IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: MARY DOE and JANE DOE, Petitioners.	Appellate Case No. 20180806-CA

UTAH MINORITY BAR ASSOCIATION BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS MARY DOE AND JANE DOE

PETITION TO ALLOW BAR ADMISSION TO UNDOCUMENTED IMMIGRANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

UTAH MINORITY BAR ASSOCIATION'S INTEREST

The Utah Minority Bar Association (UMBA) is an organization of Utah lawyers committed to promoting diversity and addressing issues that impact racial and ethnic minorities, especially in the legal community. UMBA membership is open to all members in good standing of the Utah State Bar who share a commitment to UMBA's mission.

In line with its mission, UMBA has a strong interest in this Court's determination whether otherwise qualified undocumented immigrants—many of whom might be future UMBA members—may be admitted to practice law in Utah.

SUMMARY OF ARGUMENT

The Utah Minority Bar Association submits this *amicus curiae* brief to respectfully offer its answers to the questions posed by this Court in its November 20, 2018 order. The Court invited interested parties to opine about "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." *See* Utah Supreme Court Order, Nov. 20, 2018.

The answer to the first question—whether this Court can "enact[ ] . . . a state law"—is no. Courts apply and interpret laws. Courts do not enact laws. Only the Utah Legislature enacts state laws by passing legislation either with the consent of the governor or by overriding the governor's veto. This Petition should not result in the promulgation of a judicial rule masquerading as a state law.

Instead, as explained in the argument below, the Utah Supreme Court should find 8 U.S.C. § 1621(d) (the "Federal Statute") unconstitutional because it both infringes on Utah's sovereignty in contravention of the Tenth Amendment and forces Utah to violate its own constitutional separation of powers provision.

The answer to the Court's second question is unequivocally yes. The Court should permit the admission of all qualified applicants—including the undocumented immigrants known as Dreamers—to the Utah State Bar.

ARGUMENT

I. THE FEDERAL STATUTE UNCONSTITUTIONALLY INVADES UTAH'S STATE SOVEREIGNTY.

8 U.S.C. § 1621(d) strips from the State of Utah one of the most defining characteristics of state sovereignty: the state's ability and right to distribute governance power among its three co-equal branches without interference from the federal government. The Tenth Amendment should be applied by this Court to reject the Federal Statute's claim of authority to mandate the governmental mechanism by which the State of Utah may opt out of the restrictions imposed by section 1621(a).[1] *In re Vargas*, 10 N.Y.S.3d 579, 597 (N.Y. App. Div. 2015).

The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,

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[1] UMBA's argument presumes, *in arguendo*, that § 1621 governs the admission of attorneys to state bars as professional licenses. While not the focus of this brief, there are valid arguments that the statute does not apply to law licenses.
Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants,* 2 6 GEO. J. LEGAL ETHICS 959, 963-67 (2013).

or to the people." U.S. Const. amend. X. On the flip side of the coin, "Congress exercises its conferred powers subject to the limitations contained in the Constitution" as provided for in Article I. *New York v. United States*, 505 U.S. 144, 156 (1992). In other words, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.*

Section 1621(d) triggers the Tenth Amendment because Congress does not have Constitutional authority to command that a specific state branch of government administer a specific state function.[2] The United States Supreme Court has repeatedly recognized—as does the Utah Constitution—that "[r]egulation of the bar is a sovereign function of the [state] Supreme Court." *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1066 (1991) ("the courts have historically regulated admission to the practice of law before them."); *Ex parte Garland*, 71 U.S. 333, 378–79 (1866) ("The[attorney's] admission or their exclusion is not the

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[2] The Federal Statute also triggers the Tenth Amendment because it tramples the State of Utah's historic right to govern the practice of law. Where Congress legislates in a field States have traditionally occupied, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Wyeth v. Levine*, 555 U.S. 555, 575 (2009). This presumption against preemption means that Congress must either expressly or by clear implication "supplant the state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654–55, 115 S. Ct. 1671, 1676–77, 131 L. Ed. 2d 695 (1995). Here, Congress elected not to include an express preemption provision in the Federal Statute. Nor should preemption be implied from a statute that Congress designed with an "opt out" to be exercised by States. The Statute's authorization for action by States shows that Congress did not intend to preempt the State's historic power to regulate the practice of law. *But cf. In re Garcia*, 58 Cal. 4th 440, 453 (2014).

exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases.").

