2019

In Re: Mary Doe and Jane Doe, Petitioners : Brief

Utah Supreme Court

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UTAH APPELLATE COURT
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No. 20180806-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

IN RE: MARY DOE AND JANE DOE,
Petitioners.

JOINT REPLY BRIEF OF PETITIONERS MARY DOE, JANE DOE AND THE UTAH STATE BAR

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1. Ad Hoc Coalition of Utah Law Professors
2. American Bar Association
3. American Civil Liberties Union
4. Latino Justice Amici
5. Parr Brown Gee & Loveless, P.C.
6. United States Department of Justice
7. University of Utah, S.J. Quinney College of Law
8. Utah Attorney General's Office
9. Utah Minority Bar Association
10. Utah State Office of Legislative Research and General Counsel

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ARGUMENT

The Court has now received amicus briefs from the United States, the legislative and executive branches of Utah's government, the national and local chapters of the American Civil Liberties Union, and a broad array of legal educators, advocates, and practitioners relating to whether this Court can, and should, "enact[] . . . a state law" permitting undocumented immigrants to practice law in Utah. The arguments set forth overwhelmingly demonstrate that this Court may enact a rule authorizing admission of undocumented immigrants to the practice of law, that such a rule would satisfy the "enactment of a State law" provision of 8 U.S.C. § 1621(d), and this Court should adopt such a rule to allow otherwise qualified undocumented immigrants to apply for admission to the practice of law.

Of all the amici, only the United States expressly opposes the petition. As discussed below, the Utah Legislature takes no position on whether the Court should adopt the proposed rule, and the Utah Attorney General suggests the Court delay adoption of a rule unless and until the Legislature authorizes other professional licenses. Both branches agree, however, that the Court could adopt a rule that would satisfy 8 U.S.C. § 1621(d). All remaining amici filed briefs in

support of Petitioners, and Petitioners agree with and join in the arguments raised by supporting amici as set forth below.

I. RESPONSE TO UTAH STATE AMICI AND SUPPORTING AMICI

Both the executive and legislative branches of the Utah state government agree that this Court has the authority and is the proper body to enact a rule granting undocumented immigrants eligibility for admission to practice law in the State. While the Utah Legislature expresses concern with characterizing rulemaking by this Court as "enactment of a State law," the Legislature recognizes that licensure to practice law in Utah is "not subject to legislative authority" and is instead "a province of the Court" pursuant to Article VIII, Section 4 of the Utah Constitution. Br. of Amicus Curiae Utah Legislature ("Legislature Br.") at 2-4. The Legislature accordingly agrees with Petitioners that, if read to require the Legislature to pass a law granting undocumented immigrants eligibility for law licenses, Section 1621(d) would violate the Tenth Amendment because it would purport "to require the Legislature to perform a function that the Utah Constitution delegates to the Court." *Id*. at 7. Moreover, the Legislature is of the view that "how Utah chooses to make decisions relating to the eligibility for admission to practice law is 'not a legitimate concern of the federal government,'" but rather a matter committed to the sound discretion of this Court. *Id.* at 10 (quoting *In re*

Vargas, 131 A.D. 3rd 4, 25 (N.Y. App. Div 2015)). The Legislature accordingly takes no position on whether the Court should adopt such a rule, but recognizes that the Court would be the proper entity to do so. *Id*. Like the Legislature, the Utah Attorney General recognizes the exclusive authority of this Court to regulate the practice of law by rule. Br. of Amicus Curiae the Office of the Attorney General ("Attorney General Br.") at 10-11. The Attorney General goes one step further than the Legislature to conclude that promulgation of a rule by this Court constitutes "enactment of a State law" under Section 1621(d), but arrives at the same conclusion—that this Court is the only body constitutionally permitted to authorize the practice of law by undocumented immigrants, and any interpretation of Section 1621(d) requiring a legislative act would violate the anticommandeering principles of the Tenth Amendment. *Id.* at 9-11. Unlike the Legislature, the Attorney General counsels the Court to adopt a "wait and see" approach, authorizing the practice of law by undocumented immigrants only if the Legislature first passes a statute allowing undocumented immigrants to obtain other professional licenses. With due respect to the Attorney General, his urging to follow the Legislature's policy lead is mistaken. First, different types of professional licenses implicate different policy considerations—including public safety and trust in licensed professionals, the risk posed to the public by unlicensed

practitioners, and the impact of licensing decisions on access to and cost of professional services. With respect to the practice of law, these considerations are uniquely within this Court's expertise and experience. The Legislature's decision to extend to (or withhold from) undocumented immigrants other professional licenses thus has no bearing on whether undocumented immigrants should be eligible to practice law. Second, and more importantly, this Court should not cede its constitutional authority to regulate the legal profession to another branch of government. This is a central point of the Legislature's own brief—that it is solely the Court's province to determine the eligibility of undocumented immigrants to practice law. Legislature Br. at 6-7. Whether a class of otherwise qualified applicants should be eligible for admission to practice law in this State is not—and should not—be conditioned on whether the Legislature first acts to permit those persons access to other professional licenses.

