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**State and Locally Funded Grant Programs for Undocumented Workers:  
What is 8 U.S.C. § 1621 and Why Does it Matter?**

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Undocumented workers, who are a vital part of our nation's rich diversity, contribute significantly to our society and economy.<sup>2</sup> Yet disproportionately employed in low-wage occupations,<sup>3</sup> they are among the most exploited of all workers.<sup>4</sup> The jobs that are typically available to undocumented workers pay poverty wages and put their health and well-being at risk.<sup>5</sup> Quality jobs with better pay, benefits, and a career ladder are simply not accessible.

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<sup>1</sup> Many thanks to Tanya Broder, Senior Staff Attorney at the National Immigration Law Center, whose expertise has been invaluable in the drafting of this Note. Several of the insights in this Note are also informed by my time at the California Labor Commissioner's Office and most recently, the California Labor and Workforce Development Agency, where I had the privilege of envisioning and creating the California SEED program, which is discussed below.

<sup>2</sup> For example, the vast majority of undocumented immigrants in the U.S. work and pay taxes; in 2018, undocumented immigrants contributed nearly \$32 billion in federal, state, and local taxes. UNDOCUMENTED IMMIGRANTS: ESTIMATED EARNINGS AND TAX CONTRIBUTIONS OF UNDOCUMENTED IMMIGRANTS, 2018 (New American Economy), <https://www.newamericaneconomy.org/issues/undocumented-immigrants/>. In more than 20 states, undocumented immigrants had higher rates of entrepreneurship than either lawful permanent residents or citizens of the same age group in 2014, and generated \$15.2 billion in business income in 2016. UNDOCUMENTED IMMIGRANTS: STARTING BUSINESSES, CREATING JOBS (New American Economy), <https://www.newamericaneconomy.org/issues/undocumented-immigrants/>.

<sup>3</sup> Such occupations include home and personal care, construction, janitorial, groundskeeping, restaurant, agriculture, and warehouse. See generally NICOLE PRCHAL SVAJLENKA, PROTECTING UNDOCUMENTED WORKERS ON THE PANDEMIC'S FRONT LINES: IMMIGRANTS ARE ESSENTIAL TO AMERICA'S RECOVERY, Table 2, at 7 (Center for American Progress, Dec. 2020); UNDOCUMENTED IMMIGRANTS: OCCUPATIONS WHERE UNDOCUMENTED IMMIGRANTS MAKE UP THE LARGEST SHARE OF WORKERS, 2014 (New American Economy), <https://www.newamericaneconomy.org/issues/undocumented-immigrants/>.

<sup>4</sup> Widespread labor violations are endemic to low-wage industries. See, e.g., Alejandro Lazo, Jeanne Kuang, Lil Kalish & Erica Yee, *When Employers Steal Wages from Workers*, CALMATTERS (July 26, 2022), <https://calmatters.org/explainers/when-employers-steal-wages-from-workers/>. Noncitizens are significantly more likely to experience minimum wage violations than either U.S.-born or naturalized citizens. See DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 20 (Economic Policy Institute, May 10, 2017).

<sup>5</sup> For example, undocumented women, who have high rates of poverty despite high rates of workforce participation, are paid less for similar work than all other workers in California, making only 49 cents to every \$1 dollar earned by white men. See NATALIA VEGA VARELA, ALEC CLOTT, & NANCY L. COHEN, UNDOCUMENTED AND ESSENTIAL: A PROFILE OF UNDOCUMENTED WOMEN IN CALIFORNIA 2-4 (Gender Equity Policy Institute, Feb. 2022). The median wage of California workers in low-wage industries, where undocumented workers are disproportionately concentrated, was only \$14.91 per hour in 2021; this represents only about 60% of the median hourly wage for all California workers. See LOW-WAGE WORK IN CALIFORNIA DATA EXPLORER, JOB PROFILE (UC

As socio-economic disparities experienced by undocumented workers grew even more extreme during the COVID-19 pandemic,<sup>6</sup> the public policy crisis on immigration also continued to unfold. The prospects for humane immigration reform remain bleak,<sup>7</sup> and the fate of DACA has been left hanging in the balance as litigation winds its way through the courts.<sup>8</sup> Given this grim landscape, policy innovations at the state and local level that are aimed at ameliorating the economic inequities faced by undocumented workers are needed now more than ever before.

