2019

In Re: Mary Doe AND Jane Doe, Petitioners. : Amicus Brief

Utah Supreme Court

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Case No. 20180806-SC

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: MARY DOE AND JANE DOE,
PETITIONERS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION AND SUMMARY

Pursuant to this Court's invitation, the United States respectfully submits this brief as *amicus curiae* to address the questions posed by this Court. In the view of the United States, the petition should be denied.

The petition requests that this Court create a new rule that would make a category of unlawfully present aliens eligible to receive licenses to practice law in the State of Utah. That category is apparently designed to correspond to persons who have received deferred action under the Deferred Action for Childhood Arrivals program (DACA). The federal government has taken steps to rescind DACA, and the policy continues in part only because of preliminary injunctions that are the subject of continuing litigation. We respectfully suggest that an exercise of administrative enforcement discretion that the government is seeking to rescind does not form a prudent basis for creating a new rule for the privilege of bar membership.

If this Court agrees that rulemaking would not be prudent at this time, it need not resolve questions regarding the Court's authority to establish a rule that would allow certain unlawfully present aliens to receive law licenses. If this Court were to reach those questions, however,

it should conclude that it lacks that authority. Acting in the area of immigration, where it has broad and exclusive authority, Congress determined that unlawfully present aliens should generally be ineligible for public benefits, including professional licenses. Congress permitted States to create an exception to the prohibition on receipt of public benefits, but only "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). The text and context of the provision make clear that Congress intended to require States to use their legislative processes, leaving the authority to override Congress's default rule to politically accountable actors at the state level.

Congress's conclusion that aliens should not receive benefits, subject to that narrow exception, does not implicate Tenth Amendment concerns. Congress determined that unlawfully present aliens should be ineligible for professional licenses. Congress authorized States to override that determination, but it certainly was not required to do so. And its determination to authorize States to supersede the default rule under specified conditions does not constitute an impermissible intrusion on state sovereignty.

STATEMENT

A. Statutory and Constitutional Background

1. Alien Eligibility for Public Benefits

"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); *see* U.S. Const. art. I, § 8, cls. 3, 4. Congress exercised that authority in Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or "the Act"), Pub. L. No. 104-193, 110 Stat. 2105, which deems certain categories of aliens ineligible to obtain various public benefits.

The Act deems ineligible for federal benefits those aliens who are not "qualified aliens" within the meaning of the Act, with certain listed exceptions. 8 U.S.C. § 1611. Similarly, the Act makes certain categories of aliens ineligible for state and local benefits. Aliens are not "eligible for any State or local public benefit" unless they are "qualified alien[s]" (as defined in 8 U.S.C. § 1641); nonimmigrant aliens (a term defined in 8 U.S.C. § 1101(a)(15)); or aliens who are "paroled" into the United States (under 8 U.S.C. § 1182(d)(5)) for less than one year. 8 U.S.C. § 1621(a). The term "public benefit" includes "any grant, contract, loan, professional license, or

commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* § 1621(c). Petitioners here have not disputed that a law license issued by this Court qualifies as a public benefit.

Congress authorized States to override the general statutory prohibition and make additional aliens eligible for state or local public benefits, but only "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

2. Deferred Action for Childhood Arrivals

The Secretary of Homeland Security may exercise discretion to forbear from removing an alien for a designated period, a practice known as "deferred action." *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (*AADC*); 8 C.F.R. § 274a.12(c)(14) (describing "deferred action" as "an act of administrative convenience to the government which gives some cases lower priority").

In 2012, the Department of Homeland Security announced the policy known as DACA, which makes deferred action available to "certain young people who were brought to this country as children." Pet. Ex. B, at 1 (DACA Memorandum). Following successful completion of a background

check and review, an alien who met certain age, residence, and other guidelines could receive deferred action for a period of two years, subject to renewal. *Id.* at 1-3. The DACA Memorandum stated that it "confer[red] no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *Id.* at 3.

