MEMORANDUM

To: Jerroll Sanders, ONUS

From: Greg Magarian

Re: Constitutional Basis for Proposed Equality in Policing Act

Date: June 13, 2023

This memorandum analyzes the possible constitutional grounds on which Congress might enact the proposed Equality in Policing Act, formally known as The Uniform Law Enforcement Improvement Act (hereinafter "URLEIA"), with particular attention to concerns about the anti-commandeering doctrine. In preparation for drafting this memorandum, I have reviewed the present draft of URLEIA that you provided to me. This memorandum does not constitute legal advice but rather sets forth my best understanding of the covered constitutional issues based on my academic expertise in the field of constitutional law.

An important general caveat applies to this memorandum's analysis. The extent of Congress's power to enact wide-ranging, novel statutes has been a matter of persistent constitutional controversy throughout our nation's history. This issue cuts to the core of the Constitution's structure. The Supreme Court has shown inconsistency over time, and in recent decades, in its decisions about the extent of constitutional power. Legal doctrine in this area is unstable and unpredictable. Therefore, actually defending URLEIA against legal challenges to its constitutional validity would implicate strategic and practical considerations beyond this memorandum's abstract legal analysis.

This memorandum organizes its analysis around the two constitutional provisions that might provide constitutional grounds for Congress to enact URLEIA: Section 5 of the Fourteenth Amendment, and the Commerce Clause of Article I section 8.

I. THE FOURTEENTH AMENDMENT

The Fourteenth Amendment, among its other functions,[1] protects rights guaranteed to the people in the Bill of Rights against violations by state government actors, including state officials and state subdivisions such as municipalities.[2] Among those rights are the Fourth Amendment's[3] protections against uses of excessive force and unreasonable searches by police officers.[4] Section 5 of the Fourteenth Amendment gives Congress power to enact statutes to effectuate the amendment's protections.[5] Because URLEIA seeks to remedy abuses of rights by police, and particularly uses of excessive force, URLEIA might fall within the scope of Congress's section 5 power.

One important caveat: the Fourteenth Amendment applies only to the actions of state government actors.[6] URLEIA, as I understand it, would have its most important effects on state (including municipal) policing. Therefore, this Fourteenth Amendment analysis has high salience for URLEIA. However, URLEIA would also apply to federal government and private law enforcement agencies. The federal government applications

[1] The Fourteenth Amendment separately protects against intentional racial discrimination by state government actors. *See* U.S. CONST. amend. XIV, sec. 1 (Equal Protection Clause). Racial discrimination, of course, has salience for many abusive police practices. However, I understand that you prefer not to cast URLEIA in racial terms.
[2] U.S. CONST. amend. XIV, sec. 1 (Due Process Clause). The Bill of Rights itself, without the Fourteenth Amendment, protects only against violations by the federal government. *See* Barron v. Mayor and City of Baltimore, 32 U.S. 243 (1833).
[3] U.S. CONST. amend. IV.
[4] *See* Graham v. Connor, 490 U.S. 386 (1986).
[5] U.S. CONST. amend. XIV, sec. 5.
[6] *See* Civil Rights Cases, 109 U.S. 3 (1883); United States v. Morrison, 529 U.S. 598, 619-27 (2000).

present no constitutional issue, because Congress generally may restrain its own power.[7] Private law enforcement agencies present a different problem. To the extent a private law enforcement agency derived its power from state government authority, it might be subject to URLEIA under the Fourteenth Amendment as a "state actor."[8] Given the nature of law enforcement power, the "state actor" analysis seems potentially applicable to many private law enforcement agencies, although analysis of the "state actor" question as it applies to such agencies lies outside the scope of this memorandum. If a private law enforcement agency were truly independent of state government authority, then Congress could not apply URLEIA to that agency under the Fourteenth Amendment. Instead, Congress could only rely for such application on its commerce power (discussed below).

