IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: MARY DOE and JANE DOE, *Petitioners*.	No. 20180806-SC

Brief of *Amicus Curiae*
the Office of the Utah Attorney General

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INTRODUCTION AND SUMMARY OF ARGUMENT

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Exercising that power, Congress has forbidden States to issue professional licenses to immigrants illegally present in the United States. *See* 8 U.S.C. §§ 1621(a), 1621(c)(1)(A). But Congress also lets States opt out of that ban—States may allow unlawfully present immigrants to obtain professional licenses "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." *Id.* § 1621(d).

Petitioners ask this Court to promulgate a rule making undocumented immigrants eligible for admission to the Utah State Bar. This Court, in turn, has sought the Utah Attorney General's Office's views on whether the Court "may 'enact[] . . . a state law' under 8 U.S.C. § 1621(d) permitting membership in the Utah State Bar for undocumented immigrants; and if so, whether it would be appropriate for the Court to do so." Order at 2 (Nov. 19, 2018).

In the Attorney General's Office's view, this Court may adopt a rule allowing undocumented immigrants to become members of the Utah State Bar. In fact, because this Court has interpreted the Utah Constitution to give it the exclusive power to regulate Utah State Bar admissions, only this Court has power under Utah law to enact a lawyer-specific opt-out provision that satisfies

section 1621(d). Any attempt by the Utah Legislature to regulate bar admissions for immigrants—of any legal status—would be invalid as a matter of State law.

Even so, the Court should strongly consider not promulgating an opt-out rule. At least, it should strongly consider not doing so *yet*. Immigration questions raise policy-laden disputes of great political import to many State constituencies. As the Court itself has acknowledged, resolving such inherently political policy disputes is not its forte. So to best ensure that this Court—a politically unaccountable body—sets state policy in a way that accounts for the myriad competing policy considerations, in these unique circumstances the Court should follow the Legislature's lead. It should strongly consider waiting to promulgate an opt-out rule for aspiring lawyers until the Legislature has first passed opt-out legislation authorizing undocumented immigrants to obtain the types of professional licenses that are within the Legislature's power to regulate.

ARGUMENT

I. This Court's Bar-Admission Rules Constitute "Enactment[s] of . . . State Law" for Purposes of 8 U.S.C. § 1621(d).

No one appears to seriously dispute that States satisfy section 1621(d)'s opt-out requirement when their legislatures pass a statute "affirmatively provid[ing]" that undocumented immigrants may obtain professional licenses. 8 U.S.C. § 1621(d). But that does not answer the question whether the phrase

"enactment of a State law" in section 1621(d) unambiguously makes legislation the *only* way States can opt out.

In the Attorney General's Office's view, it does not. That text can—and especially in this context, should—be interpreted to allow Utah to opt out by a court rule making undocumented immigrants eligible for bar admission.

A. Section 1621(d)'s phrase "enactment of a State law" does not unambiguously mean only a statute passed by a legislature.

Statutory construction begins, "as always, with the statutory text." *LeBeau v. State*, 2014 UT 39, ¶ 26, 337 P.3d 254.

On its face, the word "law" in section 1621(d) is not limited to statutes. The word "law" bears a broad definition. One dictionary contemporaneous with section 1621(d)'s passage lists 17 definitions for the word "law." The New Shorter Oxford English Dictionary 1544-45 (5th ed. 1993). An earlier one lists nine definitions, each containing from one to five subparts. Webster's Third New Int'l Dictionary 1279 (1963). And the definition of "law" in the edition of Black's Law Dictionary contemporaneous with section 1621(d) spans two pages. Black's Law Dictionary 884-85 (6th ed. 1990).

A few examples show this term's sweeping scope. Law is defined as a "rule of conduct imposed by secular authority"—specifically, the "body of rules, whether formally enacted or customary, which a particular State or community recognizes as governing the actions of its subjects or members and which it may

enforce by imposing penalties." New Shorter Oxford English Dictionary at 1544 (first entry). It is also defined as "a binding custom or practice of a community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision, or usage)." Webster's Third New Int'l Dictionary at 1279 (first entry). But it can also mean "[a]ny of the body of individual rules in force in a State or community"; the "action of the courts, as a means of providing redress of grievances or enforcing claims"; or "[t]he statute and common law." New Shorter Oxford English Dictionary at 1544 (second, fifth, and sixth entries).