The Department of Homeland Security (DHS) has since determined that the DACA policy should be rescinded. *See* Elaine C. Duke, Acting Secretary, DHS, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017) ("Duke Mem.")[1]; Kirstjen M. Nielsen, Secretary, DHS, *Memorandum Regarding Deferred Action for Childhood Arrivals (DACA)* (June 22, 2018) ("Nielsen Mem.") (declining to disturb

[1] Elaine C. Duke, *Memorandum of Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca

decision to rescind DACA).[2] That determination has been preliminary enjoined, however, and remains the subject of pending litigation.[3]

B. The Current Petition

Petitioners are undocumented immigrants who graduated from Utah law schools and have been admitted to practice law in California. *See* Cal. Bus. & Prof. Code § 6064(b) (authorizing California Supreme Court to admit bar applicants who are not lawfully present in the United States). Their petition asks the Court to issue a rule that would allow aliens who are unlawfully present in the United States to become members of the Utah bar as long as they (1) are otherwise qualified for admission; (2) were

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[2] Kirstjen M. Nielsen, *Memorandum from Secretary Kirstjen M. Nielsen* (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf

[3] *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 18-15068, 2018 WL 5833232 (9th Cir. Nov. 8, 2018) (affirming preliminary injunction against DACA rescission), *petition for cert. filed* (U.S. Nov. 5, 2018) (No. 18-587); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 431 (E.D.N.Y. 2018) (preliminary injunction against DACA rescission), *appeal pending*, No. 18-485 (2d Cir.), *petition for cert. filed* (U.S. Nov. 5, 2018) (No. 18-589); *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) (setting aside DACA rescission), *reconsideration denied*, 315 F. Supp. 3d 457 (D.D.C.), *appeals pending*, Nos. 18-5243, 18-5245 (D.C. Cir.), *petition for cert. filed* (U.S. Nov. 5, 2018) (No. 18-588); *Casa de Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (Mar. 5, 2018), *appeal pending*, No. 18-1522 (4th Cir.).

brought to the United States as minors and continuously resided in the United States since that time; and (3) have received documented employment authorization from United States Citizenship and Immigration Services. Proposed Rule 14-721 (Ex. A to Petition).

ARGUMENT

I. The Court should decline to issue a rule premised on the DACA policy.

The petition now before this Court asks the Court to create a new rule of eligibility for bar membership designed to correspond to the category of people who meet the guidelines for deferred action under the Deferred Action for Childhood Arrivals policy. *See, e.g.*, Pet. 17 (discussing population covered by DACA). We respectfully urge that it would be anomalous to create a rule of eligibility based on an exercise of agency enforcement discretion that has been rescinded.

Under DACA, certain aliens unlawfully present in the United States could receive deferred action for a period of two years, subject to renewal. In addition to the temporary relief from removal directly flowing from a grant of deferred action, certain collateral consequences flowed from pre-existing laws and regulations, including the ability to obtain work

authorization in certain circumstances. *See, e.g.*, 8 C.F.R. § 274a.12(c)(14). In creating DACA, the Department of Homeland Security emphasized that its exercise of enforcement discretion "confer[red] no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." Pet. Ex. B, at 3.

In 2017, DHS decided to wind down the DACA policy, concluding that it is not authorized by law and, in any event, not appropriate to continue. *See* Duke Mem., *supra* n.1; Nielsen Mem., *supra* n.2. The policy remains partially in effect only because of preliminary injunctions that are the subject of active litigation. *See supra* n.3.

It would not be prudent for the State of Utah to adopt a rule of eligibility based on the parameters of an exercise of enforcement discretion that DHS has concluded is unlawful and should, in any case, be abandoned. At a minimum, it would not seem advisable to take such a step before the courts resolve the pending challenges to DACA's rescission.

II. Section 1621 permissibly sets a default rule that can be overridden only by a legislative enactment.

If the Court were to reach the question, it should conclude that States can override the otherwise applicable bar on the receipt of benefits only through the enactment of a law by the state legislature.

A. Congress set a default rule that can be overridden only by a legislative enactment.

"For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Congress has exercised its authority to limit the eligibility of unlawfully present aliens for certain categories of benefits. With limited exceptions, such aliens are ineligible for federal benefits. *See* 8 U.S.C. § 1611. Such aliens are also ineligible for certain categories of state benefits as well, including, as relevant here, professional licenses such as a license to practice law. *See id.* § 1621. There is no dispute here that Congress has authority to render unlawfully present aliens ineligible for law licenses, or that it has exercised that authority in 8 U.S.C. § 1621. *See Florida Bd. of Bar Examiners re Question as to Whether*

Undocumented Immigrants are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 434-35 (Fla. 2014) (per curiam).

