⁰¹ A response to a comment clarified that those with similar relief include non-citizens who are PRUCOL.¹⁰² The regulations also provide that non-citizens designated as “qualified aliens,”¹⁰³ nonimmigrants¹⁰⁴, and non-citizens paroled for less than one year¹⁰⁵ under federal law are eligible for licensing.¹⁰⁶ New York thereby considers all these categories of non-citizens as lawfully present in the state.¹⁰⁷

Law that authorize such teaching service by a candidate who is not a citizen of the United States, such as section 3005 of the Education Law.

Section 3005 of the education law allows non-citizens from other states or countries in an exchange program with New York State teachers to be certified or registered in New York.

¹⁰¹ See also New York State Education Department, Office of Teaching Initiatives, *Citizenship/Immigration Status*, <http://www.highered.nysed.gov/tcert/certificate/citizenshipreq.html>.

¹⁰² MEMORANDUM FROM DOUGLAS E. LENTIVECH TO PROFESSIONAL PRACTICES COMMITTEE & HIGHER EDUCATION COMMITTEE (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

¹⁰³ 8 U.S.C. § 1641 (2012).

¹⁰⁴ 8 U.S.C. § 1101(a)(15) (2012).

¹⁰⁵ 8 U.S.C. § 1182(d)(5) (2012).

¹⁰⁶ 8 U.S.C. § 1621 (2012).

¹⁰⁷ New York also considers DACAs as lawfully present for purposes of in-state tuition and eligible as residents of the state. See The City University of New York, *University Tuition & Fee Manual, IV Residency, Part 1, Qualifying Immigration Statuses*, 6 <http://www2.cuny.edu/about/administration/offices/legal-affairs/university-tuition-fee-manual/iv-residency/> New York, like a number of other states, has statutes that make persons who have graduated from high school in New York eligible for in-state tuition even if they are not lawfully present in the state. N.Y. EDUC. LAW §§ 355(2)(h)(8); 6206(7)(a), (a-1); 6301(5). These statutes are a reaction to a federal statute that requires states to afford in-state tuition to any citizen if it provides in-state tuition to an

1. *Deferred Action for Childhood Arrivals* (“DACA”)

The Department of Homeland Security afforded DACA for some non-citizens who entered the country when children through a 2012 memorandum by the Secretary of Homeland Security.¹⁰⁸ DACA is a form of deferred action; deferred action has been available to non-citizens for many

alien who is not lawfully present on the basis of state residency. 8 U.S.C. § 1623(a) (2012). However, as DACAs are lawfully present this restriction does not apply to them and they can be afforded in-state tuition as state residents. But, not all states have agreed and there have been court challenges on the issue. *See, e.g.*, Adhiti Bandlamudi, *DACA Students Argue For In-State Tuition To Ga. Court Of Appeals*, WABE 90.1, Jun 16, 2017, <http://news.wabe.org/post/daca-students-argue-state-tuition-ga-court-appeals>; *see also* Institute for Higher Education Law and Governance, UNIV. HOUS. L. C., *Immigration Litigation in Higher Education and Challenges to DACA program (2004-2015) Immigration-related challenges to financial aid/residency, including DACA*, <http://www.law.uh.edu/ihelg/DACA/immigration-litigation.asp>

There has also been some controversy regarding DACA eligibility for Drivers' Licenses as persons who are lawfully present. *See* National Immigration Law Center, *Access to Driver's Licenses for Immigrant Youth Granted DACA*, <https://www.nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/> and *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017).

¹⁰⁸ Memorandum from the Janet Napolitano, Sec'y of Homeland Security, *Exercising Prosecutorial Discretions with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; *Consideration of Deferred Action for Childhood Arrivals Process*, DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#guidelines>; *Frequently Asked Questions*, DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> (last visited July 11, 2013). For an analysis and critique of DACA, see Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students* (June 11, 2012). William & Mary Bill of Rights Journal, Vol. 21, 2012.

years.¹⁰⁹ Any period of time in deferred action qualifies as a period of stay authorized by the Secretary of Homeland Security. Further, there is a long-standing federal regulation that allows employment authorization to those with deferred action.¹¹⁰ The USCIS reported that as of September 4, 2017 there were 689,800 active DACAs in the United States, 197,900 in California, and 32,900 in New York.¹¹¹

The Department of Homeland Security through United States Citizenship and Immigration Services (“USCIS”), issued guidelines for DACA applicants.¹¹² Applicants had to have been under the age of 31 as of June 15, 2012, have come to the United States before age 16, lived in the United States continuously since June 15, 2007, and have graduated from or be currently enrolled in school, received a General Education Development (GED) certificate, or have been honorably discharged from the military. DACA applicants cannot have been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, or otherwise pose a threat to national security or public safety. Additionally, all applicants had to provide biometrics

¹⁰⁹ See CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, AND RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE (Matthew Bender, Rev. Ed.). See also SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

¹¹⁰ 8 C.F.R. § 274a.12(c) (14).

¹¹¹ *Approximate Active DACA Recipients: State of Residence as of September 4, 2017*, uscis.gov, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

¹¹² DEP’T OF HOMELAND SEC., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS, U.S. CITIZENSHIP AND IMMIGRATION SERVS., (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD#guidelines>.

and undergo background checks.¹¹³

DACA was granted for two years and could be renewed. During this time those granted DACA are not removable from the United States based on immigration status.¹¹⁴ They are eligible for authorization to work¹¹⁵ and can receive an “Employment Authorization Document.”¹¹⁶ They are then issued social security numbers.¹¹⁷

In September of 2017, the Secretary of Homeland Security rescinded the 2012 DACA memorandum,¹¹⁸ following the Trump administration announcement that it is

¹¹³ DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., *INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, USCIS FORM I-821D*, available at <http://www.uscis.gov/files/form/i-821dinstr.pdf>.

¹¹⁴ Memorandum from the Janet Napolitano, Sec’y of Homeland Security, Exercising Prosecutorial Discretions with Respect to Individuals Who Came to the United States as Children (Jun. 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹¹⁵ The employment provisions of the immigration law target employers for sanction, rather than employees. The provisions prohibit an employer from hiring an individual as an employee to work in the U.S. if the employer knows or has reason to know that the individual is unauthorized to work in the U.S. 8 U.S.C. § 1324(a)(1) (2012).

¹¹⁶ “Q2: What is deferred action for childhood arrivals (DACA)? A2: On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization.” *Frequently Asked Questions*, DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Jan. 18, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD>.

¹¹⁷ SOC. SECURITY ADMIN, *SOCIAL SECURITY NUMBER—DEFERRED ACTION FOR CHILDHOOD ARRIVALS*, available at http://www.socialsecurity.gov/pubs/deferred_action.pdf.

¹¹⁸ Memorandum from Elaine C. Duke, Acting DHS Secretary, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, dhs.gov, <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (September 5, 2017).

phasing out DACA.¹¹⁹ DACA will continue for approved individuals until their current DACA permission expires. Those whose DACA permission will expire before March 5, 2018 can apply for an extension by making an application before October 5, 2017. Pending applications for DACA continued to be considered, but no new applications were processed.¹²⁰ However, President Trump’s official statement affirmed, “I have advised the Department of Homeland Security that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.”¹²¹ Furthermore, USCIS has a policy that it will not refer information obtained from DACA applications to immigration enforcement agencies except to address national security, public safety, serious criminal activity, or fraud.¹²²

¹¹⁹ *Deferred Action for Childhood Arrivals 2017 Announcement*, USCIS, <https://www.uscis.gov/daca2017> (last updated Sept. 5, 2017).

¹²⁰ *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> (last published Sept. 5, 2017).

¹²¹ The White House, Statement from President Donald J. Trump, Sept. 5, 2017 <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump>

¹²² *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca> (last published Sept. 5, 2017) “Q7: Once an individual’s DACA expires, will their case be referred to ICE for enforcement purposes? A7: Information provided to USCIS in DACA requests will not be proactively provided to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance (www.uscis.gov/NTA). “ USCIS, *Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, November 7, 2011, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

There is some potential for the continuation of DACA or an alternative that provides immigration status for those who came to the United States as children. Several cases have challenged the rescission of DACA,¹²³ including lawsuits brought by the Attorneys General of New York¹²⁴ and California.¹²⁵ They assert that the rescission is unconstitutional and violates the Administrative Procedure Act, among other claims. Also, legislation has been proposed that would afford those who came to the United States as

¹²³ There are two cases in New York: Compl. for Declaratory and Injunctive Relief, *New York v. Donald Trump*, No. 17-CV-5228 (E.D.N.Y. Sept. 6, 2017) https://ag.ny.gov/sites/default/files/new_york_et_al_v_trump_et_al_-_17cv5228.pdf; Letter from Michael J. Wishnie to Judge Nicholas G. Garaufis re: *Batalla Vidal et al. v. Baran et al.*, No. 1:16-CV-04756 dated Sept. 5, 2017 <https://t.co/TdSCovtF6U?amp=1>;

There are four cases in California: Compl. for Declaratory and Injunctive Relief, *The Regents of the University of California v. U.S. Dep't of Homeland Security*, No. 3:17-CV-05211 (N.D. Cal. Sept. 8, 2017) <https://t.co/rtXwjaUGEB?amp=1>; Compl. for Declaratory and Injunctive Relief, *California v. U.S. Dep't of Homeland Security* (N.D. Cal. Sept. 11, 2017) <https://t.co/7quA5nYkbG?amp=1>; Compl. for Violation of Fifth Amendment Equal Protection and Violation of 5 U.S.C. §§ 553 & 706(2)(D), *City of San Jose v. U.S.*, No. 5:17-cv-05329 (N.D. Cal. San Jose Div., Sept. 14, 2017); Compl. for Declaratory and Injunctive Relief, *Dulce Garcia v. U.S.*, 3:17-CV-05380 (N.D. Cal. San Fran. Div., Sept. 18, 2017) <https://www.scribd.com/document/359320225/Dulce-Garcia-Et-Al-v-United-States-Et-Al>

¹²³ Sixteen State Attorney Generals joined together in a lawsuit filed in the U.S. District Court for the Eastern District of New York. <https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca>; https://ag.ny.gov/sites/default/files/new_york_et_al_v_trump_et_al_-_17cv5228.pdf.

¹²⁴ Sixteen State Attorney Generals joined together in a lawsuit filed in the U.S. District Court for the Eastern District of New York. <https://ag.ny.gov/press-release/ag-schneiderman-files-lawsuit-protect-dreamers-and-preserve-daca>; https://ag.ny.gov/sites/default/files/new_york_et_al_v_trump_et_al_-_17cv5228.pdf

¹²⁵ Compl. for Declaratory and Injunctive Relief, *California v. U.S. Dep't of Homeland Security* (N.D. Cal. Sept. 11, 2017) <https://t.co/7quA5nYkbG?amp=1>.

children a pathway to a regular immigration status.¹²⁶ President Trump has tweeted that if Congress does not legalize DACA in six months, he will revisit the issue.¹²⁷

2. *Permanently Residing Under Color of Law* (“PRUCOL”)

The New York memorandum responding to comments on proposed regulations clarified that non-citizens who are PRUCOL, are eligible for licensing and teacher certification.¹²⁸ PRUCOL is a term in New York court decisions,¹²⁹ regulations¹³⁰ and administrative

¹²⁶ Dream Act of 2017, S. 1615, 115th Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1615/text>; Dream Act of 2017, H.R. 3440, 115th Cong. (2017),

<https://www.congress.gov/bill/115th-congress/house-bill/3440/text>; American Hope Act of 2017, H.R. 3591, 115th Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/3591/text?r=1>.

¹²⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200>. Glenn Thrush and Maggie Haberman, *To Allies’ Chagrin, Trump Swerves Left*, N.Y. TIMES: POLITICS NEWS ANALYSIS, <https://www.nytimes.com/2017/09/06/us/politics/trump-democrats-deal.html> (Sept. 6, 2017); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017, 3:28 AM) <https://twitter.com/realDonaldTrump/status/908276308265795585>; Peter Jacobs and Bryan Logan, *‘If we don’t have the wall, we’re doing nothing’: Trump pushes back on intense criticism over dealing with Democrats on immigration*, Sep. 14, 2017 <http://www.businessinsider.com/trump-tweets-no-deal-on-daca-2017-9>.

¹²⁸ *Memorandum from Douglas E. Lentivech & John L. D’Agati to Board of Regents Professional Practice Committee, Higher Education Committee* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

¹²⁹ See, e.g., *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977) cert. denied sub nom., *Shang v. Holley*, 435 U.S. 947 (1978); *Aliessa v. Novello*, 96 N.Y.2d 418 (2001); *Papadopoulos v. Shang*, 67 A.D.2d 84 (1st Dep’t 1979); *Brunswick Hosp. Center, Inc. v. Daines*, , 26 Misc.3d 1225(A) (2010); *Tonashka v. Weinberg*, 178 Misc.2d 280 (N.Y. Sup. Ct. 1998); see also Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L & SOC. CHANGE 395 (1988).

memorandums.¹³¹ According to the New York Court of Appeals, the PRUCOL designation is used to classify aliens of whom immigration authorities are aware, but are not deporting.¹³² New York regulation and directives state that the term includes those who are residing in the United States with the knowledge and acquiescence or permission of federal immigration authorities whose departure the federal agency does not contemplate enforcing.¹³³ A non-citizen is considered an individual whose departure the USCIS does not contemplate enforcing if, based on all the facts and circumstances of the particular case, it appears that the USCIS is otherwise permitting the immigrant to reside in the United States indefinitely, or it is the policy or practice of the USCIS not to enforce the departure of non-citizens in a particular category.¹³⁴

PRUCOL includes non-citizens who have requested or been granted deferred action, have been paroled into the United States for a period of less than one year, are under an Order of Supervision, have been granted an indefinite stay of

¹³⁰ N.Y. COMP. CODES R. & REGS. tit. 18, § 360-3.2(j)(ii) (explaining that a person is PRUCOL if such a person is “residing in the United States with the knowledge and permission or acquiescence of the federal immigration agency and whose departure from the U.S. such agency does not contemplate enforcing”).

¹³¹ E.g. OFFICE OF HEALTH INSURANCE PROGRAMS., N.Y. STATE DEP’T OF HEALTH GIS 08 MA/009, *Documentation Guide to Citizenship and Immigrant Eligibility for Health Coverage in New York State* <http://onlineresources.wnyc.net/pb/docs/08ma009.pdf>.

¹³² *Aliessa v. Novello*, 96 N.Y.2d 418 at n.2 (2001).

¹³³ N.Y. COMP. CODES R. & REGS. tit. 18 § 360-3.2(j)(ii); OFFICE OF MEDICAID MGMT., N.Y. STATE DEP’T OF HEALTH, 04 OMM/ADM-7, CITIZENSHIP & ALIEN STATUS REQUIREMENTS FOR THE MEDICAID PROGRAM 21 (2004); https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/04adm-7.pdf.