In 2021, California created a model initiative with exactly that aim, when it launched **Social Entrepreneurs for Economic Development (SEED)**—a groundbreaking competitive grant program that was designed to promote worker equity through public investment in entrepreneurship opportunities for highly marginalized communities.<sup>9</sup> Through SEED, California awarded nonprofit community-based organizations (CBOs) almost \$10 million in state funds to provide entrepreneurial training and microgrants to individuals facing substantial barriers to gainful employment due to their immigration status or limited English proficiency.<sup>10</sup> SEED training and microgrants supported these individuals in launching or maintaining a small business to address a social problem or meet a community need.<sup>11</sup> A portion of SEED also funded a demonstration project on worker-owned cooperatives, in which CBOs that organize workers in low-wage industries lead cooperative development projects in those industries.<sup>12</sup>

California enshrined SEED into state law, in order to eliminate even the smallest risk that an anti-immigrant provision of federal welfare law, codified at 8 U.S.C. § 1621, could be used in an attempt to invalidate the program. A draconian statute not widely known in the labor and workforce development field, section 1621 was passed by Congress in 1996 to restrict the eligibility of undocumented individuals for certain “state or local public benefits.”<sup>13</sup> In California, the federal law

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Berkeley Labor Center, 2021), <https://laborcenter.berkeley.edu/low-wage-work-in-california-data-explorer/>. Accordingly, studies have estimated that undocumented workers, who face heightened vulnerabilities due to their lack of work authorization, experience the highest rates of severe and chronic housing and food insecurity. See EDWARD FLORES, ANA PADILLA, RODRIGO ALATRISTE-DIAZ & KARINA JUAREZ, ESSENTIAL FAIRNESS: THE CASE FOR UNEMPLOYMENT BENEFITS FOR CALIFORNIA’S UNDOCUMENTED IMMIGRANT WORKERS 1, 5 (Community and Labor Center, UC Merced, March 2022). See also *supra* note 4.

<sup>6</sup> See FLORES, ET AL., at 6-7, *supra* note 5; Zelalem Mengesha, Esther Alloun, Danielle Weber, Mitchell Smith & Patrick Harris, “Lived the Pandemic Twice”: A Scoping Review of the Unequal Impact of the COVID-19 Pandemic on Asylum Seekers and Undocumented Migrants, 19 INT’L J. ENVIRON. RES. & PUBLIC HEALTH 6624 (May 2022), <https://www.mdpi.com/1660-4601/19/11/6624>.

<sup>7</sup> See Will Weissert & Adriana Gomez Licon, *Immigration reform stalled decade after Gang of 8’s big push*, ASSOCIATED PRESS (April 3, 2023), <https://apnews.com/article/immigration-asylum-trump-biden-gang-of-eight-3d8007e72928665b66d8648be0e3e31f>.

<sup>8</sup> DACA (Deferred Action for Childhood Arrivals), a 2012 federal program, provides work authorization and relief from deportation for immigrants who came to the U.S. as children. For an overview of the current status of legal proceedings involving DACA, see WHAT IS THE CURRENT STATE OF THE DACA PROGRAM? (National Immigration Law Center, last updated Dec. 19, 2022), <https://www.nilc.org/issues/daca/>.

<sup>9</sup> See Cal. Unemp’t Ins. Code §§ 14106, *et seq.*; NOTICE OF AVAILABILITY OF FUNDS, SOCIAL ENTREPRENEURS FOR ECONOMIC DEVELOPMENT, SOLICITATION FOR PROPOSALS (California Employment Training Panel, Jan. 2021).