Moreover, the United States Supreme Court has long held "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *New York*, 505 US at 162). "Congress may not directly or indirectly compel a state to enact a specific law or implement a specific policy, nor may Congress 'simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *In re Vargas*, 10 N.Y.S.3d at 595 (quoting *New York*, 505 U.S. at 161). "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Accordingly, "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 521 U.S. 542, 547 n.7 (1975).

Dictating to a state which co-equal branch of government regulates a state function is an even more serious invasion of state sovereignty than impermissibly compelling a state to enact a specific law, implement a specific policy, or enforce a federal regulatory program.[3] Are the sovereign states at the mercy of Congress enacting similar autocratic legislation dictating to the state which co-equal state branch administers its own state

[3] In the words of "the Dude," from The Big Lebowski—quoting, of course, George H.W. Bush—"this aggression will not stand, man." The Big Lebowski (Working Title Films 1998) (quoting President George H.W. Bush, Remarks on the Iraqi Invasion of Kuwait (Aug. 5, 1990)).

functions? A good way of answering that question is to ask: Would the states conceivably have entered into the Union if the Constitution itself gave to Congress the power to regulate the states in this way? *See Printz v. United States*, 521 U.S. 898, 920 (1997). Section 1621(d) thus transgresses the principles of federalism underpinning the United States Constitution in violation of the Tenth Amendment.

Because 8 U.S.C. § 1621(d) is constitutionally infirm based on principles of state sovereignty, this Court should decline to apply an overreaching and unconstitutional federal law. "It is the judiciary's role to interpret statutes and to ensure their constitutionality." *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 39, 424 P.3d 95, 108 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)); *see also Matheson v. Ferry*, 641 P.2d 674 (Utah 1982). This Court should protect Utah's sovereignty—not in contradiction of federal law, but in harmony with the federalist framework of the U.S. Constitution.

II. THE FEDERAL STATUTE FORCES UTAH TO VIOLATE ITS OWN SEPARATION OF POWERS DOCTRINE.

Not only does 8 U.S.C. § 1621(d) violate the Tenth Amendment, but the mechanism[4] Congress created for states to "opt-out" would force Utah to violate its own constitutional separation of powers provision.[5] The Federal Statute in essence puts the

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[4] UMBA assumes, *in arguendo*, that the § 1621(d) opt-out provision requiring an "enactment of a state law" applies to Utah Legislature. Section 1621(d) arguably does not require an act of the legislature. *See* Brief of Amicus Curiae Parr Brown Gee & Loveless , P.C. at 7.

[5] By treating Utah differently, the opt-out provision also impermissibly tramples fundamental principles of equal sovereignty among the States. *Shelby County Al. v. Holder*, 570 U.S. 529, 544 (2013) ("Not only do the States retain sovereignty under the

State of Utah in an inescapable room. While Congress gives the states a key in §1621(d), that key does not fit the lock for Utah—any effort by the Utah Legislature to unlock the door for undocumented immigrants would violate the state's constitution by invading this Court's exclusive right to regulate the practice of law.

Utah's Constitution provides for three co-equal branches of government:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1.