In any event, Petitioners agree with the Legislature and Attorney General that this Court must avoid an interpretation of Section 1621 that would conflict with the Tenth Amendment. Legislature Br. at 7-10; Attorney General Br. at 8-11. This argument is joined by all amici aside from the United States.

Petitioners also agree with and join the chorus of amici who argue this Court may, consistent with the plain meaning of Section 1621(d), "enact[] a State law"

making undocumented immigrants eligible for bar admission. 8 U.S.C. §1621(d). The term "enact" means "to make into law by authoritative act." Black's Law Dictionary, 643 (10th Ed. 2014). The term "law" refers to "[t]he set of rules or principles dealing with a specific area," *id.* at 1015, and the term "state law" refers to the "body of law in a particular state consisting of the state's constitution, statutes, regulations, and common law." Black's Law Dictionary, 1416 (7th Ed. 1999). And the text of the statute—"through the enactment of a State law," is passive, suggesting Congress did not want to limit a state's ability to opt out of Section 1621(a) to a particular branch of government. *See generally* Br. of Amici Curiae The American Civil Liberties Union and ACLU of Utah ("ACLU Br.") at 6-26; LatinoJustice's Amicus Curiae Br. at 27-30; Parr Brown Gee & Loveless, P.C.'s ("Parr Brown") Amicus Curiae Br. at 7-9; University of Utah, S.J. Quinney College of Law Amicus Curiae Br. at 10-13; Attorney General Br. at 3-8. Accordingly, this Court need not reach Petitioner's argument, joined by all amici curiae except the United States, that any contrary interpretation would violate the Tenth Amendment and principles of federalism and state sovereignty.

Petitioners also agree with amici Ad Hoc Coalition of Utah Law Professors ("Utah Law Professors") and Parr Brown that a license to practice law in Utah is not a "State or local public benefit" as defined in Section 1621(c)(1) because it is

not "provided by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(A). The Utah Supreme Court, which approves all Utah law licenses pursuant to Rule 14-104(c) of the Supreme Court Rules of Professional Practice, is not an "agency of a State or local government"—it is an independent branch of state government. *See* Parr Brown Br. at 3-7; Utah Law Professors Br. at 7-10. Furthermore, Utah does not fund law licenses with "appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(A). Instead, applicants and attorneys support the licensing process with admissions, licensing and other fees paid by applicants and attorneys to the Utah State Bar, a private, non-governmental organization that administers attorney admissions for the Court. Parr Brown Br. at 5-7; Utah Law Professors Br. at 11-15 & Ex. B. A license to practice law in Utah is therefore outside the scope of 8 U.S.C. § 1621, and this Court may adopt a rule making undocumented immigrants eligible for admission to the practice of law regardless of whether such a rule would constitute "enactment of a State law" under that statute.

II. RESPONSE TO THE UNITED STATES

The United States, for its part, opposes the Petition on two grounds. First, the United States argues that this Court should decline to enact a rule authorizing bar admission to otherwise eligible undocumented immigrants—including DACA

recipients–because DACA is based on an exercise of agency enforcement discretion that the Department of Homeland Security purported to rescind on September 5, 2017. Br. of United States as Amicus Curiae ("United States Br.") at 7-8; *see also* Elaine C. Duke, Acting Secretary, DHS, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5. 2017) ("Duke Mem.") available at https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca. Second, the United States argues that even if this Court determines it is prudent permit DACA recipients to practice law in Utah, a rule enacted by this Court cannot satisfy 1621(d) because "the phrase 'enactment of a State law' naturally connotes a statute passed by the state legislature." United States Br. at 10. These arguments are each without merit.