<sup>10</sup> See Cal. Unemp’t Ins. Code §§ 14106.5(c), 14107; NOTICE OF AVAILABILITY OF FUNDS, *supra* note 9.

<sup>11</sup> See Cal. Unemp’t Ins. Code § 14108.

<sup>12</sup> See NOTICE OF AVAILABILITY OF FUNDS, *supra* note 9.

<sup>13</sup> See *infra* note 16.

has been the basis of lawsuits attacking the authority of the state to provide various “benefits” to undocumented individuals.<sup>14</sup>

This Note seeks to inform policymakers about 8 U.S.C. § 1621, and how state and local grant programs for undocumented workers can be shielded against a section 1621 challenge. In Part 1, we start with an overview of section 1621 and what it purports to require. In Part 2, we look to California for best practices in addressing section 1621; we discuss the California SEED statute, and another state law that California enacted almost two decades ago in response to section 1621, that insulate SEED and local grant programs from a legal challenge based on the federal law. In Part 3, we highlight two potent legal arguments that could be deployed against a lawsuit alleging a violation of section 1621.

**PART 1****8 U.S.C. § 1621: Federal Restrictions on the Eligibility of Undocumented Individuals for “State or Local Public Benefits”**

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) with the primary goal of ending “welfare as we know it” by making harsh changes to public benefits programs.<sup>15</sup> Under the aegis of comprehensive welfare reform, Congress incorporated several anti-immigrant provisions into the bill, including the provision codified at 8 U.S.C. § 1621, which generally renders undocumented individuals ineligible for “state or local public benefits.”

Section 1621 consists of multiple parts. First, subsection (a) states that noncitizens who do not fall within specified enumerated categories<sup>16</sup> are ineligible for state or local public benefits. Subsection

<sup>14</sup> See, e.g., *Martinez v. Regents of Univ. of Cal.*, 50 Cal.4th 1277, 1294-96 (2010) (alleging a state law providing that undocumented students may be exempt from paying nonresident tuition at California state colleges and universities contravened 8 U.S.C. § 1621, in addition to other violations); *Cerletti v. Newsom*, 71 Cal.App.5th 760, 762-63 (2021) (challenging California’s Disaster Relief Fund that supported undocumented Californians impacted by COVID-19 who were ineligible for unemployment insurance and disaster relief, and alleging the program was not enacted by state law, in violation of 8 U.S.C. § 1621).

<sup>15</sup> See Pub.L. No. 104–193, 110 Stat. 2105 (Aug. 22, 1996); see also Alana Semuels, *The End of Welfare as We Know It: America’s once-robust safety net is no more*, THE ATLANTIC (April 1, 2016), <https://www.theatlantic.com/business/archive/2016/04/the-end-of-welfare-as-we-know-it/476322/>.

<sup>16</sup> The bar on eligibility for state or local public benefits under section 1621 does not apply to “qualified” immigrants (as defined at 8 U.S.C. § 1641), nonimmigrants under the Immigration and Nationality Act (8 U.S.C. §§ 1101 *et seq.*), and individuals who are paroled into the U.S. (under 8 U.S.C. § 1182(d)(5)) for less than one year. See 8 U.S.C. § 1621(a). Certain *lawfully* residing immigrants may not be deemed “qualified immigrants” as defined under the federal law, and are thus subject to the eligibility bar. For the purposes of this Note, however, we focus our discussion of section 1621 as it relates to individuals who are not lawfully present in the U.S.

(b) carves out certain state and local public benefits from this general prohibition.<sup>17</sup> Subject to some exceptions,<sup>18</sup> subsection (c) proceeds to define a “state or local public benefit” as:

“(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.”