Congress concluded that it would allow States to override the federal prohibition and provide otherwise-ineligible aliens with benefits, but only "through the enactment of a State law after August 22, 1996, which affirmatively provides for . . . eligibility" for a particular public benefit. 8 U.S.C. § 1621(d).

The text and context of this provision make clear that Congress contemplated a legislative enactment, rather than a rule issued by a court. Congress provided that States could override its eligibility determination only through a specified procedure: "enactment of a State law after August 22, 1996." The phrase "enactment of a State law" naturally connotes a statute passed by the state legislature. In ordinary parlance, the phrase "enactment of a . . . law" is not used to describe promulgation of a rule by a court or administrative agency; in fact, petitioners do not even use that phrase to describe what they are asking this Court to do, instead asking the Court "to adopt a rule opting out of the federal restriction against bar admission for undocumented immigrants." Pet. 12.

While in many circumstances, congressional references to state law can properly be understood to encompass any state provision with the force of law, Congress here was focused on the particular procedures a State could use to override federal law, and the federal statute is best understood to refer to enactment of a law by a state legislature. *See Florida Bd. of Bar Examiners*, 134 So. 3d at 435. The requirement that the enactment occur after August 22, 1996 (that is, after the federal law took effect), underscores that States may create an exception to the federal prohibition only by accepting political accountability for that step through enactment of legislation by a popularly elected legislature. Confirming this view, the Conference Report stated that "[o]nly the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

The petition does not seriously contest that Congress intended to require an enactment of a state law by a legislature to overrule the federal default rule. Instead, the petition argues that the Tenth Amendment limits Congress's authority to require such a legislative enactment. *See* Pet. 13-16. As discussed below, this argument is mistaken.

B. The Tenth Amendment does not prohibit Congress from conditioning States' exercise of authority in the immigration area.

The Tenth Amendment states that "[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, or to the people." U.S. Const. amend. X. The Tenth Amendment has been construed to limit "the circumstances under which Congress may use the States as implements of regulation" or may "direct or otherwise motivate the States to regulate in a particular field or a particular way." *New York v. United States*, 505 U.S. 144, 161 (1992). Thus, Congress may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (brackets and quotation marks omitted). While "Congress may use its spending power to create incentives for States to act in accordance with federal policies," "when pressure turns into compulsion, the legislation runs contrary to our system of federalism." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-78 (2012) (citation and quotation marks omitted).

Unlike the federal statute in *New York v. United States,* § 1621 does not require a State to enact legislation. Indeed, it does not require a State to do

anything. Instead, § 1621 sets a default rule of ineligibility, but provides a means by which States can override that rule.

Section 1621 was enacted as part of a broader scheme governing the ineligibility of certain categories of aliens for public benefits. Through PRWORA, Congress announced a "national policy with respect to welfare and immigration." 8 U.S.C. § 1601. And it established "a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits." *Korab v. Fink*, 748 F.3d 875, 884 (9th Cir. 2014).

With respect to state benefits, Congress directed that certain "qualified aliens" within the meaning of the Act, *see* 8 U.S.C. § 1641, "shall be eligible for any State public benefits," *id.* § 1622(b), and that aliens generally are not "eligible for any State or local public benefit" unless they are a "qualified alien," a nonimmigrant alien, or an alien paroled into the United States for less than one year, with certain listed exceptions, *id.* § 1621(a), (b). Congress also authorized States to make additional categories of aliens eligible for state or local public benefits "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." *Id.* § 1621(d).

Congress was under no obligation to accommodate state interests at all when establishing aliens' eligibility for public benefits. It is "'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, and to 'take into account the character of the relationship between the alien and this country,'" and "only rarely are such matters relevant to legislation by a State." *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (quoting *Mathews*, 426 U.S. at 80, 85).

Congress did, however, allow States to override the otherwise applicable prohibition in § 1621(d), but only when a state legislature concludes that it is appropriate to make state or local benefits available to particular aliens. The grant of authority to the state legislatures in this area of traditional federal concern cannot plausibly be characterized as an interference with state government. Rather than intruding on the States' right to "remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), Congress has here accorded state interests an additional measure of respect by granting States the authority to regulate in this area, if they so choose, by enacting a law establishing the eligibility of additional aliens. The Constitution does not compel Congress to allow States to take advantage of that

accommodation in ways that would not satisfy Congress's desired condition of clear political accountability by a popularly elected body.