A. *The Legal Standard for Fourteenth Amendment Statutes: Congruence and Proportionality*

The Supreme Court has established a rigorous standard for determining whether a federal statute properly falls within Congress's Fourteenth Amendment power. For the Fourteenth Amendment to support a statute, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[9]

Since adopting the congruence and proportionality test in 1997, the Court has invoked the test to strike down aspects of several important federal statutes. For example, the Court found Congress's allowance for state government employees to sue

[7] *See* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1923-32 (2001).
[8] *See* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 620 (1991) (setting forth the nexus test for treating nominally private actors as state actors).
[9] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

their employers under both the Americans With Disabilities Act and the Age Discrimination in Employment Act to be not "congruent and proportional" with the constitutional rights problems of, respectively, disability discrimination and age discrimination by state government employers.[10]

In essence, the congruence and proportionality test allows Congress to enact a statute under the Fourteenth Amendment only if the Court's own view about the scope of a constitutional rights problem justifies the statute's remedial measures. For URLEIA, the Court would assess whether the problem of state law enforcement officers' violations of Fourth Amendment rights justified the various remedial measures that URLEIA would impose on state law enforcement agencies. I do not here attempt a thorough analysis of how the congruence and proportionality test might apply to URLEIA, which would require expertise about facts and law relating state police practices. I note, however, that the congruence and proportionality test appears to leave the Court a great deal of latitude in positing the scope of any given constitutional rights problem.

B. *Fourteenth Amendment Avoidance of the Anti-Commandeering Doctrine*

The anti-commandeering doctrine is a judicial innovation of the past three decades that bars Congress from "commandeering" state governments. In essence, the anti-commandeering doctrine bars Congress from ordering state governments to use their governing authority to effectuate congressional policies. The doctrine bars Congress from ordering state legislatures to enact statutes[11] or not to enact statutes.[12] The Court

[10] *See* Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (ADEA); Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (ADA).
[11] *See* New York v. United States, 505 U.S. 144 (1992).
[12] *See* Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

also held in *Printz v. United States*[13] that the doctrine bars Congress from ordering state executive branch officials, such as law enforcement officers, to perform tasks prescribed by Congress.

When the Supreme Court has invoked the anti-commandeering doctrine to strike down federal statutes, those statutes have all rested on Congress's commerce power. As I will discuss below, the anti-commandeering doctrine would present a serious challenge to various elements of URLEIA if the statute had to depend for its enactment on Congress's commerce power.

However, the Court has never invoked the anti-commandeering doctrine to strike down a federal statute that depended for its constitutional authority on the Fourteenth Amendment. The Court certainly might use the doctrine that way in the future, but all of its reasoning in support of the doctrine to date has focused on the commerce power. The present consensus among legal scholars appears to hold that the anti-commandeering doctrine only applies to commerce power statutes, not to Fourteenth Amendment statutes.[14]

One analogy that supports this view of the anti-commandeering doctrine has to do with the Eleventh Amendment. The Eleventh Amendment generally protects state governments against lawsuits for damages. The Court has long held that Congress may abrogate states' Eleventh Amendment immunity in statutes it enacts pursuant to its Fourteenth Amendment power.[15] However, the Court has held that Congress may *not* abrogate states' Eleventh Amendment immunity in statutes it enacts pursuant to its

[13] 521 U.S. 898 (1997).
[14] *See* Rebecca Aviel, *Remedial Commandeering,* 54 U.C. DAVIS L. REV. 1999 (2021) (setting forth the argument and discussing prior scholarship on the issue).
[15] *See* Fitzpatrick v, Bitzer, 427 U.S. 445 (1976).

commerce power.[16] The Eleventh Amendment is very similar to the anti-commandeering doctrine in its protection of states' interests, and the Court over the past 35 years has strengthened both protections in parallel ways. The Court's distinction between Congress's Fourteenth Amendment and commerce powers in setting the scope of Eleventh Amendment immunity provides a logical template for similarly circumscribing the anti-commandeering doctrine.

If this view of the anti-commandeering doctrine's scope is correct, then it makes the Fourteenth Amendment a very favorable constitutional basis for URLEIA. In short, if URLEIA could satisfy the congruence and proportionality test for Fourteenth Amendment statutes, then a very strong argument would exist that the anti-commandeering doctrine, because it should not apply to Fourteenth Amendment enactments, has no relevance at all for URLEIA.