Section 1621(d) is problematic in Utah because the power to govern the practice of law is vested exclusively in the Utah Supreme Court—and not the Utah Legislature. *See Injured Workers Ass'n of Utah v. State*, 2016 UT 21, ¶ 14, 374 P.3d 14, 18 (explaining history of inherent power). Codified in 1985 in Article VIII, Section 4, the Utah Constitution provides "[t]he [Utah] Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons

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Constitution, there is a fundamental principle of equal sovereignty among the states.") (internal quotation marks and citation omitted). In addition to Utah, forty one other states similarly give the highest state court sole authority to promulgate the rules for bar admission. In the remaining eight states, the courts share concurrent authority with the state legislature. *See* Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements, p. 1 (2019), online at http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf. Congress's disparate treatment of States provides yet another ground for finding the opt-out provision constitutionally infirm.

admitted to practice law." Utah Const. art. VIII, § 4; *see also Barnard v. Utah State Bar*, 804 P.2d 526, 530 (Utah 1991) (explaining 1985 Utah Constitution amendment).

In other words, § 1621(d)'s prescribed process—enactment of a state law—is fundamentally at odds with Utah's Constitution. Time and time again, this Court has made clear: "one governmental branch is precluded from exercising *functions* properly belonging to another." *Timpanogos Planning & Water Mgmt. Agency v. Cent. Utah Water Conservancy Dist.*, 690 P.2d 562, 567 (Utah 1984); *see also Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995) (holding the legislature cannot diminish Court powers derived from the constitution). Were the Utah Legislature to follow Congress's mandate and enact a law, any such action would violate Utah's separation of powers doctrine.

As applied to Utah, § 1621(d) creates a proverbial Catch-22. To follow the Federal Statute, the Utah Legislature has to violate its own constitution. Yet to follow the Utah Constitution, this Court has to seemingly disobey the Federal Statute. The consequences of this Catch-22 are stark: the Federal Statute apparently forces the state of Utah to forever refuse bar admission to undocumented immigrants.

However, there is a way out. Because the Federal Statute violates the Tenth Amendment, it is constitutionally infirm and inapplicable. As in *In re Vargas*, this Court should reject Congress's authority to mandate the mechanism by which the State of Utah governs an essential state function and declare that undocumented immigrants, provided they meet all other standards for admission, may be admitted to the Utah State Bar. *See In re Vargas*, 10 N.Y.S.3d at 596.

III. UTAH'S PUBLIC POLICY FAVORS THE ADMISSION OF QUALIFIED UNDOCUMENTED IMMIGRANTS TO THE UTAH STATE BAR.

The fundamental public policy of the State of Utah favors the admission of Dreamers to the practice of law. Both the State of Utah and the United States were founded as havens for immigrants from persecution, and both have been dedicated to the principle that children should not be indicted for the sins of their parents.

Mounted to the Statute of Liberty, New Colossus reads, "Give me your tired, your poor, [y]our huddled masses yearning to breathe free… Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!" Like our nation, our state has been built by immigrants. The founders of our capitol city were pioneers who trekked more than a thousand miles to escape violent persecution.[6]

Similarly, many of Utah's Dreamers were brought to this state by their parents to escape hostility, persecution, and oppression. Approximately 9,100 to 9,800 Dreamers reside in Utah, and thousands more may be DACA-eligible.[7]

Utah's public policy has supported the integration of Dreamers into our state, which is not surprising given Utah's roots as a harbor for pioneers seeking refuge from undue hardship. For example, Utah was at the forefront of providing undocumented

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[6] Jack Jenkins, *How Donald Trump Could End the Republican Lock on the Mormon Vote*, THE ATLANTIC (Mar. 22, 2016), https://www.theatlantic.com/politics/archive/2016/03/donald-trump-gop-mormon-vote-utah/474819/

[7] *Deferred Action for Childhood Arrivals (DACA) Cata Tools*, MIGRATION POLICY INSTITUTE, https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles (last visited Mar. 26, 2019); Nicole Prchal Svajlenka et al., *A New Threat to DACA Could Cost States Billions of Dollars* CENTER FOR AMERICAN PROGRESS (July 21, 2017), https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/

students access to higher education. In 2002, as part of an effort to ensure a more educated workforce,[8] Utah became one of the first five states to offer undocumented students in-state tuition and, as recently as 2015, Utah enacted legislation allowing undocumented students access to privately-funded scholarships administered through public universities.[9] These legislative enactments demonstrate Utah's strong public policy interest in integrating Dreamers in Utah society. It would defy reason—and the public policy interests reflected by multiple legislative actions—to invite Dreamers into Utah's public law school only to deny them admission to the bar to practice law.[10]