Alternatively, law is defined as "[t]hat which is laid down, ordained, or established. . . . Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force." Black's Law Dictionary at 884 (6th ed.). Black's continues: "The 'law' of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts." *Id.* But the "word may mean or embrace: body of principles, standards and rules promulgated by government"; "administrative agency rules and regulations"; or "judicial decisions, judgments or decrees." *Id.* (citations omitted). Thus "law" plainly comprises statutes, but it just as plainly is not limited to them.

The contextual clues from the rest of section 1621(d)'s text do not undermine that conclusion. *See Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 12, 248 P.3d 465. On the contrary, they buttress it. Congress used the compound noun "State law" in section 1621(d). And "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)," the Supreme Court has "recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992) (plurality op.). "[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (internal quotation marks omitted). Because in 1996 it had been settled U.S. Supreme Court precedent for nearly 60 years that the phrase "State law" included a state's common law, statutes, and regulations, this Court can presume that Congress borrowed that broader meaning when it used that compound noun in section 1621(d).

Neither does the term "enactment" in section 1621(d) rebut that presumption and require reading "State law" to mean only "statute." Enactment is defined as "[t]he action of enacting a law; the state or fact of being enacted." New Shorter Oxford English Dictionary at 812. It can also mean "[a] thing which is enacted; an ordinance, a statute," or "[t]he provisions of a law." *Id.*

That definition admittedly encompasses both the act of a legislature's passing a statute and the statute thus produced. *See also* Black's Law Dictionary at 526 (6th ed.) (defining "Enactment" as "[t]he method or process by which a bill in the Legislature becomes a law"). But other contemporaneous usages suggest that "enactment" can also mean lawmaking processes other than a legislature's passing a statute—particularly rulemaking processes.

Most relevant, before Congress passed section 1621(d), the United States Supreme Court repeatedly used the words "enactment" or "enact" to describe regulatory processes—not legislation—producing non-statutory laws. For example, the Court pointed to its prior holding that a state bureau of prisons had created a protected liberty interest for certain prison inmates "by enacting regulations that 'used language of an unmistakably mandatory character.'" *Washington v. Harper*, 494 U.S. 210, 221 (1990) (quoting *Hewitt v. Helms*, 459 U.S. 460, 471 (1983)). It cited "real-world experience" as the reason "the Postal Service enacted the regulation at issue" in *United States v. Kokinda*, 497 U.S. 720, 735 (1990). Justice White once described how the Minnesota commissioner of corrections "enacted new parole regulations" governing prisoners' release dates. *Bailey v. Noot*, 503 U.S. 952, 952 (1992) (White, J., dissenting from the denial of certiorari). And in deciding what level of deference to apply to agency action, the

Court observed that "an agency" may be "empowered to enact legislative rules." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981).

Utah courts use that word the same way. This Court described its authority under article VIII, section 4 of the Utah Constitution as the "authority to enact rules of evidence and procedure." *Brown v. Cox*, 2017 UT 3, ¶ 17, 387 P.3d 1040. The court of appeals said the Department of Professional Licensing "enacted the Rule" an appellant had challenged as exceeding DOPL's authority. *Zen Healing Arts LLC v. Dep't of Commerce*, 2018 UT App 25, ¶ 4, 417 P.3d 629. And this Court has resolved cases by relying on Black's Law Dictionary's definition of "[p]ositive law" as law that "'typically consists of enacted law—the codes, statutes, and regulations that are applied and enforced in the courts.'" *Proulx v. Salt Lake City Recorder*, 2013 UT 2, ¶ 9, 297 P.3d 573 (quoting Black's Law Dictionary 1280 (9th ed. 2009)). Other examples abound.[1]

[1] *See, e.g.*, *Ross v. Schackel*, 920 P.2d 1159, 1170 (Utah 1996) (Stewart, A.C.J., dissenting) (noting "a sheep inspector, as a public officer, was statutorily authorized to enact regulations and take specific actions to protect the public health"); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1260 n.2 (Utah 1996) (Zimmerman, C.J., concurring in the result) (noting that the United States Department of Transportation "has enacted a regulation requiring" car manufacturers to install a certain safety feature); *Elks Lodge No. 719 (Ogden) & No. 2021 (Moab) v. Dep't of Alcoholic Beverage Control*, 905 P.2d 1189, 1206 (Utah 1995) (describing the holding of a California case "involving an apartment complex that enacted a rule prohibiting families with children from leasing apartments").