II. THE COMMERCE POWER

Article I, section 8 of the constitution sets forth the basic powers of Congress, the broadest and most important of which is the power "to regulate commerce . . . among the several States."[17] The commerce power provides the basis for most federal laws that regulate private conduct. The Supreme Court has held that Congress may also apply commerce power statutes "of general application" to state governments as well as private actors.[18] In other words, if a federal law regulates conduct in which both private actors and state governments engage – for example, management of employees – then Congress may regulate that conduct by both private actors and state governments.

[16] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
[17] U.S. CONST. art. I, sec. 8, cl. 3.

A. *The Legal Standard for Commerce Power Statutes: Substantial Effect on Interstate Commerce*

The commerce power clearly supports federal statutes that regulate literal commerce between entities in different states. Controversies arise when Congress tries to use the commerce power to regulate something that is not literally interstate commerce, such as employment practices in factories[19] or racial discrimination in places of public accommodation.[20]

The Supreme Court's basic test under the Commerce Clause is that Congress may use the commerce power to regulate any activity that has a "substantial effect" on interstate commerce.[21] That test in practice has usually been very permissive, letting Congress regulate almost any matter it wants to regulate. For the nearly six decades between 1937 and 1995, the Court never sustained a commerce power challenge to any federal statute.

However, the Court over the past 30 years has imposed some important limits on the commerce power. First, Congress may not use the commerce power to regulate wholly non-economic activity. Accordingly, the commerce power did not justify a federal ban on possessing guns near schools[22] or a federal cause of action for survivors of rape or sexual assault to sue their attackers.[23] Second, Congress may not use the commerce power to compel commerce that would not otherwise occur. Thus, the commerce power did not support the individual medical insurance mandate of the

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[18] *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985).
[19] *See* United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as a proper exercise of the commerce power).
[20] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (both upholding Title II of the 1964 Civil Rights Act as a proper exercise of the commerce power).
[21] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[22] *See* United States v. Lopez, 514 U.S. 549 (1995).

Affordable Care Act.[24] One important recent affirmation of the commerce power is that Congress may use the commerce power to regulate certain noncommercial activity as part of a broader scheme of commercial regulation. Thus, the commerce power supported Congress's ban on growing and freely distributing marijuana for medical use, because that ban was part of the broad scheme of federal controlled substance regulation.[25]

Analyzing URLEIA under the commerce power presents a difficult challenge, because the Supreme Court has never previously considered whether the commerce power can support a statute like URLEIA.

URLEIA is a statute of general application, insofar as it applies to private as well as governmental law enforcement agencies. However, law enforcement is not a paradigmatically private function like, for example, management of employees. Rather, law enforcement is perhaps the most paradigmatic function of government. Thus, URLEIA can fairly be described as a statute that focuses on government conduct and secondarily regulates parallel private conduct. The Court has never considered whether the commerce power can support a statute that primarily regulates government conduct.

A strong argument exists that state and local law enforcement practices have substantial effects on interstate commerce. However, at least two reasonable counter-arguments are available. First, because state and local law enforcement agencies have state and local jurisdiction, the Court might well categorize the actions of those agencies as axiomatically intrastate rather than interstate, taking them outside the scope of the commerce power. Note, however, that state-level law enforcement agencies do regulate

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[23] *See* United States v. Morrison, 529 U.S. 598, 607-19 (2000).
[24] *See* National Fed'n of Independent Business v. Sebelius, 567 U.S. 519, 547-58 (2012) (opinion of Roberts, C.J.). After rejecting the commerce power as a basis for the individual mandate, the Court upheld the mandate under the taxing power. *See id.* at 561-74.

some channels of interstate commerce (*e.g.*, state troopers' policing of interstate highways). Second, as discussed above, the Court has held that the commerce power does not empower Congress to regulate non-economic activity under the "substantial effect" test. That boundary appears to bar regulation even where the non-economic activity in question, such as sexual violence, has a substantial effect on interstate commerce.