The admission of Dreamers to the Utah Bar will also advance Utah's public policy interest in having a bar and a judiciary that are representative of the population they serve. In 2016, a fifty state report by the American Constitution Society compared each state's population demographics with the demographics of the respective state's judiciary and found that Utah had *the least* representative judiciary in the United States with

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[8] Dan Harrie, *Leavitt Will Sign Immigrant Tuition-Break Bill*, Salt Lake Tribune, March 16, 2002.

[9] *In-State Tuition and Unauthorized Immigrant Students*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 19, 2014), http://www.ncsl.org/research/immigration/in-state-tuition-and-unauthorized-immigrants.aspx; *Utah Policy*, uLEAD NETWORK (Jan. 11, 2018), https://uleadnet.org/map/utah-policy.

[10] By purposely opening access to public institutions so that undocumented students can obtain the required professional degree for admission to the bar, the Utah Legislature managed to craft legislation that effectively satisfies the opt-out in the Federal Statute without expressly invading this Court's exclusive right to regulate the practice of law. Accordingly, this Court may construe those legislative acts in 2002 and 2015 as the required "enactment of a State law after August 22, 1996" by having "affirmatively provide[d] for such eligibility" for undocumented students to be admitted into the Utah State Bar. This statutory construction would invoke the doctrine of constitutional avoidance and thereby permit this Court to grant the Petition without having to invalidate the Federal Statute based on the Tenth Amendment.

respect to the combined minority and gender makeup of the state's bench.[11] It is in the public's interest for the Utah Bar to be representative of the state's population, and allowing all qualified persons, regardless of their immigration status, bar admission is one step towards serving that interest. The American Bar Association agrees. In August 2017, the American Bar Association House of Delegates passed a resolution stating that "the American Bar Association supports the principle that bar admission should not be denied based solely on immigration status."[12]

This is the place—for pioneers and immigrants alike. The law is more than just a system of rules and regulations designed to steer behavior. It is rooted in process and centered on notions of justice and fairness. The law is the foundation upon which society is built and lawyers serve as watchful custodians ensuring society's most fundamental institutions are preserved. Lawyers are not appointees. They are not arbitrarily selected. Lawyers have overcome the profession's high barriers to entry designed to systematically ferret out those that do not show the requisite aptitude and character to serve the law and the public at large.

UMBA's position is not that these standards be lowered—doing so would jeopardize the legal profession—UMBA only asks that the standards be universally applied to every individual in accordance with Utah's public policy. Prohibiting bar

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[11] Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, Table A-14 (Page 27), American Constitution Society For Law and Policy, online at http://gavelgap.org/pdf/gavel-gap-report.pdf.

[12] A.B.A. Resolution 108, online at https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/108.pdf.

admission to individuals simply because *their parents* moved towards, and not away from, the glow emanating from the "shining city upon the hill" violates who we are as a profession *and* as a state.

CONCLUSION

The Federal Statute runs afoul of both the United States Constitution and the Utah Constitution. It attempts to force the State of Utah to violate and subordinate its own Constitution.

The Utah Supreme Court should affirm Utah's sovereignty and the independence of our state's judiciary from the overreaching and unconstitutional federal state. The Utah Supreme Court is—and should remain—the sole arbiter of the qualifications and standards for admission to the Utah State Bar. By declining to apply an overreaching federal law, the Utah Supreme Court can vindicate important principles of federalism and affirm the separation of powers among Utah's co-equal branches of government.

RESPECTFULLY SUBMITTED this 26th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March 2019, two true and correct copies of the foregoing **BRIEF OF UTAH MINORITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS MARY DOE AND JANE DOE** was served via email on the following:

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