¹³⁴ OFFICE OF MEDICAID MGMT., N.Y. STATE DEP’T OF HEALTH, 04 OMM/ADM-7, CITIZENSHIP & ALIEN STATUS REQUIREMENTS FOR THE MEDICAID PROGRAM 19 (2004); https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/04adm-7.pdf.

deportation, have been granted indefinite voluntary departure, have an approved immediate relative petition and family members covered by the petition, have properly filed an application for adjustment of status to lawful permanent resident, have been granted deferred enforced departure, entered and continuously resided in the United States before January 1, 1972 (registry eligible), or or have been granted suspension of deportation. It also includes individuals applying for adjustment of status, asylum, or suspension of deportation or cancellation of removal, citizens of the Federated States of Micronesia and the Marshall Islands, individuals granted Temporary Protected Status (TPS) and those applying for TPS, individuals with a K, V, S or U visa or applying for such a visa. It includes any other non-citizen living in the United States with the knowledge and permission or acquiescence of the federal immigration agency and whose departure the agency does not contemplate enforcing.¹³⁵

New Yorkers who have requested Deferred Action are considered PRUCOL since federal immigration officials have knowledge of and have acquiesced in their presence; those granted DACA are PRUCOL because of the immigration authorities' knowledge of and permission for their presence in the country.¹³⁶ Even in the event that DACA expires and new legislation is not enacted, those with expired DACA should continue as PRUCOL; they are New Yorkers within the knowledge and acquiescence of immigration officials unless in removal proceedings and

¹³⁵ OFFICE OF HEALTH INSURANCE PROGRAMS., N.Y. STATE DEP'T OF HEALTH GIS 08 MA/009, *Documentation Guide to Citizenship and Immigrant Eligibility for Health Coverage in New York State* 10 <http://onlineresources.wnyc.net/pb/docs/08ma009.pdf>; The City of New York, Human Resources Administration/Department of Social Services, *GUIDE TO HEALTH INSURANCE AND HEALTH CARE SERVICES FOR IMMIGRANTS IN NEW YORK CITY* 7-8 (2016), <https://www1.nyc.gov/assets/ochia/downloads/pdf/guide-to-health-insurance-for-immigrants.pdf>; <http://www1.nyc.gov/site/immigrants/help/city-services/insurance.page>.

¹³⁶ *Id.*

without relief applications pending.¹³⁷ Immigration authorities have extensive knowledge about each person with expired DACA from their applications and acquiesce to their presence through the policy of generally not referring expired DACAs for removal or the actual practice of not initiating removal proceedings against an individual who had DACA.

3. *Non-citizen Categories Designated Under Federal Law*

The New York regulations include as eligible for licensing the categories of non-citizens listed as federally eligible for licensing.¹³⁸ This statute lists non-citizens designated as “qualified aliens,”¹³⁹ nonimmigrants,¹⁴⁰ and non-citizens paroled for less than one year.¹⁴¹ “Qualified aliens” include legal permanent residents, non-citizens granted asylum, refugees, parolees for a year or more, non-citizens for whom deportation has been withheld, conditional entrants, Cuban Haitian entrants, certain “battered” aliens and applicants or recipients of T visas.¹⁴²

IV. *FEDERALISM AND EQUAL PROTECTION*

The regulation of occupational licensing is a traditional state function as part of a state’s control over the health, safety and welfare of its residents.¹⁴³ As such, the

¹³⁷ *Id.*

¹³⁸ 8 U.S.C. § 1621(a) (2012).

¹³⁹ 8 U.S.C. § 1641 (2012).

¹⁴⁰ 8 U.S.C. § 1101 (a)(15) (2012).

¹⁴¹ 8 U.S.C. § 1182(d)(5) (2012).

¹⁴² 8 U.S.C. § 1641 (2002).

¹⁴³ *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101, 1110 (2015); *Douglas v. Noble*, 261 U.S. 165, 167 (1923); *Graves v. Minnesota*, 272 U.S. 425, 427 (1926); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905); “Since colonial times, the regulation of professions has been seen as a state activity in the United States.” Milton Heumann, et al., *Prescribing Justice: The Law and*

state's sovereignty is protected by the principles of federalism under the Tenth Amendment of the United States Constitution.¹⁴⁴ But in making any distinctions, a state is also subject to the equal protection provisions of the federal constitution and the constitution of the state.¹⁴⁵

Both California and New York had to confront a federalism issue because of a federal statute that purported to limit state authority in determining the eligibility of non-citizens for professional licensing.¹⁴⁶ California passed a state law that complied with the federal statute's limits. New York asserted its authority to regulate occupations according to its state constitutional, legislative, and administrative structure. New York's regulations also had to satisfy equal protection as they made distinctions among categories of non-citizens. Since California's statute afforded eligibility for professional licensing without regard to immigration category, an equal protection issue was not raised.

A. Federalism

Both California and New York confronted a federal statute, 8 U.S.C. § 1621, which purported to restrict the ability of states to afford professional licensing to non-citizens. Section 1621 is part of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). Congress enacted PRWORA in 1996. PRWORA was a reform initiative designed to change means-tested government welfare.¹⁴⁷ Title IV of PRWORA, which includes section 1621, addresses welfare benefits for aliens.¹⁴⁸ The goals of

Politics of Discipline for Physician Felony Offenders, 17 B.U. PUB. INT. L.J. 1, 5 (2007).

¹⁴⁴ See *New York v. United States*, 505 U.S. 144 (1992); *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015).

¹⁴⁵ See, e.g., *Aliessa v. Novello*, 96 N.Y.2d 418, 424–25 (2001).

¹⁴⁶ 8 U.S.C. § 1621 (2012).

¹⁴⁷ *Aliessa v. Novello*, 96 N.Y.2d 418, 424–25 (2001).

¹⁴⁸ 8 U.S.C. § 1611 (2012).

this title, as stated in the statute, were to promote self-sufficiency of aliens, and to discourage aliens from immigrating to the United States to receive welfare.¹⁴⁹ The statute was focused on limiting means-tested welfare benefits and promoting economic self-sufficiency,¹⁵⁰ not on preventing access to work and licenses.¹⁵¹ None of the related Congressional reports mention professional licensing.¹⁵²

Yet, buried within the statute's definition of a state public benefit is reference to a professional license "provided by an agency of a State or local government or by appropriated funds of a State or local government."¹⁵³ The legislative reports do not explain why state professional licenses, which would promote self-sufficiency, are included.

Section 1621 attempts to impose federal limitations on state-only, fully state-financed, benefits,¹⁵⁴ thus raising issues of state sovereignty over areas that are within a state's province. Section (a) provides that a non-citizen is not eligible for state professional licensing unless the non-citizen is a "qualified alien," a nonimmigrant, or an alien who is paroled into the United States for less than one year.¹⁵⁵

¹⁴⁹ 8 U.S.C. § 1601 (2012).

¹⁵⁰ "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes . . . It continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities . . ." 8 U.S.C. § 1601(1) (2012).

¹⁵¹ 110 Stat. 2105–2355; *See In re Garcia*, 315 P.3d 117, 125–26 (Cal. 2014).

¹⁵² *See* H.R. REP. No. 104-651, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2187; H.R. REP. 104–651, at 1445 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2504.

¹⁵³ 8 USC § 1621(c) (2012); Subsection (c) defines, in relevant part, State or local benefits as, "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government."

¹⁵⁴ *Aliessa v. Novello*, 96 N.Y.2d at 426.

¹⁵⁵ 8 U.S.C. § 1621(a) (2012).

Thus, section (a) purports to allow states to afford professional licensing to some non-citizens who only have limited short term federal permission to be in the country, such as those on visitors' visas, and those with parole for less than a year, and to some nonimmigrants, such as visitors, who have no authorization to work.

Section 1621 (d), however, conveys recognition of state authority. Section (d) is entitled, "State authority to provide for eligibility of illegal aliens for State and local public benefits." It states:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996 which affirmatively provides for such eligibility.¹⁵⁶

This section demonstrates that while Congress suggested limiting professional licensing access for some aliens, it recognized that each State had the authority to make its own decisions about the inclusion of non-citizens, even those designated as "illegal."

However, the statute appears to erroneously assume that all non-citizens residing in the country under federal permission or acquiescence are mentioned in section (a). But, section (a) does not include all non-citizens who are employment authorized pursuant to federal statute and regulation or whose presence in the country has either have federal permission or acquiescence. There are several categories of non-citizens that are not included in section (a) who have permission or acquiescence to be in the country through statute, regulation or administrative directives or

¹⁵⁶ 8 U.S.C. § 1621(d) (2012).

practice.¹⁵⁷ Further, there are numerous categories of non-citizens that are not included in section (a) who are afforded employment authorization through regulation.¹⁵⁸ Section (d) therefore has to be interpreted to recognize state authority to afford licensing to categories of non-citizens in the country pursuant to federal permission or acquiescence that are not included in section (a) in addition to those designated as “illegal” or “not lawfully present.” Otherwise, Congress would be purporting to give states authority to allow professional licenses to “illegal” aliens, but not to all those non-citizens who reside in the state through federal permission or acquiescence.

Section 1621(d) therefore appears to be the operative provision that indicates the Congressional objective of allowing state professional licensing to non-citizens who both have and do not have federal authorization to reside in a state, despite the limits of section (a). However, section (d) significantly constrains and coerces states by requiring that they regulate professional licensing, an area of traditional state authority, only through legislation, and only by legislation that is passed after a certain date, and that has particular language.¹⁵⁹

California responded to this federal statute and exercised its state authority. But it did so by enacting a state statute that complied with (d). The California statute specifically states that it is enacted pursuant to subsection (d) of Section 1621 of Title 8 of the United States Code.¹⁶⁰

The New York Board of Regents and Department of Education responded to section 1621 by maintaining the authority over licensing established under state law. They

¹⁵⁷ *Supra*, Part II. E. 2. PRUCOL, Permanently Residing Under Color of Law.

¹⁵⁸ 8 C.F.R. § 274a.12(c).

¹⁵⁹ 8 USC § 1621(d) (2012).

¹⁶⁰ Cal. Bus. & Prof. Code § 135.5(a).

asserted New York's sovereignty over licensing as a traditional area left to the states. They implemented the New York legislative authority and administrative process over licensing and teacher certification. Through the Regents and the Department of Education, New York State authorized licensing through regulation. In doing so, the Regents and the Department asserted state sanctioned administrative authority.

The Department asserted the Board's statutory authority to adopt regulations regarding licensure and teacher certification under state law.¹⁶¹ Under New York State law the Board of Regents has been granted broad authority to supervise admission to the professions.¹⁶² The Commissioner of Education has broad statutory authority to administer admission to the professions¹⁶³ and to adopt relevant regulations subject to Board of Regents approval.¹⁶⁴ Further, the Commissioner of Education has explicit state statutory authority to adopt regulations regarding teacher certification for non-citizens.¹⁶⁵

The Department also pointed to the reasoning of a New York court decision regarding bar membership.¹⁶⁶ In the *Vargas* case, the Second Department found that a reading of 1621 (d) that required state legislation as the sole mechanism to opt out of the restrictions imposed by 1621 (a) unconstitutionally infringed on New York's sovereign authority under the Tenth Amendment to the United States Constitution.¹⁶⁷ The court held that the processes through

¹⁶¹ N.Y. EDUC. LAW §§ 3001, 3003, (McKinney 2015) 6501, 6506 (McKinney 2016).

¹⁶² N.Y. EDUC. LAW §§ Law 207, (McKinney 2009) 6506 (McKinney 2016).

¹⁶³ N.Y. EDUC. LAW § 6507 (McKinney 2016).

¹⁶⁴ N.Y. EDUC. LAW § 207 (McKinney 2009).

¹⁶⁵ N.Y. EDUC. LAW § 3001(3) (McKinney 2015).

¹⁶⁶ *Matter of Vargas*, 131 A.D. 3d 4 (App. Div. 2nd 2015).

¹⁶⁷ *Memorandum to Board of Regents Professional Practice Committee, Higher Education Committee*, May 9, 2016, <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

which a state choose to exercise the authority granted by federal legislation is not a legitimate concern of the federal government.¹⁶⁸

The *Vargas* court relied on United States Supreme Court decisions to establish the ability of states to structure their governmental decision-making processes as they see fit. It stated, “[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”¹⁶⁹ Further, the court noted that the Supreme Court has affirmed that Congress may not “simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”¹⁷⁰ The *Vargas* court found that the New York judicial branch of government had authority over bar membership and determined that Mr. Vargas, a DACA recipient, was eligible for admission to practice law in New York.

Although in a different context, the sovereign control of states over professional licensing is additionally supported by the reasoning in the Supreme Court’s decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.¹⁷¹ In that case, the Supreme Court reaffirmed the long-standing sovereign authority of states over the regulation of professional licensing and practice,¹⁷² stating

¹⁶⁸ *Matter of Vargas*, 131 A.D. 3d 4, 24 (App. Div. 2nd 2015).

¹⁶⁹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012), citing *New York v. United States*, 505 U.S. 144, 162 (1992).

¹⁷⁰ *New York v. United States*, 505 U.S. 144, 161 (1992).

¹⁷¹ *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101, 1110 (2015).

¹⁷² See *Douglas v. Noble*, 261 U.S. 165, 167 (1923); *Graves v. Minnesota*, 272 U.S. 425, 427 (1926); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905); Milton Heumann, et al., *Prescribing Justice: The Law and Politics of Discipline for Physician Felony Offenders*, 17 B.U. PUB. INT. L.J. 1, 5 (2007).

that professional licensing is “an undoubted exercise of state sovereign authority.”¹⁷³

The federal law involved was the Sherman Antitrust Act. As the Court explained, the antitrust law has been interpreted to honor state sovereignty and exempt state professional licensing requirements when the requirements were the result of a clear state policy accompanied by active state supervision. The Court recognized the import of state sovereignty in this area by noting that even a federal law with essential national economic objectives could not burden the States’ power to regulate.¹⁷⁴

Despite the national import of the federal antitrust laws, the Supreme Court stated that the federal laws could not be interpreted to trump state-imposed anticompetitive standards and conduct regarding licensing, as that would undermine the federalism principle of the United States Constitution.¹⁷⁵ According to the Court, state agency action in professional licensing is an exercise of state sovereign power when a state has articulated a clear policy and provides active supervision.¹⁷⁶ The Court recognized that a state is entitled to its sovereign decisions regarding professional licensing despite federal law when a state supervisor who is not an active market participant reviews

¹⁷³ *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. at 1110.

¹⁷⁴ The court stated “Federal antitrust law is a central safeguard for the Nation’s free market structures. In this regard, it is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’” 135 S.Ct. at 1109.

¹⁷⁵ *Id.* at 1110.

¹⁷⁶ *Id.* In *North Carolina State Board of Dental Examiners*, the Court upheld the FTC’s antitrust challenge because active market participants, i.e., licensed dentists, whose actions were not subject to state supervision, dominated this dental board. The Board had declared teeth whitening to be the practice of dentistry and had issued cease and desist letters to non-dentist teeth whiteners without any state agent’s review, rule or regulation.

the substance of decisions and has the power to veto or modify the decision to ensure they accord with state law and policy.¹⁷⁷

Both the New York and California systems have multiple layers of active state supervision. In California, the Department of Consumers Affairs and its Boards provide extensive and active state supervision. In New York, active state supervision is through the Board of Regents and the Department of Education and its Boards.

California did not have to confront the state sovereignty issue because its legislation complied with the federal statute. New York confronted the issue because it chose an administrative rather than legislative path. New York's sovereign authority allowed it to do so. The New York State Board of Regents is a governmental entity established by the New York State Constitution.¹⁷⁸ The New York State Legislature designates members of the Board of Regents.¹⁷⁹ The Regents have special authority over a combination of state education policy, educational institutions and professional licensing.¹⁸⁰

New York actively supervises professional licensing. Under the guidance of the New York State Board of Regents, the Education Department administers and regulates the professions through its Office of the Professions,¹⁸¹ which is assisted by a State Board¹⁸² for each profession.¹⁸³ Applicants are examined for educational qualifications,

¹⁷⁷ *Id.* at 1115–17.