While section 1621 acts as a general bar against the eligibility of undocumented individuals for state or local public benefits, the final subsection of the law allows a state to opt-out of the bar and provide for such eligibility, but only by enacting a state law. Subsection (d) states:

“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.**”<sup>19</sup>

For any such law to satisfy this federal requirement, the California Supreme Court has held, the statute “must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.”<sup>20</sup>

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<sup>17</sup> The law’s eligibility bar does not apply to the following: “(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in [42 U.S.C. § 1396b(v)(3)]) 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.” See 8 U.S.C. § 1621(b).

<sup>18</sup> Under the law, “state or local public benefit” does 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 [8 U.S.C. 1101 et seq.] 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.” See 8 U.S.C. § 1621(c)(2). The term “state or local public benefit” also does not include any “federal public benefit” under 8 U.S.C. § 1611(c). See 8 U.S.C. § 1621(c)(3).

<sup>19</sup> See 8 U.S.C. § 1621(d) (emphasis added).

<sup>20</sup> *Martinez*, 50 Cal.4th at 1296 (state law satisfied requirements of 8 U.S.C. § 1621(d)).

## PART 2

## California Statutes Affirming the Eligibility of Undocumented Individuals to Participate in SEED and Local Grant Programs

Section 1621 defines the term “state or local public benefit” to include “**any** grant, contract, loan...**provided by** an agency of a State or local government **or by appropriated funds** of a State or local government...”<sup>21</sup> No court to date has ruled on the specific issue of whether section 1621 prohibits states from implementing a grant program like SEED that funds entrepreneurship opportunities for undocumented individuals, in the absence of a state law affirmatively providing that undocumented persons are eligible for the program.

Given the arguable breadth of section 1621’s definition of “state or local public benefit,” California chose to play it cautiously.<sup>22</sup> The state codified SEED to pass muster under section 1621’s legislative mandate to states<sup>23</sup> that opt to provide “public benefits” to undocumented individuals. The SEED statute, and a separate law the state enacted almost two decades prior that expressly empowers local jurisdictions to provide monetary aid, among other public benefits, to individuals otherwise made ineligible for such benefits under section 1621, demonstrate what a state can do to immunize state and local programs serving undocumented workers against a section 1621 challenge.

#### A. California’s Codification of SEED: Unemployment Insurance Code §§ 14106, *et seq.*

The specter of 8 U.S.C. § 1621 is nothing new to the California legislature, which has passed numerous statutes affirmatively providing that undocumented individuals are eligible for certain programs or benefits, in order to remove any statutory barrier to eligibility that may be created by section 1621. Examples include California’s in-state tuition bill for students, including undocumented immigrants, who meet specified criteria,<sup>24</sup> and legislation providing for business licenses regardless of immigration status.<sup>25</sup>

<sup>21</sup> See 8 U.S.C. § 1621(c)(1)(A) (emphasis added).

<sup>22</sup> One could attempt to argue that the definition of “state or local public benefit” under section 1621 was not meant to include grant programs that are dissimilar from the other types of payments or assistance covered under the definition. However, any such limitations as to section 1621’s definitional scope have not been tested in court. We note here that with respect to any given grant program, it can matter whether the grant is received by an intermediary such as a community-based organization, and whether that organization, in turn, ultimately uses the grant to provide what would be deemed a “public benefit” to undocumented individuals. The U.S. Department of Justice has discussed these factors in relation to an analogous provision of federal law that applies to “federal public benefits.” See U.S. Department of Justice, *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 62 Fed. Reg. 61344, 61361-62 (Nov. 17, 1997).

<sup>23</sup> See 8 U.S.C. § 1621(d). For a discussion of why the state legislative mandate may violate the Tenth Amendment, see *infra* Part 3.B.

<sup>24</sup> [A.B. 540](#), 2001-2002 Cal. Assemb., Reg. Sess. (Cal. 2001) (enacted).