State and local law enforcement agencies arguably engage directly in economic activity, most obviously and consequentially by imposing fines that fund municipal governments. However, the Court's constitutional paradigm for "commerce" has always been private economic activity. The Court has never let Congress use the commerce power to regulate state or local revenue policies. Moreover, just as I suggested above about state and local law enforcement actions generally, the Court might well categorize any economic aspects of state and local law enforcement as categorically intrastate rather than interstate.

As a general matter, the Supreme Court over the past three decades has shown great concern for states' dignity and autonomy. The Court does not exempt state conduct from Congress's commerce power simply because the conduct is a "traditional governmental function."[26] However, the Court has sometimes rejected congressional regulation of state conduct that the Justices view as central to states' dignity or autonomy. For example, the Court barred Congress from dictating the location of Oklahoma's state capitol as a consideration of admitting the state to the union.[27] More recently and notoriously, the Court struck down the formula that required certain (mostly southern)

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[25] *See* Gonzales v. Raich, 545 U.S. 1 (2005).
[26] *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 537-47 (1985).

states and localities to obtain federal preclearance for changes to their voting practices. The Court essentially found that formula unfair and offensive to the covered states and jurisdictions.[28] The Court's deep solicitude for states' dignity and autonomy is an important background factor in assessing how the Justices might view URLEIA as an exercise of Congress's commerce power.

B. *The Commerce Power and the Anti-Commandeering Doctrine*

Assuming Congress could use the commerce power to enact URLEIA, the statute would face objections under the anti-commandeering doctrine. As described above, that doctrine bars Congress from mandating how state government actors must use their governmental powers. Numerous provisions of URLEIA arguably impose that sort of mandate on states. Here I briefly examine potential grounds for defending URLEIA against anti-commandeering attacks.

1. Regulation vs. Commandeering

Since the advent of the anti-commandeering doctrine, Congress has only succeeded once in defeating an anti-commandeering challenge before the Supreme Court. That case, *Reno v. Condon*,[29] involved a federal law that barred anyone from selling information from people's driving records. The state argued that the regulation essentially constrained state government autonomy, because only states have power to collect information for and about driving records in the first place. The Court, however, characterized the statute as simply regulating state conduct rather than commanding state government action. The Court also emphasized that the statute barred private actors as

[27] *See* Coyle v. Oklahoma, 221 U.S. 559 (1911).
[28] *See* Shelby County v. Holder, 570 U.S. 529 (2013).

well as state governments from selling driving record information, making the statute a generally applicable regulation, although the Court declined to decide whether general applicability was necessary for a federal statute to avoid the anti-commandeering doctrine.

Reno v. Condon would provide the most thorough and likely the most promising defense for URLEIA against an anti-commandeering attack. The *Condon* statute, like URLEIA, mainly regulated paradigmatically governmental conduct. Arguably even more than URLEIA, the *Condon* statute's application to private conduct was secondary and attenuated. Most centrally, the *Condon* statute, like URLEIA, can fairly be characterized as regulating conduct rather than commanding state government action. The Court upheld the *Condon* statute, and these parallels might conceivably lead it to uphold URLEIA.

However, caution is warranted. *Condon* is one isolated case that swam, perhaps idiosyncratically, against what has been a strong anti-commandeering tide. No Supreme Court decision since *Condon* has reinforced the *Condon* distinction between regulating state conduct and ordering state government action. URLEIA is vastly broader and more consequential than the *Condon* statute. Moreover, policing is perhaps the most conventional function that states perform, while selling off driving record information is unconventional and arguably inconsistent with a conventional understanding of state governments' proper functioning.

[29] 528 U.S. 141 (2000).

2. Mere Reporting of Information

Justice O'Connor, concurring in *Printz,* pointed out that the Court in that case did not decide "whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers" could amount to impermissible commandeering.[30] That statement implies that Justice O'Connor believed, and perhaps thought a majority of the Court would agree if the issue arose, that Congress permissibly could order states to report information to the federal government. The Court has not subsequently taken up this issue. Much of URLEIA's design involves requiring state law enforcement agencies to report information to the Department of Justice. Justice O'Connor's caveat provides a basis for arguing that those reporting requirements (though not other aspects of URLEIA that go beyond reporting information) avoid the anti-commandeering doctrine.

