IN THE UTAH SUPREME COURT

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| IN RE:<br><br>MARY DOE and JANE DOE,<br><br>Petitioners. | PUBLIC<br><br>Case No. 20180806-SC |

# BRIEF OF AMICUS CURIAE UTAH LEGISLATURE

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4. Utah Minority Bar Association, *Amicus Curiae*
5. Latino-Justice Amici, *Amicus Curiae*
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8. U.S. Department of Justice, Amicus Curiae
9. Office of the Utah Attorney General, *Amicus Curiae*
10. Utah Office of Legislative Research and General Counsel, *Amicus Curiae*
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The Utah Legislature ("Legislature"), by and through its counsel John L. Fellows and Robert H. Rees of the Office of Legislative Research and General Counsel, submits this amicus curiae brief in response to the Court's invitation in its order dated November 19, 2018.

## INTRODUCTION

8 U.S.C. § 1621(a) states that an undocumented immigrant[1] "is not eligible for any State . . . benefit," defined in Section 1621(c) to include any "professional license . . . provided by an agency of a State." Despite that general statement of ineligibility, Section 1621(d) provides a way for a state to opt out of that restriction and allow an undocumented immigrant to be eligible for a professional license. Under Section 1621(d), a "State may provide that an [undocumented immigrant] is eligible for any State . . . benefit [, including a professional license,] . . . only through the enactment of a State law."

Petitioners are undocumented immigrants who have filed a petition requesting the Court to "adopt a new rule governing admission to the Utah State Bar to allow Bar admission for undocumented immigrants." Petition to Allow Bar Admission for Undocumented Immigrants ("Petition"), p. 1. Relying on Section 1621(d)'s opt-out provision, petitioners request the Court to "exercise its constitutional authority to opt out of the federal restriction." Petition, p. 18.

[1] An alien who is not eligible for "any State . . . benefit" is described in Section 1621(a). 8 U.S.C. § 1621(a). For brevity, this brief will use the term "undocumented immigrant."

In an order dated November 19, 2018, the Court invited the Legislature to file an amicus curiae brief "on the questions of whether this 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 this Court to do so." The Legislature appreciates the Court's invitation and this opportunity to express the Legislature's perspective on these important questions.[2]

## ARGUMENT

### POINT I

### THE COURT MAY NOT, AND SHOULD NOT, "'ENACT[ ] . . . A STATE LAW' UNDER 8 U.S.C. § 1621(d)."

The Court's November 19 invitation first asks the question whether the Court may "'enact[] . . . a State law' under 8 U.S.C. § 1621(d)." The correct and obvious answer is no. Enacting state law is quintessentially -- and constitutionally -- a province of the

[2] The Court's invitation to submit an amicus brief was extended to the Office of Legislative Research and General Counsel. The Office assumes that the Court is seeking the Legislature's perspective, and this brief is filed on behalf of the Legislature. Under Utah Code Section 36-12-7(4), the Legislature has delegated to the Legislative Management Committee the authority "to direct the legislative general counsel in matters involving the Legislature's participation in litigation." Utah Code Ann. § 36-12-7(4) (West, Westlaw through 2018 General Session). Exercising that authority, on February 6, 2019, the Legislative Management Committee authorized the Office to file an amicus brief on behalf of the Legislature. *See* Summary Minutes of the Legislative Management Committee meeting at https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=SPEMAN&meetingId=16131.

Legislature.[3] Only the Legislature may "'enact[ ] . . . a State law,'" and only the legislative "enactment of a State law" can trigger Section 1621(d)'s opt-out provision.[4]

The answer to the first part of the Court's question provides the answer to the second part, asking whether it would be appropriate for the Court to "'enact[ ] . . . a State law' under 8 U.S.C. § 1621(d) permitting membership in the Utah State Bar for undocumented immigrants." Because the Court lacks the authority to "'enact[ ] . . . a State law,'" whether under Section 1621 or otherwise, it would not be appropriate for the Court to do so. It would not be appropriate for the Court to do something it is not constitutionally empowered to do.

[3] Article VI, section 1 of the Utah Constitution states that the "Legislative power of the State shall be vested in . . . a Senate and House of Representatives which shall be designated the Legislature of the State of Utah. . . ." Utah Const. art. VI, §1(1)(a). "The inherent and preeminent function of the legislative branch of government is to enact laws." *Matheson v. Ferry*, 641 P.2d 674, 686 (Utah 1982). The Legislature shares this legislative power with the People. *Carter v. Lehi City*, 2012 UT 2, ¶ 22, 269 P.3d 141 (citing Utah Const. art. VI, §1(1)(b)).