In short, "the enactment of a State law" that Congress requires of States as a precondition to their issuing professional licenses to unlawfully present immigrants is best read to include not just a statute but also a rule or regulation that "affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

B. Interpreting section 1621(d) to allow opting out only by legislation would raise grave constitutional questions.

At a minimum, section 1621(d) is ambiguous about whether States can opt out in ways other than by passing statutes. So the Court can employ additional tools of statutory construction to discern its meaning. *See LeBeau*, 2014 UT 39, ¶ 26. In these unique circumstances, the most relevant of those tools is the canon of constitutional avoidance, which supports interpreting section 1621(d) to allow Utah to opt out by court rule.

The canon of constitutional avoidance says that courts may "reject[] one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality." *Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶ 23, 332 P.3d 900. This canon "shows proper respect for the legislature, which is assumed to 'legislate[] in the light of constitutional limitations.'" *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)).

Reading section 1621(d) to prescribe legislation as the only way Utah can authorize bar admissions for undocumented immigrants would raise serious anticommandeering concerns. The anticommandeering doctrine "represents the

recognition" that Congress lacks "power to issue direct orders to the governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). Congress cannot do so because the States "retained 'a residuary and inviolable sovereignty'" when they entered the Union. *Id.* at 1475 (quoting Federalist No. 39). That inherent sovereignty includes "a State's constitutional responsibility for the establishment and operation of its own government." *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Indeed, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) ("Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create."). This Court has recognized this same "basic premise, upon which all our government is built"—"the people have the inherent authority to allocate governmental power in the bodies they establish by law." *Carter v. Lehi City*, 2012 UT 2, ¶ 21, 269 P.3d 141.

Interpreting section 1621(d)'s opt-out provision to require an exercise of state sovereign power by one specific branch of state government—the legislature—raises grave anticommandeering concerns. To be sure, this manifestation of anticommandeering differs from those held unconstitutional in

Murphy, *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). In those cases, Congress issued express federal commands requiring state officials to *do something*. Here, Congress admittedly does not require state officials (in any governmental branch) to do anything; section 1621(d) lets States chose to opt out or not, as they wish.

But if section 1621(d) is interpreted to make only statutory opt-outs effective, it becomes a federal command that a State assign specific sovereign powers to a particular branch of state government. Specifically, reading section 1621(d) that way would make a State's exercise of its sovereign power over professional licenses (including bar admissions) invalid *unless* its legislature exercised it. It's hard to think of a more direct federal intrusion on the States' core retained sovereign rights recognized in *Sugarman*, *Gregory*, *City of Eastlake*, and *Carter* to structure their governments—and assign their sovereign powers—as they see fit.

And that's not just a theoretical anticommandeering problem. The people of Utah have in *fact* assigned their sovereign power over bar admissions to this Court. The Utah Constitution gives "[t]he Supreme Court" the power to "govern the practice of law, including admission to practice law," "by rule." Utah Const. art. VIII, § 4. This Court has interpreted that provision to give the Court

"plenary" and "exclusive authority to govern the practice of law." *Injured Workers Ass'n of Utah v. State*, 2016 UT 21, ¶¶ 14, 43, 374 P.3d 14.

The upshot? As a matter of state law, any attempt by the Utah Legislature to satisfy section 1621(d) by passing an opt-out statute for bar admissions would be a nullity. So reading section 1621(d) to limit a state's ability to opt out only by passing a statute constitutes an actual, concrete affront to Utah's sovereignty—a congressional conclusion that Utah has misallocated its sovereign powers. That's at least as constitutionally offensive as Congress's "issu[ing] direct orders to state legislatures" that those legislatures theoretically could carry out. *Murphy*, 138 S. Ct. at 1478. It might be even more problematic—it's Congress requiring a state legislature to exercise a state power that the State has by sovereign right determined should be vested in another part of its government.