<sup>25</sup> [S.B. 1159](#), 2013-2014 Cal. S., Reg. Sess. (Cal. 2014) (enacted); [A.B. 2184](#), 2017-2018 Cal. Assemb., Reg. Sess. (Cal. 2018) (enacted).

In line with such prior legislation, California enacted a statute to affirmatively provide for the eligibility of undocumented individuals for the SEED program.<sup>26</sup> Section 14106.5(c) of the California Unemployment Insurance Code defines SEED “target” populations as either of the following:

- “(1) Individuals with limited English proficiency, regardless of immigration or citizenship status; or
- (2) Individuals who are neither United States citizens nor lawful permanent residents, which includes, but is not limited to, individuals who have been granted Deferred Action for Childhood Arrivals (DACA) or Temporary Protected Status (TPS) under federal law.”

The statute further provides:

“The SEED Initiative is aimed at economically disadvantaged groups who face significant barriers to employment, specifically individuals with limited English proficiency, or individuals who are neither United States citizens nor lawful permanent residents. While this includes individuals who have been granted DACA or TPS, the SEED Initiative is open to all individuals in the target populations, including but not limited to other immigrants, refugees and asylees, and United States citizens.”<sup>27</sup>

And finally, the statute explicitly addresses 8 U.S.C. § 1621 by stating:

“It is the intent of the Legislature to allow persons who are not lawfully present in the United States, as members of the SEED target populations, to participate in and benefit from the SEED Initiative, and this section is therefore enacted pursuant to Section 1621(d) of Title 8 of the United States Code.”<sup>28</sup>

Thus, the SEED statute clearly announces California’s intent to allow undocumented individuals to participate in SEED, including an express reference to 8 U.S.C. § 1621. This is more than sufficient to protect the state’s grant program against a section 1621 challenge.<sup>29</sup>

#### **B. California’s codification of local discretion to administer grant programs for undocumented individuals: Welfare & Institutions Code § 17851**

In order to provide a “local public benefit” for which undocumented individuals would otherwise be ineligible under 8 U.S.C. § 1621, the federal law requires *state* legislative action.<sup>30</sup> While California’s SEED statute inoculates the state grant program against a lawsuit based on section 1621, for *local jurisdictions* wishing to create similar programs, a California law that has been on the books for almost two decades establishes guardrails against a section 1621 suit.

In 2006, California enacted Welfare & Institutions Code § 17851, which states:

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<sup>26</sup> See Cal. Unemp’t Ins. Code §§ 14106, *et seq.*

<sup>27</sup> Cal. Unemp’t Ins. Code § 14107(b).

<sup>28</sup> Cal. Unemp’t Ins. Code § 14107(d).

<sup>29</sup> See *Martinez*, 50 Cal.4th at 1296.

<sup>30</sup> See 8 U.S.C. § 1621(d). For a discussion of why this may violate the Tenth Amendment, see *infra* Part 3.B.

“A city, county, city and county, or hospital district may, at its discretion, provide aid, including health care, to persons who, but for Section 411 of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193; 8 U.S.C. Sec. 1621), would meet eligibility requirements for any program of that entity.”<sup>31</sup>

Although section 17851 was enacted over 15 years ago, no court has construed its meaning. However, the well-established rules of statutory interpretation, which require “looking first to the words of the statute, [as] the most reliable indications of the Legislature's intent” in enacting the law,<sup>32</sup> compel a straightforward reading of section 17851. Since section 17851 is clear and unambiguous on its face, “its plain meaning controls.”<sup>33</sup>