¹⁷⁸ New York State Constitution, Article XI, § 2. (McKinney 2006)

¹⁷⁹ N.Y. EDUC. LAW § 202 (McKinney 2009); *see also* New York State Education Department, *About the Board of Regents*, <http://www.regents.nysed.gov/about>.

¹⁸⁰ N.Y. EDUC. LAW §§ 201, 207 (McKinney 2009), 6506 (McKinney 2016).

¹⁸¹ *Id.*

¹⁸² New York Education Department, *State Boards for the Professions*, <http://www.op.nysed.gov/boards/>.

¹⁸³ N.Y. EDUC. LAW, Title VIII (McKinney 2016).

required testing and character and fitness according to the regulations set by the Rules of the Board of Regents and the Regulations of the Commissioner of Education.¹⁸⁴ Further, the Board of Regents has enacted rules, policies and disciplinary procedures for professional misconduct.¹⁸⁵

Therefore, in New York, state agency action in professional licensing is an exercise of the state's sovereign power. The structure of the New York's governing systems involves state supervisors who are not active market participants, who review the substance of decisions, and who have the power to veto or modify decisions to ensure they accord with state law and policy.

New York State has chosen through its constitution and legislature to establish government entities with authority over an interrelated combination of education, educational institutions and professional licensing. Under the principles of federalism, the federal government cannot undermine the state's decision-making process by coercing or commandeering the Board of Regents and Department of Education structure and authority by imposing federal licensing criteria.

There is more reason not to impose federal restrictions based on 8 U.S.C. § 1621 than to not impose antitrust restrictions. Unlike the Sherman Act's strong national antitrust policy, section 1621 does not set forth a uniform national policy. In *Aliessa v. Novello*,¹⁸⁶ the New

¹⁸⁴ *Id.*; see also New York State Education Department, *Regulations of the Commissioner of Education*, <http://www.op.nysed.gov/title8/opregs.htm>; New York State Education Department, *Rules of the Board of Regents*, <http://www.op.nysed.gov/title8/oprules.htm>.

¹⁸⁵ *Id.* at parts 29 and 31; N.Y. EDUC. LAW §§ 6507, 6508, 6509 (McKinney 2016); New York State Education Department, *New York's Professional Misconduct Enforcement System*, <http://www.op.nysed.gov/opd/>.

¹⁸⁶ *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

York Court of Appeals found that section 1621 and other sections of the PRWORA did not reflect a uniform policy, but, rather, “potentially wide variation based on localized or idiosyncratic concepts”¹⁸⁷ The court in *Vargas* similarly found that in light of the opt-out provision of 1621(d), the federal statute does not constitute a comprehensive ban on state action.¹⁸⁸

New York’s assertion of its state sovereign control over the state’s established process for professional licensing opens the door for other states to consider the licensing of non-citizens pursuant to their particular state’s structure. This approach frees a state from a federal attempt to control the process and timing of state criteria for professional licensing.

B. Equal Protection

In promulgating its new rules, the New York Department of Education and the Regents considered that restrictions on licensing non-citizens could violate equal protection.¹⁸⁹ California did not address this issue because it passed legislation that treated all applying for licensing equally regardless of citizenship or immigration status.¹⁹⁰

Both the New York Court of Appeals¹⁹¹ and the Second Circuit¹⁹² found that New York State’s discrimination among categories of non-citizens violates equal protection

¹⁸⁷ *Id.* at 435.

¹⁸⁸ *Matter of Vargas*, 131 A.D. 3d at 23.

¹⁸⁹ *Memorandum to Board of Regents Professional Practice Committee, Higher Education Committee*, May 9, 2016, <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

¹⁹⁰ CAL. BUS. & PROF. CODE § 135.5 (West 2012).

¹⁹¹ *Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

¹⁹² *Dandamudi v. Tisch*, 686 F.3d 66 (2012) (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) (holding that aliens are considered a suspect class and applying strict scrutiny to find a New York state statute that prohibited employment authorized aliens from working as pharmacists unconstitutional).

unless justified by a compelling state interest with regard to Medicaid and professional licensing.¹⁹³ A compelling state interest was not found in either case for distinctions among categories of non-citizens. However, with regard to public school teachers, the United States Supreme Court found that a state requirement of citizenship could be justified only by a reasonable relationship to a legitimate government purpose because teaching was a governmental function.¹⁹⁴

The New York Court of Appeals found that strict scrutiny applies to state laws affecting non-citizens of whom federal immigration officials are aware but are not deporting.¹⁹⁵ In *Aliessa v. Novello*¹⁹⁶ the New York Court of Appeals concluded that a New York statute that afforded Medicaid to certain categories of non-citizens in the United States with the knowledge of federal immigration authorities, but not to others, violated the Equal Protection Clauses of the United States and New York State Constitutions. The Court of Appeals analyzed the equal protection claim by applying strict scrutiny, thereby requiring that the statute further a compelling state interest by the least restrictive means.¹⁹⁷

In *Aliessa*, New York State argued that the state statute was constitutional in that it did only what the federal statute authorized it to do with regard to federal immigration policy. The court rejected this assertion and

¹⁹³ In this conclusion, both the Court of Appeals and the Second Circuit significantly relied on the Supreme Court's decision and analysis in *Graham v. Richardson*, 403 U.S. 365, 382 (1971). For a discussion of other cases rejecting or upholding restrictions on access to occupations based on immigration status, see generally Jenessa Calvo-Friedman, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597 (2014).

¹⁹⁴ *Ambach v. Norwick*, 441 U.S. 68 (1979).

¹⁹⁵ *Aliessa*, 96 N.Y.2d at 430. The non-citizens included those in various categories that met the criteria for PRUCOL, permanently residing under color of law. *Id.* at 422 n.2.

¹⁹⁶ *Id.* at 418.

¹⁹⁷ *Id.*

stated, “Given our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria.”¹⁹⁸ The court held that a federal statute cannot constitutionally authorize New York to determine the extent to which it will discriminate against non-citizens. Quoting *Graham v. Richardson*,¹⁹⁹ the Court stated, “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.”²⁰⁰

The New York Court of Appeals found that the federal law upon which the state relied did not constitute a uniform federal policy to distinguish among aliens.²⁰¹ The court stated, “[i]n the name of national immigration policy, [title IV of PRWORA including section 1621] impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid.”²⁰² In the court’s decision, categories of non-citizens that are not listed under section 1621(a) were included among those unconstitutionally denied state benefits.²⁰³

In *Dandamudi v. Tisch*,²⁰⁴ the Second Circuit held unconstitutional a New York statute that restricted professional licenses to only citizens or legal permanent residents. The Second Circuit determined that discriminating among categories of employment-authorized aliens was not supported by any compelling state interest and therefore violated equal protection.²⁰⁵ The statute’s restrictions were challenged by non-citizens in temporary

¹⁹⁸ *Id.* at 432, n.14.

¹⁹⁹ *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

²⁰⁰ *Aliessa*, 96 N.Y.2d at 434. Some Courts in other states agreed with *Aliessa*’s analysis; some did not. See Stephen Loffredo & Helen Hershkoff, TOUGH TIMES AND WEAK REVIEW: THE 2008 ECONOMIC MELTDOWN AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN US STATE COURTS 234 (Aoife Nolan, ed., Cambridge Univ. Press, 2014).

²⁰¹ *Aliessa*, 96 N.Y.2d at 426, 435, citing 8 USC § 1621(d).

²⁰² *Id.* at 436.

²⁰³ *Id.* at 422 n.2.

²⁰⁴ *Dandamudi*, 686 F.3d at 66.

²⁰⁵ *Id.* at 70.

immigration categories including H-1B²⁰⁶ and TN Canadians who sought pharmacist licenses.²⁰⁷ Non-citizens in the H category are classified under the provision of the immigration law that defines nonimmigrants.²⁰⁸ However, those non-citizens in the TN category are not included in this definition.²⁰⁹ The TN category is established pursuant to the North American Free Trade Agreement (“NAFTA”).²¹⁰

The Second Circuit applied an equal protection analysis under the Fourteenth Amendment to the United States Constitution. The court stated, “(t)here is no question that the Fourteenth Amendment applies to *all* aliens.”²¹¹ It determined that discrimination against non-citizens who were allowed to reside and work in the United States temporarily was subject to strict scrutiny and that the New York statute was not narrowly tailored to further a compelling government interest.²¹² In doing so, the Second Circuit disagreed with a decision of the Fifth Circuit that

²⁰⁶ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2017) (stating that H-1B visas may be given to aliens who come “[T]emporarily to the United States to perform services . . . in a specialty occupation.”).

²⁰⁷ *Dandamudi*, 686 F.3d at 71 n.6 (noting that “Similar provisions of the N.Y. EDUC. LAW preclude non-Legal Permanent Resident aliens from other professions.”).

²⁰⁸ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2017).

²⁰⁹ 8 U.S.C. § 1101(a)(15) (2017).

²¹⁰ *Dandamudi*, 686 F.3d at 70 (citing 8 C.F.R. § 214.6(a)).

²¹¹ *Id.* at 72 (citing *Plyler v. Doe*, 457 U.S. 202, 215 (1982)); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

²¹² *Dandamudi*, 686 F.3d at 80. The court also held that the New York state law was preempted by federal immigration law and unconstitutional under the Supremacy Clause. The state statute stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (i.e. providing work capacity to non-citizens) by imposing an additional burden not sanctioned by Congress; *see also Dingemans v. Bd. of Bar Examiners*, 568 A.2d 354 (Vt. 1989) (bar practice rule that denied law license based on alienage was preempted because it imposed additional burdens not contemplated by the federal immigration regulatory scheme). *See* Jennessa Calvo-Friedman, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L. J. 1597 (2014) (discussing preemption in professional licensing for non-citizens).

had applied a rational relationship test to distinctions among categories of non-citizens and upheld Louisiana's requirement that an individual had to be a citizen or legal permanent resident for admission to its bar.²¹³

The Second Circuit responded to New York State's asserted interest in protecting against the transience of non-citizens who were not permanent residents. The court stated that citizenship and permanent resident status does not guarantee that a professional will remain in the state or the country or have the necessary skill for the profession or have available funds in case of malpractice.²¹⁴ In the court's view, there are other ways to limit a danger to the public of transient professionals, such as requiring malpractice insurance.²¹⁵

Further, the Second Circuit rejected the argument that federal law contemplates allowing states to deny eligibility for licenses based on non-citizen category. The court stated that the federal law just recognizes that states have a legitimate interest in ensuring that a professional license applicant has the necessary educational and experiential qualifications for that profession. However, the state's acceptable police power over licensing cannot "morph under the Supremacy Clause into a determination that a certain subclass of immigrants is not qualified for licensure merely because of their immigration status."²¹⁶

The Second Circuit did not mention 8 U.S.C. § 1621 in its analysis. The court did not need to do so because, as stated by the Supreme Court, "Congress does not have the power to authorize the individual States to violate the Equal

²¹³ *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005), reh'g en banc denied, 444 F.3d 428 (2006), cert. denied, 551 U.S. 1158 (2007).

²¹⁴ *Dandamudi*, 686 F.3d at 79.

²¹⁵ *Id.* (citing *Flores de Otero*, 426 U.S. 572, 606 (1976)).

²¹⁶ *Dandamudi*, 686 F.3d at 80 (citing *Adusumelli v. Steiner*, 740 F.Supp.2d 582, 600 (S.D.N.Y. 2010)).

Protection Clause.”²¹⁷ Under the reasoning in *Dandamudi*, the limitations in § 1621 violate equal protection as to discrimination among employment-authorized non-citizens. The Immigration and Nationality Act (“INA”) gives the executive the authority to authorize employment in the United States of non-citizens who are specifically authorized to be employed by the INA, and, additionally, to other non-citizens.²¹⁸ Employment authorization affords non-citizens authority to work in the United States for employers in the United States. The federal regulation affords employment authorization to a number of classifications of non-citizens, some within a status designation in the INA, and some otherwise authorized.²¹⁹ Specifically, the Second Circuit held that denying licenses to non-citizens in the TN category violated equal protection.²²⁰ The TN category is established pursuant to NAFTA²²¹ and affords work authorization.²²² The TN category is not included in § 1621(a) because TN is not included in 8 U.S.C. § 1101(a)(15), the section that defines nonimmigrants.²²³ Thus, the holding in *Dandamudi* applies to non-citizens with employment authorization who would be barred from professional licensing by 1621.

The reasoning of both the Second Circuit and the New York Court of Appeals support the conclusion that New York State cannot discriminate against categories non-citizens by asserting that some federal law requires it. Discrimination against these non-citizens by New York State is subject to strict scrutiny analysis and violates the Equal Protection Clauses of the New York and the United States Constitution unless justified by a compelling state interest.

²¹⁷ *Graham*, 403 U.S. at 382. See also *Aliessa*, 96 N.Y.2d at 434.

²¹⁸ 8 U.S.C. § 1324a(h)(3)(B) (2012).

²¹⁹ 8 C.F.R. § 274a.12.

²²⁰ *Dandamudi*, 686 F.3d at 66.

²²¹ *Dandamudi*, 686 F.3d at 70 (citing 8 C.F.R. § 214.6(a)).

²²² United States Citizenship and Immigration Services, *TN NAFTA Professionals*, <https://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals>.

²²³ 8 U.S.C. § 1101(a)(15) (2017).

However, even under the more minimal criteria, the rational relationship test, discrimination against non-citizens residing in the country pursuant to administrative discretion would violate equal protection. In *Arizona Dream Act Coalition v. Brewer*,²²⁴ a panel of the Ninth Circuit determined that a preliminary injunction could be granted against Arizona's policy of discrimination among non-citizens by denying drivers' licenses to DACA holders who had Employment Authorization Documents while affording them to other non-citizens with Employment Authorization Documents. The court stated the distinction was "likely to fail even rational basis review" and further, "[w]e discern no rational relationship between Defendants' policy and a legitimate state interest."²²⁵ The District Court then entered a permanent injunction on preemption grounds,²²⁶ which was upheld by the Ninth Circuit.²²⁷ After the denial of a petition for a re-hearing en banc, that Ninth Circuit opinion was amended.²²⁸ In the amended decision the Ninth Circuit stated, "Arizona's disparate treatment of DACA recipients may well violate the Equal Protection Clause," and that the defendants attempted to distinguish among categories of non-citizens with Employment Authorization Documents "in a way that does not amount to any relevant difference." Yet the court decided to affirm the District Court's decision on grounds of preemption, not equal protection.²²⁹

Equal protection concerns were relevant in New York, because prior to the new regulations, the New York

²²⁴ 757 F.3d 1053 (9th Cir. 2014).

²²⁵ *Id.* at 1065.

²²⁶ *Arizona Dream Act Coalition v. Brewer*, 81 F.Supp.3d 795 (D. Ariz. 2015).

²²⁷ *Arizona Dream Act Coalition v. Brewer*, 818 F.3d 901 (9th Cir. 2016).

²²⁸ *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017).

²²⁹ *Id.* A petition for writ of certiorari was filed, *Brewer v. Arizona Dream Act Coalition*, 2017 WL 1192142.