However, at least two factors may block this opening. First, a brief statement in a concurring opinion from a quarter-century old case is the thinnest of precedential reeds. The present Court would face no difficulty if it simply chose to ignore Justice O'Connor's *Printz* caveat. Second, even if the Court held that mere reporting requirements are not commandeering, that holding might not save any aspect of URLEIA. The Court might well decide that URLEIA's informational demands on states far exceed the "purely ministerial reporting requirements" that Justice O'Connor's caveat would exempt from the anti-commandeering doctrine.

3. Modifications to Avoid Commandeering

If all else failed, URLEIA might be modified in either of two ways that could defuse the anti-commandeering doctrine. Both of these approaches, however, would present problems of their own.

a. Federal preemption. The Constitution makes properly enacted federal law supreme over state law.[31] When a state law conflicts with a properly enacted federal law, the state law is invalid. Determining whether a federal law preempts a state law often implicates hard questions of congressional intent.[32] However, Congress always retains the prerogative to explicitly write into a statute its intent to preempt conflicting state laws. Preemption, because it regulates directly rather than ordering state governments to regulate, is distinct from commandeering,[33] although the Court has recently blurred this distinction.[34] A preemption statement in URLEIA, making clear that the statute invalidated conflicting state laws, could arguably circumvent the anti-commandeering doctrine.

Such a preemption approach would be direct and emphatic. However, it would also carry serious disadvantages. First, even with an explicit statement of preemption, URLEIA would likely trigger a range of legal disputes about whether various state laws actually conflicted with URLEIA. Second, accomplishing through preemption what the present draft of URLEIA seeks to accomplish through other means might well require a true federal takeover of various state law enforcement functions, a bridge that I understand the present URLEIA as striving not to cross. Such a federal takeover would

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[30] Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).
[31] *See* U.S. CONST. art. VI, sec. 1, cl. 2.
[32] *See, e.g.,* Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Devel. Comm'n, 461 U.S. 190 (1983).
[33] *See* New York v. United States, 505 U.S. 144, 167-68 (1992).

likely make URLEIA harder to defend in the first instance against the kinds of state autonomy objections discussed above in connection with the commerce power. Third, any remaining provisions of URLEIA that directly mandated state government action would still be vulnerable to anti-commandeering objections.

b. Conditional spending. The Supreme Court has made clear that Congress may induce states to implement federal policies by offering states funding in exchange for cooperation. If Congress is spending for the general welfare, makes clear to states what conditions the spending entails, relates the condition to a federal interest in some particular national project or program, and does not use the condition to make states violate the Constitution, a conditional spending grant is presumptively valid.[35] URLEIA appears to present no problem under any of those criteria. In addition, URLEIA already provides thorough federal funding for the mandates it imposes on states.

However, the Court has made clear that conditional spending must actually give states a choice about whether to accept the federal government's bargain. If Congress imposes an unduly coercive spending condition, then conditional spending effectively collapses into commandeering.[36] Given the choice whether to accept lavish federal funding in exchange for expanding Medicaid eligibility, numerous state governments have literally let their people suffer and die rather than acquiescing in a federal policy choice. Using a conditional spending scheme to avoid commandeering would transform URLEIA into an option for states, and many states surely would reject that option, which would substantially defeat URLEIA's purpose.

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[34] *See* Vikram D. Amar, *"Clarifying"* Murphy*'s Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines*, 2018 SUP. CT. REV. 299.
[35] *See* South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).

CONCLUSION

This memorandum has aimed to briefly assess the range of possibilities for constitutionally justifying URLEIA, together with the difficulties that all those possible approaches would present. I hope this analysis will be helpful in determining and pursuing next steps.

[36] *See* National Fed'n of Independent Business v. Sebelius, 567 U.S. 519, 575-85 (2012) (opinion of Roberts, C.J.).