As the central provision in a part of the Welfare & Institutions Code that is entitled “Public Benefits,” section 17851 is written expansively and includes an express reference to 8 U.S.C. § 1621; by its terms, it authorizes local jurisdictions to “provide *aid*, including health care” to undocumented persons otherwise denied eligibility under section 1621.<sup>34</sup> “Aid,” in turn, means “**financial assistance provided to or in behalf of needy persons under the terms of this division, including direct money payments and vendor payments.**”<sup>35</sup> And while “financial assistance” is not defined, the words of the statute must be given their “plain and commonsense meaning.”<sup>36</sup> Both the general and legal usage of this term would encompass monetary grants.<sup>37</sup> For example, the *Cambridge Dictionary* (online) defines “financial assistance” as “money that is given to someone in order to help them.”<sup>38</sup> *Black's Law Dictionary* defines “financial assistance” as “[a]ny **economic benefit**, such as a scholarship or stipend, given by one person or entity to another.”<sup>39</sup>

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<sup>31</sup> In response to 8 U.S.C. § 1621, Massachusetts also enacted a statute that affirmatively provides for the eligibility of undocumented individuals for “state or local public benefits.” The Massachusetts law states, “Notwithstanding the provisions of any general or special law to the contrary, to the maximum extent allowed by federal law, the commonwealth, including any department, board, commission, division or authority or subdivision thereof, may, subject to appropriation, provide state or local public benefits within the meaning of section 411(c) of the federal Personal Responsibility and Work Opportunity Act to any person, whether or not such person is a citizen or is a qualified alien within the meaning of section 431 of said Personal Responsibility and Work Opportunity Act, 8 U.S.C. section 1641, but only to the extent that such person otherwise satisfies the applicable criteria for such benefits.” See G.L. c. 6A, § 16C.

<sup>32</sup> See *Kim v. Reins Int'l Cal., Inc.*, 9 Cal.5th 73, 83 (2020) (citation omitted).

<sup>33</sup> See *L.A. Cnty. Metro. Transp. Auth. v. Alameda Produce Mkt., LLC*, 52 Cal.4th 1100, 1107 (2011). When the language of a statute is clear, a court's inquiry ends; there is no need to look beyond the statute itself to extrinsic sources to determine legislative intent. See *Lopez v. Sony Electronics, Inc.*, 5 Cal.5th 627, 634 (2018) (citations omitted).

<sup>34</sup> See Welfare & Inst. Code § 17851 (emphasis added).

<sup>35</sup> See Welfare & Inst. Code § 10052 (defining “aid”) (emphasis added).

<sup>36</sup> See *L.A. Cnty. Metro. Transp. Auth.*, 52 Cal.4th at 1106–07 (citation omitted).

<sup>37</sup> Since our focus is state and local grant programs like SEED, we do not discuss all forms of “aid” that are covered under section 17851. In general, we read section 17851 as affirming local discretion to provide forms of “aid” that are essentially co-extensive with “local public benefits” as that term is defined under 8 U.S.C. § 1621.

<sup>38</sup> See <https://dictionary.cambridge.org/us/dictionary/english/financial-assistance>.

<sup>39</sup> *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Relatedly, *Black's Law Dictionary* defines “federal financial assistance” as “[a]n economic benefit provided by the federal government to a recipient in the form of a trust, **grant**, or other federal program or activity.” *Id.* (emphasis added).

The plain language of section 17851 sweeps broadly, enabling local jurisdictions to provide as “aid” to undocumented individuals the benefits that federal law denies.<sup>40</sup> To the extent section 1621 may be interpreted to prohibit local jurisdictions from giving SEED-like grants to undocumented workers unless a state law “affirmatively provides” for such eligibility, section 17851 satisfies this legislative mandate.

**PART 3****Legal Defenses Against a Suit Alleging a Violation of 8 U.S.C. § 1621**

Even if a state has not enacted a statute “affirmatively providing” for the eligibility of undocumented persons for a “state or local public benefit” at issue, strong legal arguments can be made to defend against a suit alleging a violation of 8 U.S.C. § 1621. We focus on two such arguments that have been successful in court: (1) section 1621 lacks a private right of action; and (2) the federal law’s requirement that a state law must be enacted violates the Tenth Amendment to the U.S. Constitution.