Department of Education had administratively imposed limitations on professional licensing for non-citizens based on the category distinctions made by 8 U.S.C. § 1621(a),²³⁰ thereby including non-citizens in some categories while excluding other non-citizens in similarly situated categories. These distinctions were not supported by a compelling state interest and were irrational. The distinctions allowed professional licensing to certain non-immigrants with short-term permission to be in the United States and no employment authorization, while denying licenses to those with employment authorization and long-term presence in the state. For example, licensing was afforded to certain non-immigrants such as those with H or E visas²³¹ but not to other non-citizens in comparable immigration categories that also allow non-citizens' presence and authorized employment in the United States. These additional categories include the TN category, Temporary Protected Status (TPS),²³² DACA, and non-citizens under the Convention Against Torture.²³³ These are all categories that provide temporary permission to work and be in the United States. Further, the distinctions irrationally allowed licensing to short-term non-immigrants such as those with visitors' visas²³⁴ while excluding non-citizens with years-long presence from eligibility for licenses, such as non-citizens in categories that are designated as PRUCOL.

The new New York professional licensing criteria reflects the equal protection decisions in the New York Court of Appeals and the Second Circuit to the extent that

²³⁰ See *Memorandum to Bd. of Regents Prof'l Practice ,Comm., Higher Educ. Comm.* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

²³¹ 8 U.S.C. § 1101(a)(15)(E) (2012). Those with E visas are in the country pursuant to various treaties.

²³² 8 U.S.C. § 1254a (2012); see also U.S. Customs and Immigration Services (October 17, 2017), <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status>.

²³³ 112 Stat. 2681–822 (1998).

²³⁴ 8 U.S.C. § 1101(a)(15)(B) (2012).

licensing is now available to those non-citizens who are not unlawfully present, including those with DACA and those who meet PRUCOL criteria. However, the Department did not accept that non-citizens should be afforded the opportunity to be licensed if they attended public higher education in New York with in-state tuition.²³⁵ There does not appear to be even a rational basis for denying professional licensing to those whose education the state supports through its in-state tuition at public universities. New York State provides for in-state tuition for higher education for its high school graduate non-citizens²³⁶ without regard to immigration category, including education for the professions the state licenses. No reason was presented for preventing those non-citizens educated with in-state tuition from professional licensing. The state provides resources to educate non-citizens for professions, but then does not allow them to be licensed in New York for those very same professions, thus depriving the state of the economic and social benefits of their educations.

The Department also rejected the assertion that the regulations should not impose any restrictions based in immigration status.²³⁷ Even with regard to non-citizens who do not have a sanctioned presence, there must be, at least, a legitimate rationale for the discrimination.²³⁸ The New York State legislature has specifically not imposed any non-citizen category restrictions on licensing for thirty-nine

²³⁵ See *Memorandum to Bd. of Regents Prof'l Practice Comm., Higher Educ. Comm.* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

²³⁶ N.Y. EDUC. LAW §§ 355(2)(h)(8); 6206(7)(a), (a-1); 6301(5). See Lauren A. DiMartino, *The "Free College" Illusion: How State Tuition Support Programs are Widening the Opportunity Gap*, 25 GEO. J. ON POVERTY L. & POL'Y (forthcoming Jan. 2018), for a discussion and critique of financial aid provided for students for higher education including non-citizens.

²³⁷ See *Memorandum to Bd. of Regents Prof'l Practice Comm., Higher Educ. Comm.* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

²³⁸ *Plyler v. Doe*, 457 U.S. 202 (1982).

professions.²³⁹ No state rationale for administratively imposing restrictions on licensing was presented. It is presumed from the language of the regulation affording licensing eligibility to those “not unlawfully present” that the regulations were drawing a distinction between non-citizens with federal acquiescence in their presence in the country and those non-citizens with none. But even for totally undocumented non-citizens, equal protection requires at least a rational relationship to a legitimate articulated state purpose.²⁴⁰

V. COMMENTS FROM THE NEW YORK REGULATORY PROCESS

Comments made in the New York regulatory process give insight into the issues underlying licensing of non-citizens.²⁴¹ A number of the comments addressed the socio-economic impact of allowing licensing to non-citizen populations, as did positions presented in support of the California legislation.²⁴² Individuals, educators, university programs, New York City agencies and the Fiscal Policy Institute made comments in support of New York’s proposed regulations.²⁴³ Not for profit organizations such as Latino Justice, the Asian American Legal Defense Fund and the New York Immigration Coalition commented.²⁴⁴ Some of the comments in support of the proposed regulations addressed

²³⁹ See Appendix 2.

²⁴⁰ *Plyler*, 457 U.S. 202.

²⁴¹ For a review of the comments made and the Department of Education’s response, see Douglas E. Lentivech & John L. D’Agati, *Assessment of Public Comment* Attachment B, THE STATE EDUCATION DEPARTMENT (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

²⁴² *Id.*

²⁴³ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6, N.Y. Pub.Off. §87 (McKinney 2015). They are on file with the author. The author submitted a comment in support of the proposed regulations.

²⁴⁴ *Id.*

the legal issues discussed above.²⁴⁵ Many other comments made in support of the New York regulations addressed the social and economic benefits of allowing non-citizens to be licensed and certified as teachers.²⁴⁶ The comments made in opposition predominately focused on a concern about licensing for the members of military families and some general opposition to non-citizens characterized as “illegal.”²⁴⁷ Other comments urged that the state would be best served if state licensing and certification requirements focused only on competency qualifications that protected the public health, safety and welfare and did not impose any restrictions based on non-citizen status.²⁴⁸

A. Comments in Support

A number of comments focused on the benefits to New York communities of allowing otherwise eligible non-citizens to be licensed. Comments noted that New York State has a significant foreign-born population.²⁴⁹ As of 2014, 22.6 % of the New York population was foreign born, with a diverse population from all regions of the world. Non-citizens comprised 45.9% of the foreign-born New York population, over two million people.²⁵⁰ For example, a comment by several New York City offices,²⁵¹ (New York City Comment)

²⁴⁵ *Id.* For example, the New York Civil Liberties Union, Latino Justice PRLDEF, and the Asian American Legal Defense and Education Fund made comments on legal issues. *See also* Lentivech & John L. D’Agati, *supra* note 248 at 19–25.

²⁴⁶ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Migration Policy Institute, *State Immigration Data Profiles, New York*, <http://www.migrationpolicy.org/data/state-profiles/state/demographics/NY> (last visited Oct. 22, 2017).

²⁵¹ Nisha Agarwal, Carmen Fariña, Mary T. Bassett, Christopher Neale, & W. Cyrus Garrett, New York City Mayor’s Office of Immigrant Affairs, Department of Education, Department of Health, Office of

supported the regulations because they would assist the economic vitality of the city and state, increase economic opportunity for New York residents, and increase the number and diversity of people engaged in vital professions such as education and health care. Individuals and other entities made similar comments.²⁵²

Several comments focused on the regulations' promotion of the state's economic interests.²⁵³ It was noted that the state has a fiscal interest in assuring that its residents' skills and talents be put to their best use and that potential economic capacity should not be wasted. Licensed professionals have higher incomes and contribute to the state's economy through tax revenues and general economic spending.²⁵⁴ Further, as New York allows in-state college tuition for its high school graduates without regard to immigration status, allowing non-citizens to enter the occupations for which they are educated effectively uses those educational resources to the benefit of the state.²⁵⁵ Moreover, the comments stated that the amendments would increase economic opportunity for New York's immigrant populations, which would allow them to better support themselves and their families.²⁵⁶ Assuring that New York's non-citizen population can contribute to New York's economy and be integrated into New York communities are important objectives for the State.²⁵⁷

Workforce Development and Young Men's Initiative, http://www1.nyc.gov/assets/immigrants/downloads/pdf/comment_bdofregentlicensing_final.pdf (last visited Oct. 23, 2017).

²⁵² The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* The position on economic contribution and integration is supported by the State's Office of New Americans. Office for New Americans, <http://www.newamericans.ny.gov/about/about.html> (last

A number of comments from organizations and individuals addressed the state's growing need for health service professionals and stated that allowing qualified non-citizens to enter those fields will help fulfill that need.²⁵⁸ As examples, the New York City Comment stated that state labor projections indicated increasing demand for many licensed professions, especially those in medical fields.²⁵⁹ A comment from the Icahn School of Medicine at Mount Sinai pointed to projections of physician shortages.²⁶⁰ An individual comment cited reports of shortages of nurses, social workers and primary care physicians.²⁶¹ An analysis by the Fiscal Policy Institute demonstrated how immigrants matter in the licensed professions across the state as they are disproportionately represented in a number of these occupations including those in the health fields.²⁶²

visited Nov. 20, 2017); Office for New Americans, <http://www.newamericans.ny.gov/about/governor.html> (last visited Nov. 20, 2017).

²⁵⁸ *Id.* This is additionally supported by information that reveals that DACA recipients are increasingly applying to and being accepted in medical school. Over fifty medical schools consider applicants who are DACA recipients. In 2016, 113 DACAs applied through the American Medical College Application Service. Sixty-five DACA recipients who applied for admission from 2014 to 2016 matriculated at MD-granting medical schools. Nakae Sunny et al, *Considerations for Residency Programs Regarding Accepting Undocumented Students Who Are DACA Recipients*, ACAD. MED. 1 (2017) available at http://journals.lww.com/academicmedicine/Abstract/publishahead/Considerations_for_Residency_Programs_Regarding.98199.aspx.

²⁵⁹ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law and are on file with the author.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* Additionally, one study reported a growing need for health care professionals in the United States and the significant role that the foreign-born play in meeting this need. See Szilvia Altorjai & Jeanne Batalova, *Immigrant Health-Care Workers in the United States*, MIGRATION POLICY INSTITUTE (June 28, 2017), available at <http://www.migrationpolicy.org/article/immigrant-health-care-workers-united-states>.

Many comments focused on New York's current need for bilingual and culturally responsive teachers and health professionals.²⁶³ Because of New York's significant foreign-born population, commentators stated it was important that more individuals in the teaching and medical professions in New York have cultural and language capacities that reflect the diverse communities in the state.²⁶⁴ Some pointed to the shortage of qualified bilingual teachers and professionals. For example, Advocates for Children of New York stated that the shortage of bilingual psychologists, social workers, and speech, physical and occupational therapists made it difficult for children with disabilities to receive an appropriate education.²⁶⁵ Others pointed to the need for professionals who could provide culturally responsive services.²⁶⁶ Furthermore, the comments stated that enhancing diversity is also advantageous to members of the teaching and other professions by providing for engagement with multiple perspectives.²⁶⁷ Allowing non-citizens to be licensed as professionals and certified as teachers helps achieve these needs and goals.

A number of commentators focused on the positive effect of the amendments on non-citizen student populations

²⁶³ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁶⁴ *Id.*

²⁶⁵ E-mail from Abja Midha, Project Director, Advocates for Children of New York, to Peg Rivers, Director of Operations, New York State Education Department (Apr. 13, 2016), *available at* http://www.advocatesforchildren.org/sites/default/files/on_page/comments_licensing_citizenship_reqs_41316.pdf?pt=1.

²⁶⁶ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁶⁷ *Id.*

in New York.²⁶⁸ They noted that inclusive measures have brought hope to non-citizen youth and encouraged them to stay in school and pursue higher education and professions. The inability to obtain licenses for the professions for which they work hard to be educated has been a barrier for them.²⁶⁹ It has discouraged them from pursuing the professions for which they have capacity and ambition.²⁷⁰ The amendments provide young non-citizens with hope and encouragement to stay in school, meet their potential and maximize their achievements.

Individual non-citizens who would benefit from the amendments also chose to comment, illustrating their reasons for support. A number were in school or about to enter school to study to be doctors, nurses or therapists.²⁷¹ They had come to New York as children, graduated from high school in New York, succeeded in public universities in New York, and volunteered in community based programs.²⁷² Their comments stated that they viewed their professional choice as a means of contributing to the communities and state in which they were raised.²⁷³

B. Comments in Opposition

Many of the comments in opposition to the proposed regulations in New York focused on a concern about

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ These comments are supported by the findings in National UnDACAmented Research Project. Roberto G. Gonzales et al., *DACA at Year Three: Challenges and Opportunities in Assessing Higher Education and Employment*, National UnDACAmented Research Project (2016), available at http://immigrationpolicy.org/sites/default/files/docs/daca_at_year_three.pdf.

²⁷¹ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁷² *Id.*

²⁷³ *Id.*

difficulties faced by military spouses in obtaining New York licenses when they relocated to New York.²⁷⁴ The argument made was that the state should not afford licensing to non-citizens when there were barriers for military spouses.²⁷⁵ However, the issue involved for military spouses was different in kind from the issue faced by non-citizens. Non-citizens were excluded from applying for licenses despite their relevant education and other qualifications that met New York standards. Military spouses who were licensed in other states were not prevented from applying for New York licenses, but they had to demonstrate that they met New York's education and other qualifications. For some, this was a time-consuming process. This issue was resolved by a state statute, effective in 2017,²⁷⁶ that provided for expedited initial applications, reduction in application fees, and temporary practice permits for military spouses who had licenses in other states with standards substantially equivalent to New York State standards.²⁷⁷

These adverse comments failed to recognize that the proposed, and now final, regulations assist some military families by allowing their non-citizen members to be licensed for the professions for which they were otherwise qualified under New York's requirements. Significant numbers of non-citizens serve in the United States Military and there

²⁷⁴ Lentivech & John L. D'Agati, *supra* note 10 at 26.

²⁷⁵ The proposed regulations were criticized because at the time the Board of Regents had not changed competency requirements for military spouses or automatically accepted their licenses in other states as a basis for New York licenses. Press Release, Terrence Murphy, Murphy tells Regents to Put Military Personnel, Families, Before Illegal Immigrants (Mar. 12, 2016) *available at* <https://www.nysenate.gov/newsroom/press-releases/terrence-murphy/murphy-tells-regents-put-military-personnel-families-illegal>.

²⁷⁶ N.Y. EDUC. LAW § 6501(2) (McKinney 2016).

²⁷⁷ New York Office of the Professions, *Military Spouses Relocated to New York State-Expedited Licensing Services*, <http://www.op.nysed.gov/prof/militaryspouse.htm> (last visited Oct. 23, 2017).

are non-citizen members of military families.²⁷⁸ In recognition of their service, special policies apply to the citizenship and immigration categories of members of the military and military families. Military family members may be eligible for parole in place or deferred action granted by the USCIS, United States Citizenship and Immigration Services.²⁷⁹ This affords renewable permission to be in the United States and eligibility for work authorization.²⁸⁰ Therefore, this is a non-citizen category analogous to DACA that would be recognized under the New York regulations as eligible for licensing or certification. These military spouses, like any other citizens or non-citizens, would have to meet New York's qualifications for licensing.

The other comments against the regulations complained that "illegal" aliens should not be allowed to be teachers or be licensed in New York. However, the regulations required that non-citizens had to be "not unlawfully present" to be licensed or certified, thereby excluding those who were "illegal."²⁸¹

C. Comments Urging No State Restrictions Based in Non-Citizen Category

Some comments urged that New York, like California, should focus only on requirements related to the competency qualifications for licensing or certification. The comments

²⁷⁸ Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, Migration Policy Institute, (May 15, 2008) <http://www.migrationpolicy.org/article/immigrants-us-armed-forces/>.

²⁷⁹ U.S. Citizenship and Immigration Services, *Discretionary Options for Military Members, Enlistees and Their Families*, <https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families> (last visited Oct. 23, 2017); U.S. Citizenship and Immigration Services, Adjudicator's Field Manual, Chapter 21 *Family-based Petitions and Applications*, 21.1(c) <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-3501.html#0-0-0-385> (last visited Oct. 23, 2017).

