No. 16-1405

In The
Supreme Court of the United States

EARL DE VRIES,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to urge this Court to grant review in order to hold that 8 U.S.C. § 1621(d) violates the Tenth Amendment to the U.S. Constitution, sever

[1] Timely notice was given to all parties. Both Petitioner and Respondent have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

that provision from the statute of which it is a part, and accordingly decide in favor of petitioner.

SUMMARY OF THE ARGUMENT

The Regents of the University of California ("Regents") have provided instate tuition benefits to aliens not lawfully present in the United States. 8 U.S.C. § 1621(a) makes such aliens ineligible for state or local public benefits. 8 U.S.C. § 1621(d), however, provides that states, in order to make unlawfully present aliens eligible for public benefits, must do so by a state law affirmatively providing for such eligibility.

Under the Supremacy Clause of the U.S. Constitution, Congress may preempt state laws or policies in an area over which Congress has constitutional authority. Thus, 8 U.S.C. § 1621(a) is valid under the Supremacy Clause; it preempts laws or policies by states in the area of immigration, over which the Constitution grants Congress plenary authority.

8 U.S.C. § 1621(d), however, violates the Tenth Amendment to the Constitution. Under the Tenth Amendment, Congress may not command a state to reorganize the republican form of government it has adopted, or to apportion political accountability differently than it has chosen to do. Since Congress issued both sorts of commands in § 1621(d), that provision violates the Tenth Amendment.

Section 1621(d) is severable from the rest of the statute of which it is a part. When it is severed, the remaining statute preempts the Regents' provision of instate tuition benefits to unlawfully present aliens.

ARGUMENT

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") to reform the country's welfare system. Pub L. 104-193, 110 Stat. 2107 (1996). In part of PRWORA, Congress restricted welfare eligibility and public benefits to aliens. *Id.* at §§ 401-423 (codified at 8 U.S.C. 1600 *et seq.*) 8 U.S.C. § 1621(a) provides that unlawfully present aliens are "not eligible for any State or local public benefit. . . ." Subsection (b) provides a limited list of exceptions related to community necessities such as emergency disaster relief, immunizations, and programs identified by the Attorney General. 8 U.S.C. § 1621(b). Subsection (d) is an exception to subsection (a); it allows individual states to provide eligibility to illegal aliens for state and local public benefits, with a catch:

> 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) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. § 1621(d).

Section 1621(a) is constitutional; it operates as a federal preemption of state laws or policies in an area, immigration, in which Congress has plenary authority. Section 1621(d), by contrast, violates the Tenth Amendment because it commands states to restructure their governments. Therefore, § 1621(d) should be severed from PRWORA, and petitioner should prevail under § 1621(a).

I. 8 U.S.C. § 1621(a) Preempts State Or Local Grants Of Public Benefits To Unlawfully Present Aliens.

In 8 U.S.C. § 1621(a), Congress provided that, other than when certain exceptions apply, unlawfully present aliens are "not eligible for any State or local public benefit." This provision of § 1621, standing alone, explicitly preempts any state or local laws, regulations, or policies that would grant public benefits to illegal aliens. Section 1621(a) falls squarely within the powers of the federal government. Unlike § 1621(d) (analyzed below), § 1621(a) does nothing more than prevent States and localities from actively creating programs which would undermine a Congressional scheme passed pursuant to Congress' delegated power of regulating immigration.

The Supremacy Clause of the Constitution provides that federal law is "the Supreme law of the land." Art. VI, cl. 2. "A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S.

363, 372 (2000). State law is naturally preempted to the extent of any conflict with a federal statute. *Id*. A state law therefore cannot stand in "clear contrast" to a "congressional scheme in the scope of the subject matter addressed." *Id.* at 378. There is also no doubt under this principle that "Congress may withdraw specified powers from the States by enacting a statute." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Here, in § 1621(a), Congress has withdrawn from the states the power to give public benefits to unlawfully present aliens.

This Court has long recognized the authority of Congress to act in the area of immigration. "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahasi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). "[T]he power to regulate immigration is unquestionably a federal power." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 588 (2011). Indeed, this Court has specifically found that Congress may deny admission to aliens who are likely to consume public benefits. *See Graham v. Richardson*, 403 U.S. 365, 377 (1971) (holding that the federal statutory exclusion of "aliens who are paupers, professional beggars, or vagrants or aliens who are likely at any time to become public charges" from being admitted into the United States was validly adopted "[p]ursuant to that power"). Thus, when the federal

government substantively legislates on matters touching immigration, it clearly overrides the states. "Under the Constitution, states are granted no such powers [over immigration], they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States." *Takahasi*, 334 at 419.