Given section 1621(d)'s ambiguity, this Court should rely on the canon of constitutional avoidance to conclude that the Court may satisfy section 1621(d)'s opt-out provision by enacting the proposed rule.[2]

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[2] Some *amici* have argued that bar admissions in Utah are not subject to section 1621(a)'s ban because, they contend, in Utah a bar license is neither provided by a state agency nor funded by appropriated state funds. *See, e.g.*, Br. of *Amicus Curiae* Parr Brown Gee & Loveless, P.C. at 3-7 (citing 8 U.S.C. § 1621(c)(1)(A)); Br. of *Amici Curiae* Ad Hoc Coalition of Utah Law Professors at 7-15 (same). Nationally, courts are reassessing whether compelled membership in, or funding of, private entities such as bar associations is consonant with the First Amendment. *See, e.g.*, *Fleck v. Wetch*, 139 S. Ct. 590 (2018) (granting certiorari, vacating the judgment in 868 F.3d 652, and remanding the case to the Eighth

II. Because the Petition Is Inextricably Linked to a Deeply Political Issue, the Court Should Strongly Consider Not Enacting an Opt-Out Rule for Bar Admissions Until the Legislature Passes Opt-Out Legislation for Other Professional Licenses.

Though this Court can enact an opt-out rule that would satisfy section 1621(d), the more appropriate course in these unique circumstances would be to follow the Legislature's policy lead. The Court should strongly consider adopting an opt-out rule for bar admissions only after the Legislature has passed a statute allowing undocumented immigrants to obtain other professional licenses. That conclusion follows from three straightforward premises.

First, when it enacts rules for bar admission, this Court makes policy. Bar-admission rules are "rules of general applicability" for aspiring lawyers and involve "the 'weighing of broad, competing policy considerations'"—the two "chief hallmarks of legislative action." *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 31, 322 P.3d 662. To be sure, the constitution assigns this limited policymaking function to the Court. But in that role the Court deviates sharply

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Circuit for it to consider—in light of *Janus v. State, Cty., & Municipal Employees*, 138 S. Ct. 2448 (2018)—the petitioner's arguments that mandatory membership in a state bar association, and state bar's opt-out funding rule, violate the First Amendment). To avoid inadvertently implicating those separate constitutional questions, this Court may wish to assume without deciding that Utah bar licenses are subject to section 1621(a)'s ban—particularly since the Attorney General's Office's analysis and *amici*'s approach reach the same conclusion on the Court's first question.

from its usual role of "interpreting the policy decisions of the legislature—not on making [policy] decisions in the first place." *Carter*, 2012 UT 2, ¶ 50.

Second, as the Court itself has long acknowledged, the Court is not well equipped to tackle divisive policy questions. "'As a general rule, making social policy is a job for the Legislature, not the courts.'" *Jones v. Barlow*, 2007 UT 20, ¶ 34, 154 P.3d 808 (quoting *Van v. Zahorik*, 597 N.W.2d 15, 18 (Mich. 1999)). Indeed, the Court has been "'especially'" reluctant to make policy "'when the determination or resolution requires placing a premium on one societal interest at the expense of another.'" *Id.* (quoting *Van*, 597 N.W.2d at 18). "Courts are ill-suited for such ventures" because they "are unable to fully investigate the ramifications of social policies and cannot gauge or build the public consensus necessary to effectively implement them." *Id.* ¶ 36. The Court thus protects its institutional credibility and legitimacy through actions recognizing that "'[t]he responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.'" *Id.* ¶ 34 (quoting *Van*, 597 N.W.2d at 18).

Third, this particular policy issue—immigration—is a uniquely hot-button political topic. The constant drumbeat of immigration-related news stories

reflects how squarely this issue remains fixed in our national conversation.[3] Even more to the point, immigration policy remain unsettled in Utah. Just last week, the *Salt Lake Tribune* reported on local efforts "to reaffirm" immigration policies that, in their proponents' view, "emphasiz[ed] humane treatment of immigrants, keeping families together and focusing deportation on serious criminals." Lee Davidson, *Officials reaffirm family-friendly Utah Compact on immigration. LDS Church still backs it but again doesn't sign it.*, Salt Lake Trib. (Mar. 21, 2019), https://www.sltrib.com/news/politics/2019/03/21/officials-reaffirm-family/. One participant said that "'our immigration system is still in need of significant reform.'" *Id.* The proponents reemphasized their principles to push those reforms their way because "[i]mmigration debates remain bitter." *Id.*

And that's precisely the point. The policy debates about immigration differ in kind from policy debates about, say, what the bar examination should consist of, *see* Rule 14-710, or who should be admitted to the Utah State Bar by motion, *see* Rule 14-705. Those latter issues command significantly less cognizance. So the