[4] This conclusion becomes even more clear upon reviewing the legislative history of Section 1621. The House Conference Report states: "Only the affirmative enactment of a law by a State legislature and signed by the Governor . . . will meet the requirements of this [opt-out] section." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

## POINT II

## NOTWITHSTANDING SECTION 1621, THE COURT HAS THE AUTHORITY TO DETERMINE WHETHER UNDOCUMENTED IMMIGRANTS ARE ELIGIBLE FOR ADMISSION TO PRACTICE LAW.

Although accurate and firmly based on the Utah Constitution's allocation of authority, the simple answers provided above do not address an underlying conflict that Section 1621 appears to create. Section 1621 plainly requires a legislative "enactment of a State law" to trigger the opt-out provision making undocumented immigrants eligible for a "professional license." However, a professional license to practice law in Utah is not subject to legislative authority. The Utah Constitution gives that authority to the Court.[5] On the surface, Section 1621 seems to create an irreconcilable conflict. Section 1621 requires the "enactment of a State law," a province of the Legislature, to make an undocumented immigrant eligible for a license to practice law, a province of the Court.

The Legislature believes there are two ways to resolve this conflict while preserving both the Legislature's and the Court's constitutionally based authority. First, the conflict is resolved by reading Section 1621 to apply to only professional licenses for which the Legislature may properly "'enact[ ] . . . a State law.'" Second, if Section 1621 is read more broadly to include the professional license to practice law, then Section 1621's requirement that the Legislature "'enact[ ] . . . a State law'" to extend eligibility

[5] Utah Const. art. VIII, § 4 ("The Supreme Court by rule shall govern the practice of law, including admission to practice law. . . .").

for admission to practice law to undocumented immigrants is an unconstitutional intrusion into the state's sovereign allocation of authority over admission to practice law, in violation of the Tenth Amendment of the Constitution of the United States. Accordingly, the Court should reject Congress's attempt in Section 1621 to mandate the governmental mechanism by which the state of Utah determines whether to opt out of Section 1621's restriction on an undocumented immigrant's admission to practice law in Utah.

A. Section 1621 should be read to apply only to professional licenses within the scope of the Legislature's authority.

The conflict between the Legislature's authority to enact laws and the Court's authority to govern admission to practice law is avoided altogether by a reading of Section 1621 that is consistent with those respective authorities. Section 1621 makes an undocumented immigrant ineligible for "any State . . . benefit," defined to include a "professional license . . . provided by an agency of a State." A state may make an otherwise ineligible undocumented immigrant eligible for a state benefit "only through the [legislative] enactment of a State law."

Eligibility for most professional licenses in this state is determined according to laws enacted by the Legislature. Under Title 58 of the Utah Code, the Legislature has provided standards and eligibility criteria for a host of professional licenses, including licenses for medical care providers, architects, public accountants, construction professionals, and cosmetologists. For those professional licenses, it would be

appropriate for Congress to require the Legislature to enact a law to extend eligibility for those professional licenses to undocumented immigrants.

There is one professional license, however, the eligibility for which is *not* determined by state laws enacted by the Legislature. That professional license is a license to practice law. Because of Article VIII, Section 4 of the Utah Constitution, the Legislature is precluded from exercising its legislative authority to enact state laws governing the admission to practice law in Utah.

Section 1621 should be read as acknowledging and respecting that division of responsibility over professional licenses. Section 1621 should be read to apply only to professional licenses the eligibility for which is properly governed by the Legislature's "enactment of a State law." A law license -- admission to practice law -- is subject to regulation by the Court and is not subject to the legislative "enactment of a State law."

The Legislature supports a reading of Section 1621 that results in its application only to those professional licenses that the Legislature may govern through the enactment of state laws.[6] The Legislature does not enact state law relating to the admission to

[6]This reading avoids the need to address the argument that Section 1621 is unconstitutional under the Tenth Amendment. In so doing, the Court would be employing the canon of constitutional avoidance and presuming that Congress did not intend an interpretation that raises serious constitutional doubts—in this instance, under the Tenth Amendment, which is explained below. *See Utah Dep't of Transp. v. Carlson*, 2014 UT 24, ¶ 23, 332 P.3d 900 ("[W]hen a court rejects one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality, it shows proper respect for the legislature, which is assumed to 'legislate[ ] in the light of constitutional limitations.'").

practice law, and Section 1621 should not be read to apply to eligibility for the admission to practice law in Utah. Under that reading of Section 1621, the Court could appropriately consider itself not to be constrained by Section 1621's provision making an undocumented immigrant ineligible for a "professional license . . . provided by an agency of a State." The Court may exercise its discretion to determine whether undocumented immigrants should be eligible for admission to practice law in Utah.