²⁸⁰ *Id.*

²⁸¹ Lentivech & John L. D'Agati, *supra* note 248 at 28–29.

stated the reasons summarized as follows. The state has the police power authority to protect the health, safety and welfare of the state's residence and the expertise in the requirements for professional licensing to best achieve that goal. Congress affords states the choice of not having to make determinations based on immigration status by providing the state the option to choose to allow even totally unauthorized aliens to be licensed.²⁸² The comments noted this option allows a state to focus on what is within the state's expertise and authority, the competency requirements for licensing. It leaves to the federal immigration authorities their expertise in implementing and enforcing the immigration law. By doing so the state does not put any imprimatur on the legality under immigration law of a person's presence in the state. It merely recognizes that such a judgment and determination is in the control of the federal government.²⁸³

Further, the comments argued Congress made the judgment not to impose penalties on non-citizens who work without authorization, but only on the employers who hire non-citizens who do not have authorization to work.²⁸⁴ It is unlawful for an employer to hire an alien without employment authorization for employment in the United States.²⁸⁵ Employers who violate this pay a civil penalty,²⁸⁶ and may be subject to criminal penalties if there is "a pattern or practice" of such violation.²⁸⁷ However, as the U.S. Supreme Court recognized, there are no criminal penalties for employees who engage in unauthorized work.²⁸⁸ In

²⁸² 8 U.S.C. § 1621(d) (2012).

²⁸³ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁸⁴ *Id.*

²⁸⁵ *Id.* See also 8 U.S.C. § 1324a(a)(1)(A) (2012).

²⁸⁶ *Id.* See also 8 U.S.C. § 1324a(e)(4) (2012).

²⁸⁷ *Id.* See also 8 U.S.C. § 1324a(f)(1) (2012).

²⁸⁸ *Id.*

Arizona v. United States, the Court struck down as unconstitutional an Arizona statute that made it a state misdemeanor for an unauthorized alien to knowingly apply for, solicit, or perform work as an employee.²⁸⁹ Because Congress had made a deliberate choice to not penalize work without authorization, a state could not criminalize it.²⁹⁰ Additionally, those non-citizens who engage in sole proprietorships, partnerships or corporate structures are not engaging in employment.²⁹¹ A person holding a professional license, who establishes a business entity or performs services as an independent contractor, is not engaged in “employment” as he does not have an employer.²⁹²

If a state does not impose restrictions based in immigration status, state interests are protected by an existing New York law, which requires the provision of a social security number²⁹³ or federal taxpayer identification²⁹⁴

²⁸⁹ 132 S. Ct. 2492, 2503 (2012); In doing so, the Court stated: “The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be “unnecessary and unworkable,” (citing U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners 65–66 (1981).

²⁹⁰ *Id.*

²⁹¹ *Patel v. INS*, 811 F.2d 377 (7th Cir. 1987), *see also Bhakta v. INS*, 667 F.2d 771 (9th Cir. 1981) (holding that the INS cannot deem a non-citizen’s management of his business enterprise to be “unauthorized employment” when considering his application for an adjustment of status).

²⁹² 8 C.F.R. § 274a.1(g); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); 8 C.F.R. § 274a.1(f), (h), (j); Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243 (2017).

²⁹³ Applicants for employment related social security numbers must provide indicia of employment authorization. Social Security Administration, *Social Security Numbers for Noncitizens*, (July 2017), <http://www.ssa.gov/pubs/EN-05-10096.pdf>.

²⁹⁴ New York State Tax Law requires license applicants to provide a social security number or federal employer identification number (or the

by license applicants. Individuals with professional licenses through the New York Department of Education may be employees, or practice their professions as sole proprietors, in partnerships or certain corporate structures.²⁹⁵ They also may apply for an alternative taxpayer identification number.²⁹⁶ Therefore, the state's interest in tax payments, and identification of those it licenses is protected.

Additionally, the comments asserted that removing any immigration related criteria from licensing would allow the state to better reap the benefit of its in-state tuition policy.²⁹⁷ New York State provides in-state tuition to its non-citizen New York high school graduates without regard to any immigration category.²⁹⁸ It benefits the state to allow those educated with in-state tuition to practice the professions for which they have been educated. In response to these comments, New York again reiterated that it made the choice to provide licensing opportunities to a broad category of those not unlawfully present.²⁹⁹

VI. INSIGHTS FROM CALIFORNIA'S AND NEW YORK'S APPROACHES

reason the person does not have the numbers.) N.Y. Tax § 5(2) (McKinney 2014).

²⁹⁵ The New York State Department of Education allows professionals with the licenses/certificates at issue to set up these corporate entities. New York State Department of Education, *Corporate Entities for Professional Practice*, (Oct. 12, 2016) <http://www.op.nysed.gov/corp/>.

²⁹⁶ Internal Revenue Service, *Employer Identification Number: Understanding Your EIN*, (2014), available at <https://www.irs.gov/pub/irs-pdf/p1635.pdf>.

²⁹⁷ The summary of the comments in this Article is based on a review of the comments that were obtained pursuant to The New York Freedom of Information Law, New York Public Officers Law, Article 6 and are on file with the author.

²⁹⁸ N.Y. EDUC. LAW §§ 355(2)(h)(8) (McKinney 2009); 6206(7)(a), (a-1); 6301(5) (McKinney 2016).

²⁹⁹ Lentivech & John L. D'Agati, *supra* note 248.

The insights from the California and New York approaches are useful for other states, members of the public and organizations, even though the specific process of setting licensing criteria in each state differs. As matter of law, regulation and policy, California and New York removed restrictions on non-citizens from professional licensing, broadening the ability of their non-citizen populations to gain professional licensing and thereby contribute to the state. While what might be most appropriate in one state may differ from another, the California and New York experiences provide information about the benefits and detriments of various choices.

California chose a legislative approach, while New York addressed the issue through administrative regulation. Both states faced a federal statute that purported to limit state control over a traditional area of state authority. California chose legislation designed to specifically comport with the requisites of the federal statute that required state legislation passed at a particular time and with particular language.³⁰⁰ It therefore did not have to assert its state sovereignty under the Tenth Amendment over state licensing as did New York.³⁰¹ New York's regulatory approach required that New York insist on its state sovereignty to control licensing criteria through the process set by the state Constitution, the state legislature and the relevant administrative entities.³⁰² New York's approach allowed decision-making by the administrative and state authorities with expertise in the area and responsibility for implementation.³⁰³

Both California and New York allowed for some public input into the decision about eligibility for licenses.

³⁰⁰ *Supra* PART I, A, The California Legislation.

³⁰¹ *Supra* PART III, A. Federalism.

³⁰² *Id.*

³⁰³ *Supra* PART II. B. The New York System of Professional Licensing and Teacher Certification.

Organizations in California had a voice in support or opposition to the legislation.³⁰⁴ But, New York's notice and comment regulatory process gave opportunity for comments by a wide range of individuals, experts, organizations, educational institutions, and local governments.³⁰⁵ Moreover, this process required that the governmental entities making the decision had to consider and respond to the comments from various members of the public about the proposal.³⁰⁶ In New York, this resulted in multiple perspectives on the role of non-citizens in the state's economy and professional and community endeavors, as well as the legality of the proposal.³⁰⁷

California and New York both made comprehensive choices about the professions affected within the context of their state's system for regulating professions and teachers. California's law affected a broader number of occupations because the California Department of Consumer Affairs had authority over a large number of occupations.³⁰⁸ The New York system divides occupational licensing among different agencies.³⁰⁹ Only the professions and teachers are regulated by the Board of Regents and Education Department, which also have authority over higher education institutions.³¹⁰

³⁰⁴ *Supra* PART I. D. History of the Legislation and Positions in Favor and Opposed.

³⁰⁵ *Supra* PART IV. COMMENTS FROM THE NEW YORK REGULATORY PROCESS.

³⁰⁶ The New York Board of Regents and Department of Education had to review and respond to comments under the state's Administrative Procedure Act, N.Y. A.P.A. § 202 5(b) (McKinney 2017). See Douglas E. Lentivech & John L. D'Agati, *Assessment of Public Comment Attachment B, THE STATE EDUCATION DEPARTMENT* (May 9, 2016), <http://www.regents.nysed.gov/common/regents/files/516heppca1.pdf>.

³⁰⁷ *Supra* PART IV, COMMENTS FROM THE NEW YORK REGULATORY PROCESS.

³⁰⁸ *Supra*, PART 1. The California System of Professional Licensing and Teacher Certification.

³⁰⁹ *Supra* PART II, B. The New York System of Professional Licensing and Teacher Certification.

³¹⁰ *Id.*

Both California and New York significantly broadened the categories of non-citizens eligible for professional licensing and teacher certification. But California removed all non-citizen category restrictions.³¹¹ California's choice to remove restrictions based in non-citizen status left determinations about immigration law enforcement to the federal government. This approach freed the relevant state administrative agency to focus only on the competency requirements the state deems necessary to protect the health and safety of its population. California also thereby avoided the intricacies of and changes in immigration law, policy, and practice.

New York allowed licensing and teacher certification to those who can demonstrate that their presence had federal knowledge and acquiescence or permission.³¹² New York focused on the integration of the non-citizen population residing in the state through federal action or inaction. The New York position requires an interpretation of immigration categories through the state standard of PRUCOL.³¹³ New York also avoided the criticism that it was affording licensing to those who are completely undocumented. But California was not deterred by that critique, and its Supreme Court, in the context of bar membership, clarified that lack of an immigration status alone does not make a person unqualified for an occupation regulated by the state.³¹⁴

Both states viewed the expansion of non-citizens' eligibility for professions and teaching as a significant economic gain for the state. The recorded positions on the California legislation supported this,³¹⁵ as did the wide

³¹¹ CAL. BUS. & PROF. CODE § 135.5 (West, Westlaw through Ch. 467 of 2017 Reg.Sess).

³¹² *Supra*, Part II, E. The Non-citizen Categories Eligible for Licensing and Certification.

³¹³ *Supra*, Part II, E., 2. PRUCOL, Permanently Residing Under Color of Law.

³¹⁴ *In re Garcia*, 315 P.3d at 130.

³¹⁵ *Supra* notes 51–55.

variety comments in New York.³¹⁶ The positive effects on a state's economy of allowing licensing for DACA recipients was also behind Nebraska state legislation that allowed DACA recipients to apply for occupational licenses passed over the state Governor's veto.³¹⁷ Legislators and Chambers of Commerce saw the bill as assisting in building the state's needed workforce.³¹⁸

These positions are generally supported by studies on the economic impact of immigration.³¹⁹ There has been some disagreement about the economic impact of immigration in the United States. However, most of the disagreement is about whether lower skilled migrants contribute sufficiently to the tax base or adversely impact opportunities for United States citizens with limited educations.³²⁰ The economic advantages of more highly educated and skilled non-citizens are generally acknowledged as they increase the tax base and add to the development of the economy by contributing their skills and expending their resources.³²¹

³¹⁶ *Supra* Part IV. A. Comments in Support.

³¹⁷ Don Walton & Zach Pluhacek, *Senators Override Ricketts' Veto On Young Immigrant Licensure Bill*, Lincoln Journal Star, Apr. 20, 2016 available at http://journalstar.com/legislature/senators-override-ricketts-veto-on-young-immigrant-licensure-bill/article_a2d6d276-cde0-5d26-a893-dd472c55dc44.html.

³¹⁸ *Id.*

³¹⁹ Francine D. Blau & Christopher Mackie, *The Economic and Fiscal Consequences of Immigration* (2017) available at <https://www.nap.edu/read/23550/chapter/1#xx>; James P. Smith & Barry Edmonston, *The New Americans: Economics, Demographic, and Fiscal Effects of Immigration* (1997) available at <https://www.nap.edu/read/5779/chapter/2#3>.

³²⁰ Francine D. Blau & Christopher Mackie, *The Economic and Fiscal Consequences of Immigration* (2017) available at <https://www.nap.edu/read/23550/chapter/1#xx>.

³²¹ Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, Cato Institute, January 18, 2017, <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>; American Immigration Council, Value Added: Immigrants Create Jobs and Businesses, Boost Wages of Native-Born Workers, (Jan. 1, 2012) <https://www.americanimmigrationcouncil.org/research/value-added-immigrants-create-jobs-and-businesses-boost-wages-native-born-workers>.

Both states enhanced the value of the education of their non-citizen residents and gained economic and social benefits from non-citizens who use their educations in the employment for which they are qualified. The benefits especially apply to the growing need for health professionals, and specialized need for teachers and other helping professionals who have language and cultural competency.³²² However, California is in a better position to gain the benefits from its provision of in-state tuition to non-citizens since it allows licensing without regard to immigration status for its non-citizen graduates.

Both states also seriously considered the contributions, needs and integration of their non-citizen populations in providing for greater diversity in their licensed professionals and teachers.³²³ This consideration comports with the public service and protection justification for the state function of professional licensing.³²⁴

VII. CONCLUSION

The issues confronted by the choices made by California and New York provide important information to other states, their organizations and residents in considering how to best promote the public health and safety goals of state regulation of professions and how to effectively allow members of their non-citizen populations to contribute to their communities and states. Both California and New York demonstrated the advantages of expanding non-citizen eligibility for professional licensing and teacher certification in a comprehensive manner. They decided that the comprehensive inclusion of non-citizens in a state's professions and teaching provides the state and its communities and residents with significant socio-economic

³²² *Supra* Part IV. A. Comments in Support.

³²³ *Id.*

³²⁴ *Supra* notes 178–179.

advantage. Further, the New York approach establishes that state sovereignty precludes federal control of a state's process or choice of state governmental entity responsible for licensing criteria. Therefore, a state need not comply with the federal statutory requirement that licensing for categories of non-citizens has to be set only by a state statute enacted after August 22, 1996. A state may set the eligibility of non-citizens for licenses by the state's established process, including administrative regulation or a state statute enacted before August 22, 1996.

VIII. APPENDIX 1—CALIFORNIA LICENSING AND
TEACHER CERTIFICATION

CALIFORNIA DEPARTMENT OF CONSUMER
AFFAIRS³²⁵

1. Accountancy³²⁶

Business and Professions Code §§ 5000 – 5158³²⁷

Title 16, Division 1, California Code of Regulations §§ 1 –
99.1³²⁸

Reciprocity (BPC §§ 5096 – 5096.21)³²⁹

2. Acupuncture³³⁰

Sections 4925 to 4979 of the California Business and
Professions Code³³¹

Title 16, sections 1399.400 to 1399.489.2 of the California
Code of Regulations³³²

3. Arbitration Certification³³³

Sections 472 to 472.5 of the California Business and
Professions Code³³⁴

³²⁵ See generally CAL. DEP'T OF CONSUMER AFFAIRS, 2016 ANNUAL REPORT (2016), http://www.dca.ca.gov/publications/2016_annrpt.pdf (providing background on the function of the California Department of Consumer Affairs). DCA issues licenses, certificates, registrations and permits in over 250 business and professional categories through 39 regulatory entities comprised of boards, bureaus, committees, a program, and a commission (boards and bureaus). These 39 entities set and enforce minimum qualifications for the professions and vocations they regulate, which include nearly all of California's healthcare fields. California Department of Consumer Affairs, *supra* note 26, at 3.

³²⁶ The California Board of Accountancy handles licensing, regulatory, and disciplinary functions of accountants.

³²⁷ CAL. BUS. & PROF. CODE §§ 5000–5158 (West 2017).

³²⁸ CAL. CODE REGS. tit. 16, §§ 1–99.1 (2017).

