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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 31(d)(24), RULES OF THE ARIZONA SUPREME COURT: LEGAL DOCUMENT PREPARERS	No. R-13-0001 COMMENT OF THE DPA DOCUMENT PREPARERS ASSOCIATION

On behalf of the DPA Document Preparers Association, a voluntary organization of duly licensed Arizona legal document preparers, the undersigned respectfully submits the following comment in opposition to the above-captioned petition:

I.

The proposal under consideration is nothing more than a thinly disguised stab at "turf protection" by a financially-interested segment of the immigration bar. It should be summarily rejected.

The arguments advanced by petitioners are reminiscent of the largely pretextual objections raised by Arizona attorneys more than a decade ago, when the formal licensing and regulation of legal document preparers was first proposed and considered by the Arizona Supreme Court.

Subsequent experience has demonstrated that the "sky was not falling," as attorneys then shouted with alarm. The Legal Document Preparers Program has proven to be a rousing success, and thousands of ordinary people have gained access to reasonably priced services that they were not previously able to enjoy.

Going back in time, some will recall that similar objections were once raised by the organized bar when Arizona realtors wanted to prepare routine transactional documents. It was argued that specialized legal knowledge, possessed only by attorneys, was required to prepare the paperwork associated with common real estate transactions. Because the organized bar's cries of alarm were viewed by the public as motivated by self-interest, the voters of Arizona rejected them, and in doing so made clear that they wanted to see more legal services available at cheaper prices. *See*, Arizona Constitution Art. 26, Sec. 1 (1962), which was passed in response to *State Bar of Arizona v. Arizona Land Title & Trust*, 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented at* 91 Ariz. 293, 371 P.2d 1020 (1962). A half century later, there is no significant history of land titles in disarray or increased litigation expenses because realtors were given a green light to draft certain documents.

The "elephant in the room," both then and now, is that there would be no need at all for non-lawyer document preparers if attorneys had not priced themselves out of the reach of most citizens (and non-citizens). Many thousands of people with limited resources have benefitted from the foresight and willingness of the Arizona Supreme Court to boldly address the daunting challenge of making legal services available to the largest possible number of consumers. This concern dates back decades, for example, to the court's active support for legal aid providers; to the court's

establishment of IOLTA trust accounts to fund legal services for the poor; to the self-serve kiosks of the 1990s that provided court–ready forms at low cost in the rural counties (for which Arizona received international acclaim), and the "self-service centers" in the urban counties, where hundreds of thousands of people were able to obtain legal forms and personal assistance in completing them. None of these innovations resulted in harm to the public or the justice system, as then predicted by attorneys.

The licensing, education, and oversight of non-lawyers by the Court and its Document Preparers Board are a continuation of this proud tradition. The instant petition, if granted, would be a giant step backward.

II.

The ostensible reason advanced in support of the instant petition is a claim of federal preemption of all matters dealing with immigrants. The impetus for this claim seems to be a gross misreading and/or exaggeration of *Arizona v. U.S.*, 132 S. Ct. 2492 (2012). That case recently dealt with the infamous Arizona law known as SB 1070. In it, the United States Supreme Court reaffirmed what has long been the law, to wit: that the *narrow* field of "alien regulation," *i.e.* who should or should not be admitted into the country, and the conditions under which a legal entrant may stay, has been preempted by the federal government.

There can, of course, be no doubt that the actual identification and registration of aliens fall within such "regulation." Nowhere in *Arizona v. U.S.*, *supra*, however, is there the slightest suggestion that assisting an applicant in the completion of required immigration paperwork constitutes or interferes with such regulation, and/or is so complicated or of such national importance that it cannot be done by a state-licensed document preparer. There is also no language in that case, or in the various regulations

relied on by petitioners, leading to the absurd conclusion that permitting such assistance would create an obstacle to the full purposes and objectives of Congress. *See, Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (confirming that there is a "high threshold" to be met for a finding of federal preemption), and *DeCanas v. Bica*, 96 S. Ct. 933, 936 (1976), (superseded in part by statute, but not with respect to its discussion of the traditional elements or types of preemption).