Nor does § 1621(a) impinge upon state sovereignty under the Tenth Amendment. It is true that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 578 (2012). Also, "Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system," *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975), nor may Congress "commandeer" a state's legislative or administrative apparatus for federal purposes, *Printz v. United States*, 421 U.S. 898, 933 (1997). But § 1621(a) merely prevents states and localities from undermining federal objectives in an area of federal concern. *See Graham*, 403 U.S. at 377. Thus, it does not come close to impairing the states' integrity or their ability to function in a federal system. *See, a fortiori, Lozano v. City of Hazelton*, 724 F.3d 297, 303 (3rd Cir. 2013) (holding that conflict preemption occurs "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (quoting *Arizona*, 567 U.S. at 399).

Section 1621(a) does not require the States to act, or to use their administrative apparatus; it merely prevents them from spending public money in a way that thwarts Congress's purposes. Nor, unlike § 1621(d), does § 1621(a) command states to restructure their governments. Section 1621(a), therefore, is not vulnerable to a Tenth Amendment challenge.

II. 8 U.S.C. § 1621(d) Violates The Tenth Amendment.

The California Constitution gives the Regents, rather than the state legislature, authority to provide in-state tuition to unlawfully present aliens. Cal. Const. art. IX, § 9, subd. (a). By demanding "the enactment of a State law," § 1621(d) provides that only the state legislature may make unlawfully present aliens eligible for public benefits. Thus, § 1621(d) commands California to alter the structure of its government by transferring authority from the Regents to the legislature.

Section 1621(d) commands state government restructuring in another way, too: by reapportioning political accountability in state governments. That section commands, not merely regulation with a given subject matter or effect, but regulation with a particular political significance: states may only make unlawfully present aliens eligible for public benefits by an "affirmative[ ]" grant of such eligibility. This command makes state decision makers assume heightened political accountability for making unlawfully present aliens eligible for public benefits.

As shown above, if California wishes to give unlawfully present aliens public benefits, the federal government may permit it to do so, permit it to give some benefits but not others, or permit it to give no benefits. Section 1621(d) does none of these things. Rather, it permits California to give benefits only in a certain *way*: by a law of a form that would make officials more politically accountable than would a non-affirmative law with the same effect. California's current political structure makes no demand for such heightened political accountability, but leaves officials free to draft laws that accomplish a given purpose without "affirmatively" stating that they are doing so. Thus, by making its demand for heightened political accountability, § 1621(d) alters California's governmental structure, and that of any state that has not imposed the federally-mandated structure upon itself.

Yet how states structure their governments, provided they have a republican form of government, is an inviolable attribute of their sovereignty. Because § 1621(d) commands state government restructuring, it therefore violates the Tenth Amendment.

The Tenth Amendment provides 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. In *New York v. United States*, this Court found that Congress cannot compel a State government to regulate according to federal direction. 505 U.S. 144, 177 (1992) (holding that forcing a state to take title to radioactive waste was unconstitutional

under the Tenth Amendment). *See also Printz*, 521 U.S. at 933 (holding that the federal government cannot require chief law enforcement officers to perform background checks). "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York*, 505 U.S. at 178. Also, the federal government may only regulate individuals within a state, not the state as a state. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286 (1981) (discussing the intersection of Commerce Clause power and the Tenth Amendment).

Of particular relevance here, "[t]hrough the structure of its government, . . . a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *id.* at 463-64 (holding, on state sovereignty grounds, that federal age discrimination law did not apply to Missouri's mandatory retirement age for state court judges in the absence of a clear statement by Congress that it did so apply, and leaving open whether a state's power to structure its government was "inviolate" even where Congress, exercising its commerce power, speaks clearly); *cf., e.g.*, *United States v. Morrison*, 529 U.S. 598, 617-19 (2000) (holding that, under the Tenth Amendment, Congress lacked power under the Commerce Clause to punish intrastate violence, because such police power was reserved to the states). As this Court has explained:

> By "'splitting the atom of sovereignty,'" the founders established "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual

> rights and obligations to the people who sustain it and are governed by it.'" *Saenz* v. *Roe*, 526 U.S. 489, 504, n.17, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999), quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995) (concurring opinion). "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.