³²⁹ CAL. BUS. & PROF. CODE §§ 5096–5096.21 (West 2017).

³³⁰ Acupuncture Board issues license to practice acupuncture.

³³¹ CAL. BUS. & PROF. CODE §§ 4925–4979 (West 2017).

³³² CAL. CODE REGS. tit. 16, §§ 1399.400–1399.489.2 (2017).

³³³ An arbiter is a “person or persons within an arbitration program who actually decide disputes.” CAL. CODE REGS. tit. 16, § 3396.1(d).

³³⁴ CAL. BUS. & PROF. CODE §§ 472–472.5 (West 2017).

Sections 2101 to 2801 of the California Commercial Code³³⁵

Sections 43204 to 43205.5 of the California Health and Safety Code³³⁶

Sections 1790 to 1795.8 of the Song-Beverly Consumer Warranty Act (Lemon Law)³³⁷

Sections 11700 to 11909 of the California Vehicle Code³³⁸

Title 16, sections 3396.1 to 3399.6 of the California Code of Regulations³³⁹

4. Architects ³⁴⁰

Sections 5500 to 5683 of the California Business and Professions Code³⁴¹

Title 16, sections 100 to 160 of the California Code of Regulations³⁴²

Title 16, sections 2602 to 2680 of the California Code of Regulations³⁴³

Title 16, section 121 of the California Code of Regulations (reciprocity)³⁴⁴)

5. Athletic Commission ³⁴⁵

³³⁵ CAL. COM. CODE §§ 2101-2801 (West 2017).

³³⁶ CAL. HEALTH & SAFETY CODE §§ 43204–43205.5 (West 2017).

³³⁷ Song-Beverly Consumer Warranty Act (Lemon Law), CAL. CIV. CODE §§ 1790–1795.8 (West 2017).

³³⁸ CAL. VEH. CODE §§ 11700-11909 (West 2017).

³³⁹ CAL. CODE REGS. tit. 16, §§ 3396.1–3399.6 (2017).

³⁴⁰ Just for architects. “An architect licensed by the California state board of architectural examiners may practice the profession of landscape architecture as defined in the Business & Professions Code when such work is one phase of a larger contract or as an entire project.” CAL. BUS. & PROF. CODE § 5500.1 (West 2017).

³⁴¹ CAL. BUS. & PROF. CODE §§ 5500–5683 (West 2017).

³⁴² CAL. CODE REGS. tit. 16, §§ 100–160 (2017).

³⁴³ CAL. CODE REGS. tit. 16, §§ 2602–2680 (2017).

³⁴⁴ CAL. CODE REGS. tit. 16, § 121 (West 2017).

³⁴⁵ The Commission controls:

professional and amateur boxing, professional and amateur kickboxing, all forms and combinations of forms of full contact martial arts contests, including mixed martial arts, and matches or exhibitions conducted, held, or given within this state.

Sections 18600 to 18887 of the California Business and Professions Code³⁴⁶

Title 4, sections 201 to 829 of the California Code of Regulations³⁴⁷

6. Automotive Repair³⁴⁸

Sections 9880 to 9889.68 of the California Business and Professions Code³⁴⁹

Sections 44000 to 44126 of the California Health and Safety Code³⁵⁰

Title 16, sections 3300 to 3395.5 of the California Code of Regulations³⁵¹

7. Barber / Cosmetology³⁵²

Sections 7301 to 7426.5 of the California Business and Professions Code³⁵³

Title 16, sections 901 to 999 of the California Code of Regulations³⁵⁴

Section 7331 of the California Business and Professions Code (reciprocity)³⁵⁵

No event shall take place without the prior approval of the commission. No person shall engage in the promotion of, or participate in, a boxing or martial arts contest, match, or exhibition without a license, and except in accordance with this chapter and the rules adopted hereunder.

CAL. BUS. & PROF. CODE § 18640 (West).

³⁴⁶ CAL. BUS. & PROF. CODE §§ 18600–18887 (West 2017).

³⁴⁷ CAL. CODE REGS. tit. 16, §§ 201–829 (2017).

³⁴⁸ Specifies automotive repair dealers. CAL. BUS. & PROF. CODE § 9880 (West 2017).

³⁴⁹ CAL. BUS. & PROF. CODE §§ 9880–9889.68 (West 2017).

³⁵⁰ CAL. HEALTH & SAFETY CODE § 44000–44126 (West 2017).

³⁵¹ CAL. CODE REGS. tit. 16, §§ 3300–3395.5 (2017).

³⁵² Covers “hair, skin, nail care, and electrolysis” CAL. BUS. & PROF. CODE § 7301 (West 2017).

Also specifies “barbering, cosmetology, or electrolysis.” CAL. BUS. & PROF. CODE § 7317 (West 2017).

³⁵³ CAL. BUS. & PROF. CODE §§ 7301–7426.5 (West 2017).

³⁵⁴ CAL. CODE REGS. tit. 16, §§ 901–999 (2017).

³⁵⁵ CAL. BUS. & PROF. CODE § 7331 (West 2017).

8. Behavioral Sciences ³⁵⁶

Sections 4980 to 4999.129 of the California Business and Professions Code³⁵⁷

Title 16, sections 1800 to 1889.3 of the California Code of Regulations³⁵⁸

9. Cemetery / Funeral ³⁵⁹

Sections 7600 to 7746 of the California Business and Professions Code³⁶⁰

Title 16, sections 1200 to 1291 of the California Code of Regulations³⁶¹

Title 16, Division 23, California Code of Regulations §§ 2300 – 2390 ³⁶²

Health and Safety Codes §§ 7000 – 9677 ³⁶³

Health and Safety Codes §§ 102100 – 103800 ³⁶⁴

Government Code §§ 27460 – 27530 ³⁶⁵

³⁵⁶ Applies to marriage and family therapy marriage as defined by Section 4980.02.

Includes educational psychology. CAL. BUS. & PROF. CODE § 4989.14 (West).

The Department of Consumer Affairs determines the “licensure of marriage and family therapists, clinical social workers, professional clinical counselors, and educational psychologists.” CAL. BUS. & PROF. CODE § 4990.18 (West).

Applies to clinical social workers. CAL. BUS. & PROF. CODE § 4991.1 (West).

Applies to health care professionals providing telephone medical advice services. CAL. BUS. & PROF. CODE § 4999 (West).

³⁵⁷ CAL. BUS. & PROF. CODE §§ 4980 – 4999.129 (West 2017).

³⁵⁸ CAL. CODE REGS. tit. 16, §§ 1800–1889.3 (2017).

³⁵⁹ Applies to cemetery brokers (CAL. BUS. & PROF. CODE § 7651 (West 2017)); cemetery salespeople (CAL. BUS. & PROF. CODE § 7651.3 (West 2017)); cemetery brokerage licenses to a cemetery brokerage corporation (CAL. BUS. & PROF. CODE § 7652 (West 2017)); cemetery managers (CAL. BUS. & PROF. CODE § 7653.6 (West 2017)); cremated remains disposers (CAL. BUS. & PROF. CODE § 7672.1 (West 2017)).

³⁶⁰ CAL. BUS. & PROF. CODE §§ 7600–7746 (West 2017).

³⁶¹ CAL. CODE REGS. tit. 16, §§ 1200–1291 (2017).

³⁶² Cal. Code Regs. tit. 16, §§ 2300 – 2390 (West 2017).

³⁶³ Cal. Health & Safety Code § 7000 – 9677 (West 2017).

³⁶⁴ Cal. Health & Safety Code § 102100 – 103800 (West 2017).

³⁶⁵ Cal. Gov’t Code §§ 27460 – 27530 (West 2017).

Welfare and Institutions Code §§ 11150 – 11160, §§
12150 – 12156, §§ 17400 – 17410 ³⁶⁶

10. Chiropractic Examiners ³⁶⁷
Business and Professions Code §§ 1000 – 1058
(Chiropractic Initiative Act) ³⁶⁸
Title 16, Division 4, California Code of Regulations §§ 301
– 390.6 ³⁶⁹
Reciprocity (16 CCR § 323 ³⁷⁰)

11. Contractors ³⁷¹
Business and Professions Code §§ 7000 – 7199.7 ³⁷²
Title 16, Division 8, California Code of Regulations §§ 810
– 890 ³⁷³
License Requirements (§§ 7065 – 7077, ³⁷⁴ 16 CCR § 825
³⁷⁵)
Reciprocity (BPC § 7065.4 ³⁷⁶)

12. Court Reporters ³⁷⁷
Business and Professions Code §§ 8000 – 8047 ³⁷⁸
Title 16, Division 24, California Code of Regulations §§
2400 – 2481 ³⁷⁹

13. Dentistry ³⁸⁰

³⁶⁶ Cal. Welf. & Inst. Code §§ 11150 – 11160, 12150 – 12156,
17400 – 17410 (West 2017).

³⁶⁷ Just authorizes chiropractic examiners.

³⁶⁸ CAL. BUS. & PROF. CODE §§ 1000 – 1058 (West 2017).

³⁶⁹ Cal. Code Regs. tit. 16, §§ 301 – 390.6 (West 2017).

³⁷⁰ Cal. Code Regs. tit. 16, § 323 (West 2017)

³⁷¹ Just authorizes contractors.

³⁷² CAL. BUS. & PROF. CODE §§ 7000 – 7199.7 (West 2017).

³⁷³ Cal. Code Regs. tit. 16, §§ 810 – 890 (West 2017).

³⁷⁴ CAL. BUS. & PROF. CODE § 7065 – 7077 (West 2017).

³⁷⁵ Cal. Code Regs. tit. 16, § 825 (West 2017).

³⁷⁶ CAL. BUS. & PROF. CODE § 7065.4 (West 2017).

³⁷⁷ Authorizes certified shorthand reporter. CAL. BUS. & PROF.
CODE § 8020 (West).

³⁷⁸ CAL. BUS. & PROF. CODE §§ 8000 – 8047 (West 2017).

³⁷⁹ Cal. Code Regs. tit. 16, §§ 2400 – 2481 (West 2017).

Business and Professions Code §§ 1600 – 1808, §§ 1970-1976 ³⁸¹

Title 16, Division 10, California Code of Regulations §§ 1000 – 1087 ³⁸²

14. Dental Hygiene

Business and Professions Code §§ 1900 – 1976.4 ³⁸³

Title 16, Division 10, California Code of Regulations §§ 1000 – 1023.8, §§ 1067 – 1090.1, § 1107, §§ 1131 – 1132, §§ 1138 – 1144, §§ 1149 – 1153 ³⁸⁴

15. BEARHFTI (electronic and appliance repair businesses – sale and administration of service contracts; manufacture and sale of upholstered furniture and bedding, supply dealers, custom upholsterers, bedding sanitizers, manufacture of thermal insulation products and tests for flammability and sanitation)

Business and Professions Code §§ BEAR: 9800 – 9874 ³⁸⁵

HFTI: §§ 19000 – 19221 ³⁸⁶

Title 16, Division 27, California Code of Regulations §§ 2701 – 2775 ³⁸⁷

Title 4, Division 3, California Code of Regulations §§ 1101 – 1383.6 ³⁸⁸

16. Guide Dogs ³⁸⁹

³⁸⁰ Includes dentists. Also includes specific license to perform various surgeries or use specific types of anesthesia. Also includes dental hygienist. Cal. Bus. & Prof. Code § 1902.2 (West).

³⁸¹ CAL. BUS. & PROF. CODE §§ 160 – 1808, 1970-1976 (West 2017).

³⁸² Cal. Code Regs. tit. 16, §§ 1000 – 1087 (West 2017).

³⁸³ CAL. BUS. & PROF. CODE §§ 1900 – 1976.4 (West 2017).

³⁸⁴ Cal. Code Regs. tit. 16, §§ 1000 – 1023.8, 1067 – 1090.1, 1107, 1131-1132, 1138-1144, 1149-1153 (West 2017).

³⁸⁵ CAL. BUS. & PROF. CODE §§ 9800 – 9874 (West 2017).

³⁸⁶ CAL. BUS. & PROF. CODE §§ 19000 – 19221 (West 2017).

³⁸⁷ Cal. Code Regs. tit. 16, §§ 2701 – 2775 (West 2017).

³⁸⁸ Cal. Code Regs. tit. 16, §§ 1101 – 1383.6 (West 2017).

³⁸⁹ “The board shall have exclusive authority in this state to issue licenses for the instruction of persons who are blind or visually impaired in

Business and Professions Code §§ 7200 – 7217³⁹⁰
 California Civil Code §§ 54 – 55.32³⁹¹
 California Penal Code §§ 346 – 367g, § 600.2, and §
 600.5³⁹²
 California Vehicle Code § 21963³⁹³
 California Food and Agriculture Code §§ 30850 – 30854
³⁹⁴ and §§ 31601 – 31609 ³⁹⁵
 Americans with Disabilities Act Title III – Public
 Accommodations (42 U.S.C. 12181) ³⁹⁶
 Title 16, Division 22, California Code of Regulations §§
 2250 – 2295.3 ³⁹⁷

17. Landscape Architects ³⁹⁸
 Business and Professions Code §§ BEAR: 5500 – 5683 ³⁹⁹
 Title 16, Division 27, California Code of Regulations §§
 100 – 160 ⁴⁰⁰
 Title 4, Division 3, California Code of Regulations §§ 2602
 – 2680 ⁴⁰¹
 Reciprocity (16 CCR 2615 ⁴⁰²)

18. Medical Board ⁴⁰³

the use of guide dogs and for the training of guide dogs for use by persons who are blind or visually impaired. It shall also have exclusive authority in this state to issue licenses to operate schools for the training of guide dogs and the instruction of persons who are blind or visually impaired in the use of guide dogs.” CAL. BUS. & PROF. CODE § 7200.5 (West).

Also applies to owners of assistance dogs. CAL. FOOD & AGRIC. CODE §§ 30850 – 30854 (West).

³⁹⁰ CAL. BUS. & PROF. CODE §§ 7200 – 7217 (West 2017).

³⁹¹ Cal. Civ. Code §§ 54 – 55.32 (West 2017).

³⁹² Cal. Penal Code §§ 346 – 367g, 600.2, 600.5 (West 2017).

³⁹³ Cal. Veh. Code § 21963 (West 2017).

³⁹⁴ Cal. Food & Agric. Code §§ 30850 – 30854 (West 2017).

³⁹⁵ Cal. Food & Agric. Code §§ 31601 – 31609 (West 2017).

³⁹⁶ 42 U.S.C. § 12181 (2017).

³⁹⁷ Cal. Code Regs. tit. 16, §§ 2250 – 2295.3 (West 2017).

³⁹⁸ Just applies to landscape architects.

³⁹⁹ CAL. BUS. & PROF. CODE §§ 5500 – 5683 (West 2017).

⁴⁰⁰ Cal. Code Regs. tit. 16, §§ 100 – 160 (West 2017).

⁴⁰¹ Cal. Code Regs. tit. 16, §§ 2602 – 2680 (West 2017).

⁴⁰² Cal. Code Regs. tit. 16, § 2615 (West 2017).