The classic requirements for a finding of federal preemption remain as they have been for decades, to wit:

(1) "Express" preemption, where Congress explicitly defines the extent to which an enactment preempts state law;

(2) "Implied" preemption, where state law regulates conduct in a field that Congress intended the federal government to occupy exclusively; and

(3) "Conflict" preemption, where state law actually conflicts with federal law (meaning that it is impossible to comply with both, or that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

See, Hutto v. Francisco, 210 Ariz. 88, 90, 107 P.3d 934, 936 (2005). *See also, State v. Barragan-Sierra*, 219 Ariz. 276, 286-87, 196 P.3d 879, 889-90 (2008).

None of the foregoing requirements are present here. Moreover, it is clear from a reading of *Arizona v. U.S., supra* at 2509-11, and other cases on the subject, that federal law does not automatically preempt every state law dealing with aliens. *See, e.g., Grocers Supply, Inc v. Cabello*, 390 S.W.3d 707 (Tex. 2012); *State v. Lopez*, ___So. 3d ___, WL 1200338 (La. App. 2013).

It is especially noteworthy here that the federal government has neither rejected nor raised any objection to immigration papers completed with the assistance of Arizona's licensed document preparers. Does it not stand to reason that if immigration authorities believed the federal law to be as alleged by petitioners, they could (and should) simply refuse to accept such forms? Federal officials, however, are not complaining, which strongly suggests that there is no problem other than in the minds (and pocketbooks) of the petitioners.

III.

Every immigration document is signed by the *applicant* under penalty of perjury. The document preparer indicates, by his/her own signature in an appropriate space, that he/she is a licensed legal document preparer in Arizona, and that the form was filled in at the request of, and with information provided by, the applicant. Nothing is hidden.

When completed, the forms are given to the applicant for filing and/or mailing. The document preparers do not file paperwork, do not appear with applicants at immigration interviews or court proceedings, and do not purport to be providing legal representation. They merely help applicants fill out required forms.

The instant petitioners have not offered any evidence to support the hyperbolic claim that "[s]election of proper immigration forms requires the training and skills of an immigration lawyer." Within the last 20 years we have seen machines (touch screen computers in free standing kiosks) selecting proper legal forms, and assisting consumers to complete them, in specialized areas such as domestic relations (including abuse), and landlord-tenant disputes. We have also had non-lawyers in self-service centers helping people select and fill out court-ready forms in these and other

specialized legal fields. Many such forms are now freely available on the internet, as are the very immigration documents presently being filled out with the assistance of document preparers.

Most of the applicants speak little or no English and/or are poor. They cannot afford lawyers, and/or are reluctant to seek formal counsel. Moreover, the examination taken by licensed document preparers includes immigration and naturalization content, (*see* Section 3 "Overview of the Examination," Candidate Study Guide, page 3), which is more than can be said for the Arizona State Bar examination.

It is also significant that petitioners' plea for "emergency" treatment under Rule 28(G), as well as their motion to consolidate this petition with the Court's consideration of Administrative Orders 2012-85 and 2012-94, were recently denied. Obviously, there has been no showing by petitioners that innocent people are being regularly (or even irregularly) harmed by the activities of these document preparers.

IV.

Petitioners' claim that the present system "is both unconstitutional as an impermissible encroachment upon federal immigration and nationality regulations and is suboptimal administrative policy" is, quite frankly, over the top. The Arizona Supreme Court has inherent power to create rules governing the authorized and unauthorized practice of law in this state. Duly enacted rules, statutes and ordinances carry a presumption of constitutionality, and the burden to prove otherwise is always very heavy. *See, Baseline Liquors v. Circle K Corp.*, 129 Ariz. 215, 218, 630 P.2d 38, 41 (1981); *McGovern v. McGovern*, 201 Ariz. 172, 178, 33 P.3d 506, 512 (2001); *State v. Brown*, 207 Ariz. 231, 236, 85 P.3d 109, 114 (2004); *State v.*

Klausner, 194 Ariz. 169, 172, 978 P.2d 654, 657 (1998). Petitioner has not met this burden here.

Finally, the puzzling discussion on page 5 of the petition, which seeks to conflate notaries with document preparers, lends nothing of value to the analysis and is just plain wrong, as other commentators (including the Board of Legal Document Preparers) have already noted.

The petition should be denied.

Respectfully submitted this 20th day of May, 2013.

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