Alden v. Maine, 527 U.S. 706, 751 (1999). *See also Shelby County v. Holder*, 133 S. Ct. 2612, 2623-24 (2013) (holding that the Voting Rights act infringed on the right of states to structure elections without federal interference, and that "[o]utside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives"); *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1115 (2015) ("The States have a sovereign interest in structuring their governments").

Notably, a New York appellate court has found §1621(d) unconstitutional under the Tenth Amendment. In *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York.*, 131 A.D.3d 4 (2015), the court examined whether the state judiciary had the power under § 1621(d) to grant an unlawfully present alien admission to the state bar.

The court found that the federal government commandeered New York in that provision by forcing it to structure its government in such a way that only the legislature, rather than the judiciary, could have decision-making authority in bar admission determinations. *Id.* at 24-27. While the New York appellate court correctly found that § 1621(d) is unconstitutional, it unaccountably failed to consider whether it should be severed from PRWORA.

Indeed, as explained above, § 1621(d) violates the Tenth Amendment for the reason the *Vargas* court identified: it commands states that wish to provide public benefits to unlawfully present aliens to restructure their governments. But this Court should go further than the *Vargas* court, and sever this unconstitutional provision from the statute of which it is a part. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (holding that courts should not nullify more of a statute than is necessary).

III. 8 U.S.C. § 1621(d) Is Severable.

PRWORA includes a severability clause, which creates a presumption that § 1621(d) is severable. Additionally, the statute can continue to function as intended without § 1621(d).

"If any provision of this title or the application of such provision to any person or circumstance is held to be unconstitutional, the remainder of this title and the application of the provision of such to any person or circumstance shall not be affected thereby."

8 U.S.C. § 1643(d). This language is standard for federal severability clauses. *See INS v. Chadha*, 462 U.S. 919, 932-33 (1983) (discussing the severability clause of the Immigration and Nationality Act, which closely tracks that of 8 U.S.C. § 1643(d)).

A severability clause provides a court with the presumption of congressional approval to sever an unconstitutional section of a statute. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). "[W]hen Congress has explicitly provided for severance by including a severability clause in the statute, . . . the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (citing *Chadha*, 462 U.S. at 932. *See also Champlin Refining Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 235 (1932)).

The presumption of severability is dispositive, provided that the remaining constitutional provisions are both workable and consistent with Congress's basic legislative objectives in enacting the statute. *United States v. Booker*, 543 U.S. 220, 258-59 (2004) (citing *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984)). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines*, 480 U.S. at 684.

Far from it being evident that Congress would not have enacted § 1621 without § 1621(d), the introductory language of PRWORA provides strong support that Congress would have enacted § 1621 even if subsection (d) had been excluded from the text. In § 1601, Congress stated its goals in the area of the intersection of immigration and welfare. It noted that immigration to the United States has always been grounded in the principle that aliens coming to this country should be self-sufficient and not depend on upon public resources to meet their needs. 8 U.S.C. § 1601(1) & (2). Congress's reforms in PRWORA pertaining to immigration were spurred on by the previous system's failure to assure that aliens were not a burden to the public benefits system. 8 U.S.C. § 1601(4). The goal of this reform was to remove welfare and public benefits as pull factors for illegal immigration. As Congress found, "it is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6).

Furthermore, the conference reports produced when PRWORA was being passed show a commitment to ensuring illegal aliens do not receive public benefits. "[C]onference reports are the most persuasive evidence of legislative intent, after the statute itself." *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) (citing *Davis v. Lukhard*, 788 F.3d 973, 981 (4th Cir. 1986)). The welfare reform strategy for PRWORA was to restrict federal and state benefits in order to end welfare's role as an "immigration magnet." H.R. Rept. 104-651 at 6 (1996). The committee

found that making illegal aliens ineligible for welfare benefits would help reduce the incentive to enter the United States illegally. *Id.* at 1453.

In short, there is no indication from either the text of the statute or its legislative history that § 1621 would not have passed if the unconstitutional section, § 1621(d), were not included in the act. Indeed, as shown, the statute more fully effectuates Congress's purpose without § 1621(d) than with it.

CONCLUSION

For the foregoing reasons, this Court should grant review in order to hold that § 1621(d) is unconstitutional, sever it from PRWORA, and find for petitioner based on § 1621(a).

Respectfully submitted,

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