Business and Professions Code §§ 2000 – 2448, §§ 2505 – 2529.5, §§ 2540 – 2569 ⁴⁰⁴
Title 16, Division 13, California Code of Regulations §§ 1300 – 1379.78, §§ 1399.200 – 1399.279 ⁴⁰⁵
Reciprocity (BPC §§ 2135, 2135.5 AND 2135.7 ⁴⁰⁶)

19. Occupational Therapy ⁴⁰⁷
Business and Professions Code §§ 2570 – 2571 ⁴⁰⁸
Title 16, Division 13, California Code of Regulations §§ 1300 – 1379.78, §§ 1399.200 – 1399.279 ⁴⁰⁹

20. Optometry ⁴¹⁰
Business and Professions Code §§ 2540 – 2545, §§ 2546 – 2546.10, §§ 2550 – 2569, §§ 3000 – 3167 ⁴¹¹
Title 16, Division 15, California Code of Regulations §§ 1500 – 1581 ⁴¹²

⁴⁰³ Applies to “physician’s and surgeon’s certificate,” (CAL. BUS. & PROF. CODE § 2050 (West)); medical assistant, physician assistant, nurse practitioner or certified nurse-midwife (CAL. BUS. & PROF. CODE § 2069 (West)).

Includes osteopathic physician’s and surgeon’s certificate. CAL. BUS. & PROF. CODE § 2099.5 (West).

Also includes doctor of podiatric medicine. CAL. BUS. & PROF. CODE § 2472 (West).

Also includes midwives and midwife assistants. CAL. BUS. & PROF. CODE § 2507, 2516.5 (West).

⁴⁰⁴ CAL. BUS. & PROF. CODE §§ 2000 – 2448, 2505 – 2529.5, 2540 – 2569 (West 2017).

⁴⁰⁵ Cal. Code Regs. tit. 16, §§ 1300 – 1379.78, 1399.200 – 1399.279 (West 2017).

⁴⁰⁶ CAL. BUS. & PROF. CODE §§ 2135, 2135.5, 2135.7 (West 2017).

⁴⁰⁷ Applies to OT and OTAs.

⁴⁰⁸ CAL. BUS. & PROF. CODE §§ 2000 – 2448, 2505 – 2529.5, 2540 – 2569 (West 2017).

⁴⁰⁹ Cal. Code Regs. tit. 16, §§ 1300 – 1379.78, 1399.200 – 1399.279 (West 2017).

⁴¹⁰ Applies to optometrists and related additional certifications related to optometry.

⁴¹¹ CAL. BUS. & PROF. CODE §§ 2540 – 2545, 2546 – 2546.10, 2550 – 2569, 3000 – 3167 (West 2017).

⁴¹² Cal. Code Regs. tit. 16, §§ 1500 – 1581 (West 2017).

Title 16, Division 13.5, California Code of Regulations §
1399⁴¹³

Reciprocity (BPC §§ 3057⁴¹⁴)

21. Osteopathic⁴¹⁵

Business and Professions Code §§ 2000 – 2459.7⁴¹⁶

Title 16, Division 16, California Code of Regulations §§
1600 – 1697⁴¹⁷

Reciprocity (BPC § 2153.5⁴¹⁸)

22. Pharmacy⁴¹⁹

Business and Professions Code §§ 4000 – 4426⁴²⁰

Title 16, Division 17, California Code of Regulations §§
1702 – 1793.8⁴²¹

23. Physical Therapy⁴²²

Business and Professions Code §§ 2600 – 2696⁴²³

Title 16, Division 13.2, California Code of Regulations §§
1398 – 1399.99.4⁴²⁴

Reciprocity (BPC 2636.5⁴²⁵)

Graduate Practice – Physical Therapist and Physical
Therapist Assistance “License Applicant” Statute (§
2639)⁴²⁶

⁴¹³ Cal. Code Regs. tit. 16, § 1399 (West 2017).

⁴¹⁴ CAL. BUS. & PROF. CODE § 3057 (West 2017).

⁴¹⁵ Applies to osteopathic physician or surgeon.

⁴¹⁶ CAL. BUS. & PROF. CODE §§ 2000 – 2459.7 (West 2017).

⁴¹⁷ Cal. Code Regs. tit. 16, §§ 1600 – 1697 (West 2017).

⁴¹⁸ CAL. BUS. & PROF. CODE § 2153.5 (West 2017).

⁴¹⁹ Applies to pharmacists (CAL. BUS. & PROF. CODE § 4200 (West)), pharmacy technicians (CAL. BUS. & PROF. CODE § 4202 (West)), and intern pharmacists (CAL. BUS. & PROF. CODE §§ 4208 – 4209 (West)).

⁴²⁰ CAL. BUS. & PROF. CODE §§ 4000 – 4426 (West 2017).

⁴²¹ Cal. Code Regs. tit. 16, §§ 1702 – 1793.8 (West 2017).

⁴²² Applies to physical therapists and physical therapist assistants. CAL. BUS. & PROF. CODE § 2636 (West).

⁴²³ CAL. BUS. & PROF. CODE §§ 2600 – 2696 (West 2017).

⁴²⁴ Cal. Code Regs. tit. 16, §§ 1398 – 1399.99.4 (West 2017).

⁴²⁵ CAL. BUS. & PROF. CODE § 2636.5 (West 2017).

⁴²⁶ Cal. Code Regs. Tit. 21, § 2639 (West 2017).

24. Physician Assistants ⁴²⁷
Business and Professions Code §§ 3500 – 3546 ⁴²⁸
Title 16, Division 13.8, California Code of Regulations §§
1399 – 1399.99.4 ⁴²⁹

25. Podiatric Doctors ⁴³⁰
Business and Professions Code §§ 2460 – 2499.8 ⁴³¹
Title 16, Division 13.9, California Code of Regulations §§
1399.650 – 1399.725 ⁴³²
Reciprocity (BPC § 2488 ⁴³³)

26. Private Postsecondary Education ⁴³⁴
California Education Code §§ 94800 – 94950 ⁴³⁵
Title 5, Division 7.5, California Code of Regulations §§
70000 – 76240 ⁴³⁶

27. BPELSG (engineers, land surveyors, geologists,
geophysicists)
Business and Professions Code §§ 6700 – 6799
(Engineers)
§§ 7800 – 7887 (Geologists and Geophysicists) and §§
8700 – 8805 ⁴³⁷ (Land Surveyors)
Title 16, Division 5, California Code of Regulations §§ 400
– 476 ⁴³⁸ (Engineers / Surveyors)

⁴²⁷ Applies to physician assistants only.

⁴²⁸ CAL. BUS. & PROF. CODE §§ 3500 – 3546 (West 2017).

⁴²⁹ Cal. Code Regs. tit. 16, §§ 1399 – 1399.99.4 (West 2017).

⁴³⁰ Applies only to podiatric doctors and surgeons.

⁴³¹ CAL. BUS. & PROF. CODE §§ 2460 – 2499.8 (West 2017).

⁴³² Cal. Code Regs. tit. 16, §§ 1399.650 – 1399.725 (West 2017).

⁴³³ CAL. BUS. & PROF. CODE § 2488 (West 2017).

⁴³⁴ Applies to institutions offering educational programs designed to lead to positions requiring licensure. Cal. Educ. Code §§ 94904 – 94905, 94929.5(2) (West).

⁴³⁵ Cal. Educ. Code §§ 94800 – 94950 (West 2017).

⁴³⁶ Cal. Code Regs. tit. 16, §§ 70000 – 76240 (West 2017).

⁴³⁷ CAL. BUS. & PROF. CODE §§ 6700 – 6799, 7800 – 7887, 8700 – 8805 (West 2017).

⁴³⁸ Cal. Code Regs. tit. 16, §§ 400 – 476 (West 2017).

Title 16, Division 29, California Code of Regulations §§
3000 – 3067 ⁴³⁹ (Geologists)

Reciprocity (BPC § 6759, § 7847, AND § 8748 ⁴⁴⁰)

28. Fiduciaries ⁴⁴¹

Business and Professions Code §§ 6500 – 6592 ⁴⁴²

Title 16, Division 41, California Code of Regulations §§
4400 – 4622 ⁴⁴³

29. Psychology ⁴⁴⁴

Business and Professions Code §§ 2900 – 2999 ⁴⁴⁵

Title 16, Division 13.6, California Code of Regulations §§
1380 – 1397.71 ⁴⁴⁶

Reciprocity

Temporary practice by out of state licenses; waiver of
examination requirement (BPC § 2946 ⁴⁴⁷)

Temporary practice by licensees of other state or
foreign country (BPC § 2912 ⁴⁴⁸)

30. Real Estate ⁴⁴⁹

Business and Professions Code §§ 10000 – 11288 ⁴⁵⁰

Title 10, Division 6, California Code of Regulations §§
2705 – 3109 ⁴⁵¹

31. Real Estate Appraisers ⁴⁵²

⁴³⁹ Cal. Code Regs. tit. 16, §§ 3000 – 3067 (West 2017).

⁴⁴⁰ CAL. BUS. & PROF. CODE §§ 6759, 7847, 8748 (West 2017).

⁴⁴¹ Applies to licensed professional fiduciaries.

⁴⁴² CAL. BUS. & PROF. CODE §§ 6500 – 6592 (West 2017).

⁴⁴³ Cal. Code Regs. tit. 16, §§ 4400 – 4622 (West 2017).

⁴⁴⁴ Applies to psychologists and those who practice psychotherapy.

⁴⁴⁵ CAL. BUS. & PROF. CODE §§ 2900 – 2999 (West 2017).

⁴⁴⁶ Cal. Code Regs. tit. 16, §§ 1380 – 1397.71 (West 2017).

⁴⁴⁷ CAL. BUS. & PROF. CODE § 2946 (West 2017).

⁴⁴⁸ CAL. BUS. & PROF. CODE § 2912 (West 2017).

⁴⁴⁹ Applies to real estate broker licensees. CAL. BUS. & PROF. CODE §§ 10150 (West). Also applies to real estate salespeople. CAL. BUS. & PROF. CODE §§ 10151 (West).

⁴⁵⁰ CAL. BUS. & PROF. CODE §§ 10000 – 11288 (West 2017).

⁴⁵¹ Cal. Code Regs. tit. 16, §§ 2705 – 3109 (West 2017).

Business and Professions Code §§ 11300 – 11423 ⁴⁵³
Title 10, Division 6.5, California Code of Regulations §§
3500 – 3780

Federal:

Title 11, United States Code §§ 1101 – 1126 ⁴⁵⁴
Title 15, United States Code §§ 1639e ⁴⁵⁵
Title 12, United States Code §§ 225.61 – 225.67 ⁴⁵⁶
Title 12, United States Code §§ 1222.20 – 1222.26

⁴⁵⁷

Reciprocity (10 CCR 3569 ⁴⁵⁸)

32. Registered Nursing ⁴⁵⁹

Business and Professions Code §§ 2700 – 2838.4 ⁴⁶⁰
Title 16, Division 14, California Code of Regulations §§
1402 – 1495.4 ⁴⁶¹
Reciprocity: Business and Professions Code § 2732.1(b) ⁴⁶²

33. Respiratory Care ⁴⁶³

Business and Professions Code §§ 3700 – 3779 ⁴⁶⁴
Title 16, Division 13.6, California Code of Regulations §§
1399.300 – 1399.395 ⁴⁶⁵
Reciprocity (BPC § 3735 ⁴⁶⁶)

⁴⁵² Applies to real estate appraisers only.

⁴⁵³ CAL. BUS. & PROF. CODE §§ 11300 – 11423 (West 2017).

⁴⁵⁴ 11 U.S.C. §§ 1101 – 1126 (2017).

⁴⁵⁵ 15 U.S.C. § 1639e (2017).

⁴⁵⁶ 15 U.S.C. § 225.61 – 225.67 (2017).

⁴⁵⁷ 15 U.S.C. § 1222.20 – 1222.26 (2017).

⁴⁵⁸ Cal. Code Regs. tit. 15, § 3569 (West 2017).

⁴⁵⁹ Includes midwives (Cal. Bus. & Prof. Code § 2746 (West)),
Nurse Anesthetists (Cal. Bus. & Prof. Code §§ 2825 – 2833.6 (West)), nurse
practitioners (Cal. Bus. & Prof. Code § 2834 – 2837 (West)), and clinical
nurse specialists (Cal. Bus. & Prof. Code § 2838 – 2838.4 (West)).

⁴⁶⁰ CAL. BUS. & PROF. CODE §§ 2700 – 2838.4 (West 2017).

⁴⁶¹ Cal. Code Regs. tit. 16, §§ 1402 – 1495.4 (West 2017).

⁴⁶² CAL. BUS. & PROF. CODE § 2732.1(b) (West 2017).

⁴⁶³ Applies to respiratory care practitioners only.

⁴⁶⁴ CAL. BUS. & PROF. CODE §§ 3700 – 3779 (West 2017).

⁴⁶⁵ Cal. Code Regs. tit. 16, §§ 1399.300 – 1399.395 (West 2017).

⁴⁶⁶ CAL. BUS. & PROF. CODE § 3735 (West 2017).

34. Security and Investigative ⁴⁶⁷

Business and Professions Code §§ 6980 – 6980.84, §§
7500 – 7599.75 ⁴⁶⁸

Title 16, Division 7, California Code of Regulations §§ 600
– 645 ⁴⁶⁹

35. Speech and Hearing ⁴⁷⁰

Business and Professions Code §§ 2530 – 2539.14 ⁴⁷¹

Title 16, Division 13.3, California Code of Regulations §§
1399.100 – 1399.144 ⁴⁷²

Title 16, Division 13.4, California Code of Regulations §§
1399.150 – 1399.199.14 ⁴⁷³

36. Structural Pest ⁴⁷⁴

Business and Professions Code §§ 8500 – 8698.6 ⁴⁷⁵

Title 16, Division 19, California Code of Regulations §§
1900 – 1999.5 ⁴⁷⁶

37. Veterinary Medicine ⁴⁷⁷

Business and Professions Code §§ 4800 – 4917 ⁴⁷⁸

⁴⁶⁷ Applies to proprietary security officers (CAL. BUS. & PROF. CODE §§ 7574 – 7478 (West)), private patrol officer (CAL. BUS. & PROF. CODE §§ 7580 – 7588 (West)), alarm company operators (CAL. BUS. & PROF. CODE §§ 7590 – 7599.80 (West)), private investigators (CAL. BUS. & PROF. CODE §§ 7512 – 7573.5 (West)), repossessioners (CAL. BUS. & PROF. CODE §§ 7500 – 7511.5 (West)), and locksmiths (CAL. BUS. & PROF. CODE §§ 6980 – 6981 (West)).

⁴⁶⁸ CAL. BUS. & PROF. CODE §§ 6980 – 6980.84, 7500 – 7599.75 (West 2017).

⁴⁶⁹ Cal. Code Regs. tit. 16, §§ 600 – 645 (West 2017).

⁴⁷⁰ Applies to speech-language pathologists and audiologists.

⁴⁷¹ CAL. BUS. & PROF. CODE §§ 2530 – 2539.14 (West 2017).

⁴⁷² Cal. Code Regs. tit. 16, §§ 1399.100 – 1399.144 (West 2017).

⁴⁷³ Cal. Code Regs. tit. 16, §§ 1399.150 – 1399.199.14 (West 2017).

⁴⁷⁴ Applies to pest control operators, field representatives, and applicators. CAL. BUS. & PROF. CODE § 8560 (West).

⁴⁷⁵ CAL. BUS. & PROF. CODE §§ 8500 – 8698.6 (West 2017).

⁴⁷⁶ Cal. Code Regs. tit. 16, §§ 1900 – 1999.5 (West 2017).

⁴⁷⁷ Applies to veterinarians and individuals practicing veterinary medicine. CAL. BUS. & PROF. CODE § 4828 (West).

⁴⁷⁸ CAL. BUS. & PROF. CODE §§ 4800 – 4917 (West 2017).