A. DACA Is Still in Effect and Regardless, Deferred Action Is Here to Stay

The United States argues it would be imprudent for this Court to grant law licenses to undocumented immigrants "based on parameters of an exercise of enforcement discretion that DHS has concluded is unlawful and should, in any case, be abandoned." United States Br. at 8. Of course, DACA has been in effect since 2012, and, as the United States concedes, multiple courts have enjoined DHS's attempt to rescind the program. United States Br. at 6 n.3 (citing cases);

ACLU Br. at 29 n.12 (citing cases).[1] Most recently, the United States Court of Appeals for the Ninth Circuit affirmed a nationwide injunction, holding that plaintiffs are likely to prevail in establishing that DHS's rescission of DACA on the ground that it is an "illegal" program is arbitrary and capricious:

> But after a change in presidential administrations, in 2017 the government moved to end the DACA program. Why? According to the Acting Secretary of Homeland Security, upon the legal advice of the Attorney General, DACA was illegal from its inception, and therefore could no longer continue in effect. And after Dulce Garcia—along with other DACA recipients and affected states, municipalities, and organizations—challenged this conclusion in the federal courts, the government adopted the position that its fundamentally legal determination that DACA is unlawful is unreviewable by the judicial branch. With due respect for the Executive Branch, we disagree.
>
> The government may not simultaneously both assert that its actions are legally compelled, based on its interpretation of the law, and avoid review of that assertion by the judicial branch, whose "province and duty" it is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The government's decision to rescind DACA is subject to judicial review. And, upon review, we conclude that plaintiffs are likely to succeed on their claim that the rescission of DACA—at least as justified on this record—is arbitrary,

[1] See generally National Immigration Law Center, Status of Current DACA Litigation, https://www.nilc.org/issues/daca/status-current-daca-litigation (last updated February 7, 2019).

> capricious, or otherwise not in accordance with law. We therefore affirm the district court's grant of preliminary injunctive relief.

Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 486 (9th Cir. 2018). Further, despite DHS's multiple filings for certiorari before judgment, the United States Supreme Court has not granted review in any of the pending DACA cases. *See* United States Br. at 6 n.3. Accordingly, DACA remains in effect and will likely remain in effect for some time regardless of DHS's erroneous position that the policy is unlawful.

Moreover, whether DHS is ultimately successful in rescinding DACA should have no bearing on whether this Court permits undocumented immigrants to practice law in Utah. Any undocumented immigrant should be eligible for admission to the Utah State Bar if otherwise qualified and of good moral character. This includes individuals who have deferred action relief now and individuals who might obtain deferred action relief in the future.[2] According to the United States Citizenship and Immigration Services (USCIS), "[d]eferred action is a

[2] It could also include undocumented immigrants without deferred action relief. The California Supreme Court took this approach and admitted Sergio C. Garcia to the California State Bar based on an immigration visa petition that had been pending for more than 19 years. Mr. Garcia was not eligible for DACA because he was over the age of 30 when DHS adopted the policy. *In re Garcia*, 58 Cal.4th 440, 463 & n.18 (2014).

discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion." USCIS, Frequently Asked Questions, https://www.uscis.gov/archive/frequently-asked-questions (last updated March 8, 2018). DHS considers individuals with deferred action relief to be lawfully present in the United States because "deferred action is a period of stay authorized by the Attorney General." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1059 (9th Cir. 2014); *citing* 8 U.S.C. § 1182(a)(9)(B)(ii); 8 C.F.R. 214.14(d)(3); U.S. Immigration and Naturalization Servs., Adjudicator's Field Manual Ch. 40.9.2(b)(3)(J).

Deferred action is not an anomaly. Deferred action has been available based on humanitarian considerations since at least as early as 1975, when the former Immigration and Naturalization Service ("INS") issued the following guidance: "Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category." INS, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975); *see generally* Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. L. J. 243 (2010) (reviewing the legal background and history of deferred action). The United States may grant deferred action relief on an ad hoc

basis or may target it at specific groups. According to the National Immigration Forum, the United States has granted deferred action relief to targeted groups of undocumented immigrants at least 20 times since the 1970s, and at least five times since the late 1990s. National Immigration Forum, Deferred Action Basics (April 15, 2016) https://immigrationforum.org/article/deferred-action-basics/. Accordingly, as long as deferred action continues to exist, there is no reason to deny individuals with deferred action relief the opportunity to practice law in Utah, regardless of whether one deferred action program—DACA—is rescinded by the United States.

B. The Court Should Reject the United States' Arguments

The Court should reject the United States' argument that Section 1621(d) requires the Legislature to take action. As the United States itself concedes, "in many circumstances congressional references to state law can properly be understood to encompass any state provision with the force of law." United States Br. at 11. But the United States, relying heavily on an unexplained sentence in House of Representatives Report No. 104-725 (1996) (Conf. Rep.), nevertheless maintains that Section 1621(d) does not permit this Court to enact a law opting out of Section 1621(a). Of course, "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce v. Whiting*, 563 U.S. 582,

599 (2011) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); *accord United States v. California*, 2019 U.S. App. LEXIS 11275 at *55 n.18, 2019 WL 1717075 (9th Cir. Apr. 18, 2019) (declining to credit the same conference report upon which the United States relies with respect to a different section of the Immigration and Nationality Act).