B. If read more broadly, Section 1621 violates the Tenth Amendment. Section 1621 may not limit the Court's exercise of its power under Article VIII of the Utah Constitution.

The Court should read Section 1621 as not applying to a license to practice law. That reading of Section 1621 avoids the potential conflict between the Legislature's authority to enact state laws and the Court's authority to govern admission to practice law. If, however, the Court reads Section 1621 to apply to a license to practice law, there is another way to avoid the potential conflict caused by Section 1621. That conflict is avoided by the Court rejecting Section 1621's attempt, in violation of the Tenth Amendment, to require the Legislature to perform a function that the Utah Constitution delegates to the Court.

If read more broadly to apply also to a license to practice law, Section 1621 fails to recognize the state's allocation of authority over eligibility for admission to practice law. Article VIII, Section 4 clearly allocates that authority to the Court, yet Section 1621 requires a legislative "enactment of a State law" in order to determine an otherwise ineligible undocumented immigrant's eligibility for admission to practice law. Section

1621's requirement is contrary to the state's allocation of authority over eligibility for admission to practice law and violates the Tenth Amendment to the United States Constitution.[7]

This is the conclusion the New York Supreme Court reached in *In re Vargas*.[8] In *Vargas*, the court considered the application of an undocumented immigrant for admission to the Bar of the State of New York in light of Section 1621. The State of New York argued that Section 1621, by prescribing the enactment of a state law as the method by which individual states can exercise the right to opt out of the restrictions imposed by Section 1621, violates the Tenth Amendment.[9]

The court found the Tenth Amendment argument persuasive. Discussing the Tenth Amendment, the court stated, "Inherent in the respect for state sovereignty is the recognition that 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'"[10] The court noted that New York, by legislative enactment, determined that the state judiciary is the

[7] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[8] *In re Vargas*, 131 A.D. 3rd 4 (N.Y. App. Div. 2015).

[9] *Id.* at 23–24.

[10] *Id.* at 25 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012)).

sovereign authority vested with the responsibility for formulating the eligibility qualifications governing the admission of attorneys to practice law.[11] The court read Section 1621 as prescribing the mechanism by which states are required to exercise the authority to opt out of the ineligibility restriction, in contradiction of the manner that the state of New York had determined to govern admission to practice law. The court held that " the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by [Section 1621] is not a legitimate concern of the federal government."[12] The court stated that the opt-out provision of Section 1621, by attempting to prescribe the mechanism by which states may exercise the opt-out authority, "cannot withstand scrutiny under the Tenth Amendment."[13] The court determined that a decision to opt out from the restrictions imposed by Section 1621 may be lawfully exercised by the judiciary, in order to be consistent with New York's allocation of authority over admission to practice law.[14]

Similarly, how Utah chooses to make decisions relating to eligibility for admission to practice law is "not a legitimate concern of the federal government" and "cannot

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 27.

withstand scrutiny under the Tenth Amendment."[15] In the narrow context of determining eligibility for admission to practice law, the Court should interpret the requirement of the "enactment of a State law" to require not a legislative enactment but action by the Court exercising its authority under Article VIII, Section 4. Although the Court may not "'enact[ ] . . . a State law,'" the Court may "by rule . . . govern . . . admission to practice law."[16] Whether the Court should adopt a rule relating to the eligibility of an undocumented immigrant for admission to practice law is a matter that is within the discretion of the Court.

## CONCLUSION

For the foregoing reasons, the Utah Legislature respectfully answers the Court's questions in the negative and asserts that the Court lacks the authority to "'enact[ ] . . . a State law'" under Section 1621 and, therefore, should not do so. Notwithstanding that conclusion, the Legislature suggests that the Court retains and may exercise its authority

[15] *See id.* at 25.

[16] Utah Const. art. VIII, § 4.

to determine whether to adopt a rule extending eligibility to undocumented immigrants for admission to practice law in Utah.

Respectfully submitted this 26th day of March, 2019.

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## CERTIFICATE OF DELIVERY

I hereby certify that on the 26th day of March, 2019, a true and correct copy of the foregoing Brief of *Amicus Curiae* Utah Legislature was served by U.S. Mail, with two copies by first class mail, postage prepaid, to the following:

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