Title 16, Division 20, California Code of Regulations §§
2000 – 2086.9 ⁴⁷⁹
Civil Code §§ 3051, 3052, §§ 3080 – 3080.03, §§ 1834.5 –
1834.6 ⁴⁸⁰
Health and Safety Code §§ 122125 – 122220 ⁴⁸¹

38. VN & PT (vocational nurses [LVNs] and psychiatric
technicians [PTs]) ⁴⁸²
Business and Professions Code §§ 2840 – 2895.5 and §§
4500 – 4548 ⁴⁸³
Title 16, Division 25, California Code of Regulations §§
2500 – 2557.3 and §§ 2560 – 2595.3 ⁴⁸⁴

39. Naturopathic doctors and assistants
Business and Professions Code §§ 3610 – 3686 ⁴⁸⁵
Title 16, Division 25, California Code of Regulations §§
4200 – 4268 ⁴⁸⁶
Title 16, Division 13.7, California Code of Regulations §
1399.434 ⁴⁸⁷

CALIFORNIA COMMISSION on TEACHING CREDENTIALING ⁴⁸⁸

⁴⁷⁹ Cal. Code Regs. tit. 16, §§ 2000 – 2086.9 (West 2017).

⁴⁸⁰ Cal. Civ. Code §§ 3051, § 3052, 3080 – 3080.03, 1834.5 – 1834.6
(West 2017).

⁴⁸¹ Cal. Health & Safety Code §§ 122125 – 122220 (West 2017).

⁴⁸² Applies only to vocational nurses and psychiatric technicians.

⁴⁸³ CAL. BUS. & PROF. CODE §§ 2840 – 2895.5, 4500 – 4548 (West
2017).

⁴⁸⁴ Cal. Code Regs. tit. 16, §§ 2500 – 2557.3, 2560 – 2595.3 (West
2017).

⁴⁸⁵ CAL. BUS. & PROF. CODE §§ 3610 – 3686 (West 2017).

⁴⁸⁶ Cal. Code Regs. tit. 16, §§ 4200-4268, 1399.434 (West 2017).

⁴⁸⁷ Cal. Code Regs. tit. 16, § 1399.434 (West 2017).

⁴⁸⁸ California Commission on Teacher Credentialing, *About the
Commission*, <https://www.ctc.ca.gov/commission/default> (last visited Jul.
15, 2017) (citing The California Commission on Teacher Credentialing
serves “as a state standards board for educator preparation for the public
schools of California, the licensing and credentialing of professional
educators in the State, the enforcement of professional practices of

Title 2, Division 3, California Education Code §§⁴⁸⁹
Title 5, Division 8, California Code of Regulations §§
80000 – 80694⁴⁹⁰
First Time Application Form⁴⁹¹

educators, and the discipline of credential holders in the State of California.”).

⁴⁸⁹ Cal. Educ. Code §§ 44200 – 44409 (West 2017).

⁴⁹⁰ Cal. Code Regs. tit. 5, § 80000 – 80694 (West 2017).

⁴⁹¹ Cal. Comm’n on Teacher Credentialing, *How to Submit a Paper Application*, <https://www.ctc.ca.gov/credentials/submit-paper> (last visited Jul. 15, 2017).

*IX. APPENDIX 2–N.Y. EDUC. LAW AND DEPARTMENT OF
EDUCATION APPLICATIONS FOR PROFESSIONAL
LICENSES FOR NON-CITIZENS*

**NO STATUTORY LIMITATIONS BASED ON
IMMIGRATION CATEGORY FOR 29 PROFESSIONS**

1. Acupuncturist⁴⁹² Application Form
<http://www.op.nysed.gov/prof/acu/acu1.pdf>
2. Athletic Trainer.⁴⁹³ Application Form
<http://www.op.nysed.gov/prof/at/at1.pdf>
3. Audiologist ⁴⁹⁴ Application Form
<http://www.op.nysed.gov/prof/slpa/sla1.pdf>
4. Clinical Laboratory Technologist⁴⁹⁵ Application Form
<http://www.op.nysed.gov/prof/clt/clt1.pdf>
5. Cytotechnologist⁴⁹⁶ Application Form
<http://www.op.nysed.gov/prof/clt/clt1.pdf>
6. Clinical Laboratory/ Histological Technician⁴⁹⁷
Application Form
<http://www.op.nysed.gov/prof/clt/cyt1.pdf>
7. Dental Assistant ⁴⁹⁸ Application Form
<http://www.op.nysed.gov/prof/dent/dent-rdfl1.pdf>
8. Dietitian/Nutritionist ⁴⁹⁹ Application Form
<http://www.op.nysed.gov/prof/diet/diet1.pdf>

⁴⁹² N.Y.EDUC.LAW § 8214 (McKinney 2016).

³⁷⁷ N.Y.EDUC.LAW § 8355 (McKinney 2016).

³⁷⁸ N.Y.EDUC.LAW § 8206 (McKinney 2016).

³⁷⁹ N.Y.EDUC.LAW § 8605 (McKinney 2016).

³⁸⁰ N.Y.EDUC.LAW § 8605 (McKinney 2016).

³⁸¹ N.Y.EDUC.LAW §§ 8606, 8606-a (McKinney 2016).

³⁸² N.Y.EDUC.LAW § 6608-b (McKinney 2016).

³⁸³ N.Y.EDUC.LAW § 8004 (McKinney 2016).

9. Medical Physicist⁵⁰⁰ Application Form
<http://www.op.nysed.gov/prof/medphys/mdl1.pdf>
10. Physician Assistant⁵⁰¹ Application Form
<http://www.op.nysed.gov/prof/med/pa1.pdf>
11. Specialist Assistant⁵⁰² Application Form
<http://www.op.nysed.gov/prof/med/sa1.pdf>
12. Mental Health Practitioner⁵⁰³ Application Form
<http://www.op.nysed.gov/prof/mhp/mft1.pdf>
13. Family Therapist⁵⁰⁴ Application Form
<http://www.op.nysed.gov/prof/mhp/mft1.pdf>
14. Creative Arts Therapist⁵⁰⁵ Application Form
<http://www.op.nysed.gov/prof/mhp/cat1.pdf>
15. Psychoanalyst⁵⁰⁶ Application Form
<http://www.op.nysed.gov/prof/mhp/psyan1.pdf>
16. Registered Nurse⁵⁰⁷ Application Form
<http://www.op.nysed.gov/prof/nurse/nurse1.pdf>
17. Licensed Practical Nurse⁵⁰⁸ Application Form
<http://www.op.nysed.gov/prof/nurse/nurse1.pdf>

⁵⁰⁰ N.Y. EDUC. LAW § 8705 (McKinney 2016).

⁵⁰¹ N.Y. EDUC. LAW § 6541 (McKinney 2016).

⁵⁰² N.Y. EDUC. LAW § 6541 (McKinney 2016).

⁵⁰³ N.Y. EDUC. LAW § 8403 (McKinney 2016).

⁵⁰⁴ N.Y. EDUC. LAW § 8403 (McKinney 2016).

⁵⁰⁵ N.Y. EDUC. LAW § 8404 (McKinney 2016).

⁵⁰⁶ N.Y. EDUC. LAW § 8405 (McKinney 2016).

⁵⁰⁷ N.Y. EDUC. LAW § 6905 (McKinney 2016).

⁵⁰⁸ N.Y. EDUC. LAW § 6905 (McKinney 2016).

18. Certification for Nurse Practitioners and Clinical Nurse Specialists⁵⁰⁹
Application Forms
<http://www.op.nysed.gov/prof/nurse/np1.pdf>;
<http://www.op.nysed.gov/prof/nurse/cns1.pdf>
19. Perfusionist permit ⁵¹⁰ Application Form
<http://www.op.nysed.gov/prof/perfusion/perf5.pdf>
20. Physical Therapist ⁵¹¹ Application Form
<http://www.op.nysed.gov/prof/pt/pt1.pdf>
21. Physical Therapist Assistant ⁵¹²
Application Form
<http://www.op.nysed.gov/prof/pt/pt1.pdf>
22. Polysomnographic Technologist (authorization) ⁵¹³
Application Form
<http://www.op.nysed.gov/prof/polysom/polysom1.pdf>
23. Respiratory Therapist ⁵¹⁴ Application Form
<http://www.op.nysed.gov/prof/rt/rt1.pdf>
24. Respiratory Technician⁵¹⁵ Application Form
<http://www.op.n.gov/prof/rt/rt1.pdf>
25. Social Worker Master ⁵¹⁶ Application Form
<http://www.op.nysed.gov/prof/sw/lmsw1.pdf>
26. Clinical Social Worker⁵¹⁷ Application Form
<http://www.op.nysed.gov/prof/sw/lcsw1.pdf>

⁵⁰⁹ N.Y. EDUC. LAW §§ 6910, 6911 (McKinney 2016).

⁵¹⁰ N.Y. EDUC. LAW § 8609(9) (McKinney 2016).

⁵¹¹ N.Y. EDUC. LAW § 6734 (McKinney 2016).

⁵¹² N.Y. EDUC. LAW § 6734 (McKinney 2016).

⁵¹³ N.Y. EDUC. LAW § 8505 (McKinney 2016).

⁵¹⁴ N.Y. EDUC. LAW § 8504 (McKinney 2016).

⁵¹⁵ N.Y. EDUC. LAW § 8504 (McKinney 2016).

⁵¹⁶ N.Y. EDUC. LAW § 7704 (McKinney 2016).

27. Speech Pathologist/Audiologist⁵¹⁸
Application Form
<http://www.op.nysed.gov/prof/slpa/sla1.pdf>
28. Licensed Behavior Analyst⁵¹⁹
Application Form
<http://www.op.nysed.gov/prof/aba/aba1.pdf>
29. Certified Behavior Analyst Assistant⁵²⁰
Application Form
<http://www.op.nysed.gov/prof/aba/aba1.pdf>

SPECIFIC LANGUAGE THAT CITIZENSHIP IS NOT A REQUIREMENT AND NO IMMIGRATION RELATED CRITERIA FOR 9 PROFESSIONS

The statutes regarding the following professions specifically state that an individual does not need to meet any requirements as to U.S. Citizenship and do not include an immigration category requirement.

1. Interior Design⁵²¹ Application Form
<http://www.op.nysed.gov/prof/id/intdesform1.pdf>
2. Architect⁵²² Application Form
<http://www.op.nysed.gov/prof/arch/arch1.pdf>
3. Occupational Therapist⁵²³ Application Form
<http://www.op.nysed.gov/prof/ot/ot1.pdf>

⁵¹⁷ N.Y. EDUC. LAW § 7704 (McKinney 2016).

⁵¹⁸ N.Y. EDUC. LAW § 8206 (McKinney 2016).

⁵¹⁹ N.Y. EDUC. LAW § 8804(2) (McKinney 2016).

⁵²⁰ N.Y. EDUC. LAW § 8804(1) (McKinney 2016).

⁵²¹ N.Y. EDUC. LAW § 8305 (McKinney 2016).

⁵²² N.Y. EDUC. LAW § 7304 (McKinney 2016).

⁵²³ N.Y. EDUC. LAW § 7904 (McKinney 2016).

4. Occupational Therapist Assistant⁵²⁴
Application Form
<http://www.op.nysed.gov/prof/ot/ot1.pdf>
5. Ophthalmic Dispensing⁵²⁵ Application Form
<http://www.op.nysed.gov/prof/od/od1.pdf>
6. Optometrist⁵²⁶ Application Form
<http://www.op.nysed.gov/prof/optom/opt1.pdf>
7. Podiatrist⁵²⁷ Application Form
<http://www.op.nysed.gov/prof/pod/pod1.pdf>
8. Psychologist⁵²⁸ Application Form
<http://www.op.nysed.gov/prof/psych/psych1.pdf>
9. Certified Public Accountant⁵²⁹ Application Form
<http://www.op.nysed.gov/prof/cpa/cpa1.pdf>

**STATUTES LIMITING LICENSES FOR 13
PROFESSIONS DECLARED UNCONSTITUTIONAL**

The statutory limits on non-citizen eligibility for thirteen professions was declared unconstitutional in *Dandamudi v. Tisch*⁵³⁰

1. Chiropractor.⁵³¹ Application Form
<http://www.op.nysed.gov/prof/chiro/chiro1.pdf>
2. Certified Shorthand Reporter⁵³² Application Form
<http://www.op.nysed.gov/prof/csr/csr1.pdf>

⁵²⁴ N.Y. EDUC. LAW § 7904 (McKinney 2016).

⁵²⁵ N.Y. EDUC. LAW § 7124 (McKinney 2016).

⁵²⁶ N.Y. EDUC. LAW § 7104 (McKinney 2016).

⁵²⁷ N.Y. EDUC. LAW § 7004 (McKinney 2016).

⁵²⁸ N.Y. EDUC. LAW § 7603 (McKinney 2016).

⁵²⁹ N.Y. EDUC. LAW § 7404 (McKinney 2016).

⁵³⁰ 686 F. 3d 66 (2012).

⁵³¹ N.Y. EDUC. LAW § 6554 (McKinney 2016).

3. Dentist⁵³³ Application Form
<http://www.op.nysed.gov/prof/dent/dent1.pdf>
4. Dental Hygienist⁵³⁴ Application Form
<http://www.op.nysed.gov/prof/dent/dh1.pdf>
5. Engineer⁵³⁵ Application Form
<http://www.op.nysed.gov/prof/pels/pe1.pdf>
6. Land Surveyor⁵³⁶ Application Form
<http://www.op.nysed.gov/prof/pels/l surv1.pdf>
7. Landscape Architect⁵³⁷ Application Form
<http://www.op.nysed.gov/prof/larch/landarch1.pdf>
8. Massage Therapist⁵³⁸ Application Form
<http://www.op.nysed.gov/prof/mt/mt1.pdf>
9. Physician⁵³⁹ Application Form
<http://www.op.nysed.gov/prof/med/med1.pdf>
10. Midwife⁵⁴⁰ Application Form
<http://www.op.nysed.gov/prof/midwife/mid1.pdf>
11. Pharmacist⁵⁴¹ Application Form
<http://www.op.nysed.gov/prof/pharm/pharm1.pdf>

⁵³² N.Y. EDUC. LAW § 7504 (McKinney 2016).

⁵³³ N.Y. EDUC. LAW § 6604 (McKinney 2016).

⁵³⁴ N.Y. EDUC. LAW § 6609 (McKinney 2016).

⁵³⁵ N.Y. EDUC. LAW § 7206 (McKinney 2016).

⁵³⁶ N.Y. EDUC. LAW § 7206-a (McKinney 2016).

⁵³⁷ N.Y. EDUC. LAW § 7324 (McKinney 2016).

⁵³⁸ N.Y. EDUC. LAW § 7804 (McKinney 2016).

⁵³⁹ N.Y. EDUC. LAW § 6524 (McKinney 2016).

⁵⁴⁰ N.Y. EDUC. LAW § 6955 (McKinney 2016).

⁵⁴¹ N.Y. EDUC. LAW § 6805 (McKinney 2016).

12. Veterinarian⁵⁴² Application Form
<http://www.op.nysed.gov/prof/vetmed/vet1.pdf>
13. Veterinary Technician⁵⁴³ Application Form
<http://www.op.nysed.gov/prof/vetmed/vt1.pdf>

⁵⁴² N.Y. EDUC. LAW §§ 6704, 6711 (McKinney 2016).

⁵⁴³ N.Y. EDUC. LAW § 6711 (McKinney 2016).