Similarly misplaced is the United States' reliance on the Florida Supreme Court's advisory opinion in *Florida Board of Bar Examiners Re: Questions as to Whether Undocumented Immigrants are Eligible for Admissions to the Florida Bar*, 134 So. 3d 432 (Fla. 2014). In that matter, the Florida Board of Bar Examiners asked the court for its opinion on whether a particular undocumented immigrant and similarly situated future applicants were eligible for admission under then-existing law. *Id*. at 433. Accordingly, the court surveyed existing Florida law and determined the applicant was ineligible because "there is no current State law that meets the requirements of section 1621(d) and permits this Court to issue a law license to an unauthorized immigrant." *Id*. at 435. In contrast to this case, the Florida Supreme Court was not asked to adopt a rule granting to undocumented immigrants eligibility for bar admission, and neither analyzed nor concluded that adoption of such a rule would not satisfy Section 1621(d). Accordingly, the Florida Supreme Court's "plain meaning" analysis of Section

1621(d) is dicta, cursory and incomplete. Like the United States here, the court did not review the dictionary or statutory definitions of "enact" and "law," address the multitude of other statutes that use words like "legislature" and "statute" explicitly, or consider the federalism clear-statement rule. *Id*.; *compare* United States Br. at 9-11 *with* ACLU Br. at 6-18, Attorney General Br. at 2-8, and Parr Brown Br. at 7-9.

Furthermore, the United States analogy to *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 288 (1981) is based on a logical fallacy. *Hodel* involved a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Like many environmental statutes passed in the 1960s and 1970s, SMCRA deploys a cooperative federalism approach under which states are expected to take the lead in surface mining regulation while the federal government oversees their efforts. Under SMCRA, if a state demonstrates that it can effectively regulate surface mining on its own, the federal government may approve the state's program. In the absence of a state program, the federal Office of Surface Mining becomes responsible to regulate surface mining operations. In *Hodel*, the Supreme Court ruled that this cooperative federalism approach to regulation does not violate the Tenth Amendment because the Tenth Amendment does not "limit congressional power to pre-empt or displace state

regulation of private activities affecting interstate commerce"—an area of express congressional authority. *Id.* at 289-90.

Of course, Section 1621 is not an attempt to pre-empt or displace state regulation of undocumented immigrants. Federal law does not permit Utah to enforce its own immigration laws subject to federal oversight. Instead, this section bars Utah from providing its own state public benefits to undocumented immigrants unless Utah chooses to "opt out" of the federal rule. Utah's only role is to decide whether to opt out, and the United States' argument that Utah can only do so legislatively is an impermissible attempt to commandeer the very method by which Utah makes its choice. Put another way, because Section 1621 purports to govern "how [Utah] can interact with the federal government, not the activities of private individuals, . . . *Hodel* is inapposite." *United States v. California*, 2019 U.S. App. LEXIS 11275 at * 49 n.15, 2019 WL 1717075 (holding the federal government may not require California to cooperate in federal immigration enforcement efforts without violating the Tenth Amendment); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) ("The Constitution . . . confers upon Congress the power to regulate individuals, not States." (internal quotation marks omitted)); ACLU Br. at 26 n.11. Section 1621(d) accordingly cannot, consistent with the requirements of the Tenth Amendment, be interpreted to mandate which branch of

Utah's government may enact a law opting out of 1621(a)'s bar on professional licensure for undocumented immigrants.

CONCLUSION

This Court has the exclusive authority and discretion to "enact[] . . . a State law" permitting undocumented immigrants eligibility for admission to practice law. The United States' policy arguments are unpersuasive and its statutory analysis of Section 1621(d) is without merit and would, in any event, run afoul of the Tenth Amendment. The Court should rejected the United States' arguments and adopt the rule proposed by Petitioners.

DATED this 25th day of April 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 3,197 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) and regarding public and non-public filings.

DATED this 25th day of April, 2019.

/s/ Anthony C. Kaye

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of April 2019, I caused a true and correct copy of the JOINT REPLY BRIEF OF PETITIONERS MARY DOE, JANE DOE AND THE UTAH STATE BAR to be served via email to:

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