[3] *See, e.g.*, Nick Miroff, *'The Conveyor Belt': U.S. officials say massive smuggling effort is speeding immigrants to – and across – the southern border*, Wash. Post (Mar. 15, 2019), https://www.washingtonpost.com/national/the-conveyor-belt-us-officials-say-massive-smuggling-effort-is-speeding-immigrants-to--and-across--the-southern-border/2019/03/15/940bf860-4022-11e9-a0d3-1210e58a94cf_story.html; Julia Ainsley, *February had highest total of undocumented immigrants crossing U.S. border in 12 years*, NBC News (Mar. 5, 2019, 2:37 p.m.), https://www.nbcnews.com/news/amp/ncna979546.

Court's policy experience or expertise on those questions does not necessarily transfer to immigration policy debates that remain unresolved despite more than a decade of effort from Utah's political branches.

To highlight this ongoing national and local debate is not to take a side in it. Rather, it is to reiterate what the U.S. Supreme Court has already said: "Immigration policy shapes the destiny of the Nation." *Arizona*, 567 U.S. at 415. And "the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse." *Id.* at 416.

But if this Court unilaterally opts out of section 1621(d) now by enacting a rule authorizing bar admission for undocumented immigrants, the Court will be taking an unavoidably political stance on a hot-button policy question before the Legislature has manifested the state's "political will" on it. *Id.* The Court could do so, but that would disregard the wisdom behind the Court's prior acknowledgement that this body is ill suited to "draw[] lines in a society as complex as ours." *Jones*, 2007 UT 20, ¶ 34 (internal quotation marks omitted). The proposed rule necessarily "plac[es] a premium on one societal interest at the expense of another," *id.* (internal quotation marks omitted)—despite this Court's being "unable to fully investigate the ramifications of [this] social polic[y]" or

"gauge or build the public consensus necessary to effectively implement" it, *id.* ¶ 36.

The Attorney General's Office emphasizes that it takes no position on whether the proposed rule is a good or bad idea. It does not do so because the Legislature—not this Office—is best suited to declare the State's "political will," after a "searching, thoughtful, rational civic discourse," *Arizona*, 567 U.S. at 416, about whether undocumented immigrants should be eligible for professional licenses in Utah. In other words, this Office and this Court share the same institutional and structural deficiencies for resolving these types of inherently political questions "upon which there is no broad consensus." *Jones*, 2007 UT 20, ¶ 38. Institutional modesty thus counsels in favor of deference to the Legislature on this important question.[4]

[4] To the best of the Office's knowledge, the part of the Utah Code most relevant to this question is section 63G-12-402. That section requires state agencies to "verify the lawful presence" of an applicant for "a state or local public benefit as defined in 8 U.S.C. § 1621." Utah Code § 63G-12-402(1)(a)(i). Among the few exceptions to that rule, *see id.* § 63G-12-402(3), only subsection 402(3)(g) appears to speak to a professional license—specifically, a securities license—and even then the exception applies only to applicants who have "registered with the Financial Industry Regulatory Authority," *id.* § 63G-12-402(3)(g)(i). So as a whole, subsection 402(3)'s exceptions do not appear to constitute the sort of "affirmative[]" general legislative endorsement of professional licenses for undocumented immigrants, 8 U.S.C. § 1621(d), that might make enacting a bar-admissions rule appropriate now. *Cf.* Neb. Rev. Stat. §§ 4-111(3)(b), 4-111(3)(e) (expressly invoking "the authority provided in 8 U.S.C. § 1621(d)" to prescribe when undocumented immigrants may obtain any "professional or commercial license").

CONCLUSION

This Court may enact a rule that satisfies 8 U.S.C. § 1621(d) and allows undocumented immigrants to become members of the Utah State Bar. But given undisputed political realities, it should strongly consider not doing so until the Legislature has first passed a statute making undocumented immigrants generally eligible to obtain the types of professional licenses that are within the Legislature's power to regulate.

Respectfully submitted,

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March 26, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Utah R. App. P. 24(g) because:

   · this brief contains 3,985 words, excluding the parts of the brief exempted by Rule 24(g)(2).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because:

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s/ Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on 26 March 2019, a true, correct, complete copy of the foregoing Amicus Brief of the Office of the Utah Attorney General was filed with the Court and served via electronic mail or U.S. mail postage prepaid to the following:

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