The federal scheme at issue here is best analogized to that in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981), where the Supreme Court held that Congress could permissibly create a regulatory scheme that would apply unless a State implemented its own regulatory scheme that satisfied certain federal requirements. The Court noted that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining," and held that the federal statute did not "become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. In the same way, § 1621 does no more than authorize the States to impose their own regulations, subject to certain conditions.

As in *Hodel*, States can determine whether they wish to take advantage of the flexibility Congress provided, but must do so on the terms set out by Congress. If the state legislature chooses to enact a law authorizing this Court to grant licenses to unlawfully present aliens, then federal immigration law would no longer impose a barrier to admission, and this Court could determine whether such licenses are appropriate.

In enacting 8 U.S.C. § 1621(d), Congress did not purport to strip this Court of authority that it would otherwise have enjoyed. Absent § 1621(d), the State would have no authority to provide law licenses to unlawfully present aliens. Section 1621(d) merely provides that, as a matter of federal law, the state legislature may override the federal default rule in the immigration area. In Florida, for example, although the state constitution provides that the Florida Supreme Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law," Fla. Const. art. V, § 15, the legislature overrode 8 U.S.C. § 1621 and thus granted its Court the discretion to admit unlawfully present aliens to the bar. *See* Fla. Stat. § 454.021(3); *Florida Bd. of Bar Examiners*, 134 So. 3d at 438-39 (Labarga, J., concurring) (noting that although authority over bar admissions is typically reserved to the Florida Supreme Court, under federal law only the legislature could establish an exception to 8 U.S.C. § 1621).

As petitioners note, this Court ordinarily has exclusive authority to make determinations regarding eligibility for law licenses. Utah Const. art VIII, § 4; *Injured Workers Assoc. of Utah v. Utah*, 374 P.3d 14, 20-21 (Utah 2016). But there is no dispute that 8 U.S.C. § 1621(a) permissibly supersedes any authority this Court might have in the case of unlawfully

present aliens, and thus, absent 8 U.S.C. § 1621(d), that unlawfully present aliens would be categorically ineligible for law licenses.

The U.S. Supreme Court cases cited by the petition are inapposite. In *Fry v. United States*, 421 U.S. 542 (1975), the Supreme Court upheld a federal statute authorizing the President to impose wage limitations on state employees. The Court rejected the argument that limiting salary increases for state officials to 5.5%, when the state legislature had specifically provided for a 10.6% salary increase, impermissibly "interferes with sovereign state functions." *Id.* at 547. To the extent that *Fry* is relevant, it merely underscores that the Tenth Amendment does not protect all operations within a State from federal intervention.

The U.S. Supreme Court's decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), involved federal limitations on States' ability to establish the qualifications of state judges. The Court held that it would not conclude that Congress meant to legislate in this area absent a clear statement. *Id.* at 460-61. Here, there is no dispute that Congress could have established a prohibition on the receipt of benefits without affording the States an opportunity to create a limited exception to the prohibition. Congress's accommodation of States' interests in § 1621(d) cannot be said to "intrude

on state governmental functions," *id.* at 470, or "alter the usual constitutional balance between the States and the Federal Government," *id.* at 460 (quotation marks omitted), and, of course, Congress has clearly indicated that enactment of a state law is required if a state intends to override the federal default rule. The Appellate Division of the New York Supreme Court was thus wrong to treat 8 U.S.C. § 1621 as analogous to the provision at issue in *Gregory*. *See Matter of Vargas*, 131 A.D.3d 4, 25-26 (N.Y. App. Div. 2015).

In sum, petitioners do not contest that federal law requires that the rule they seek take the form of an enactment by the State Legislature. Their contention that this requirement violates the Tenth Amendment is without basis.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2019, I electronically filed the foregoing with the Clerk of the Court by sending it by electronic mail to supremecourt@utcourts.gov. I also served the foregoing on the following by electronic mail:

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ADDENDUM: 8 U.S.C. § 1621

8 U.S.C. § 1621

§ 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not--

(1) a qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c)).

(b) Exceptions

Subsection (a) shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the

Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means--

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

(2) Such term shall not apply--

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act qualified for such benefits and for whom the United States under reciprocal treaty agreements is

required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

(3) Such term does not include any Federal public benefit under section 1611(c) of this title.

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.