**A. 8 U.S.C. § 1621 lacks a private right of action**

Lawsuits based on the federal welfare law’s provisions barring undocumented individuals from accessing “state or local public benefits” attracted some attention during the COVID-19 pandemic, when California and Maryland provided cash aid to undocumented persons.<sup>41</sup> While the case against California was dismissed as moot by a state appellate court,<sup>42</sup> the Maryland suit resulted in the first and only federal appeals court decision to examine whether a private party has the right to bring suit under section 1621. In *Bauer v. Elrich*, the Fourth Circuit found there was no such right.<sup>43</sup>

The plaintiffs in *Bauer* were two Maryland taxpayers who filed a complaint in state court against county officials to challenge a program, the Emergency Assistance Relief Payment Program (EARP), that the county created to address economic hardships due to the COVID-19 pandemic.<sup>44</sup> The EARP provided cash assistance to residents, including undocumented individuals, who met certain income requirements and did not qualify for state or federal pandemic-related aid.<sup>45</sup> The plaintiffs’ complaint consisted solely of one count, alleging that the county’s distribution of direct cash payments to undocumented individuals through the EARP violated 8 U.S.C. § 1621, and that this unlawful distribution of county funds caused the plaintiff taxpayers to “suffer pecuniary injury.”<sup>46</sup>

<sup>40</sup> See *supra* note 22. Whether or not successful arguments can be made to limit the definitional scope of “state or local public benefit” under 8 U.S.C. § 1621, Welfare & Institutions Code § 17851 acts as a safeguard to ensure local jurisdictions are not otherwise barred by section 1621 from providing some arguable “benefit” to undocumented individuals.

<sup>41</sup> See *Cerletti*, 71 Cal.App.5th at 762-63 (section 1621 suit challenging California’s Disaster Relief Fund that supported undocumented Californians impacted by COVID-19); *Bauer v. Elrich*, 8 F.4th 291, 295-96 (4th Cir. 2021). We discuss *Bauer* below.

<sup>42</sup> The appellate court noted that the case involved a one-time expenditure of funds that had already been spent. See *Cerletti*, 71 Cal.App.5th at 766, 768.

<sup>43</sup> *Bauer*, 8 F.4th at 301.

<sup>44</sup> *Id.* at 295.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 296.



While the plaintiffs did not dispute that 8 U.S.C. § 1621 lacks a private right of action, they contended that their complaint was based on the Maryland taxpayer standing doctrine and the allegation that the county violated section 1621 was merely an element of their state law claim.<sup>47</sup> Rejecting that argument (and finding the exercise of federal jurisdiction was proper), the Fourth Circuit stated that “[a]lthough the plaintiffs attempt to use the Maryland taxpayer standing doctrine as the procedural vehicle for their claim, they do not seek to advance any state law right or enforce any duty established under state law. Instead, their complaint contains a single theory of liability, namely, that the County defendants’ implementation of the EARP violates a federal law.”<sup>48</sup> The court explained that the Maryland taxpayer standing doctrine “merely confers standing in state court for taxpayers to enforce a right or obligation imposed by some other provision of law.”<sup>49</sup>

Because “federal law creates the substantive requirement that the plaintiffs seek to enforce,” the appellate court looked to 8 U.S.C. § 1621 to determine whether it authorized a private remedy.<sup>50</sup> Noting that the U.S. Supreme Court has emphasized private rights of action to enforce federal law must be created by Congress and that courts may not create a private remedy without evidence of Congressional intent,<sup>51</sup> the Fourth Circuit found that in addition to “lacking any explicit reference to a private right of action,” section 1621 by its terms does not “grant[]... private rights to any identifiable class and does not purport to protect or benefit state taxpayers like the plaintiffs.”<sup>52</sup> Thus, the court stressed that “[t]he plaintiffs cannot use the procedural mechanism of Maryland taxpayer standing to bring a claim that is one and the same as a purported enforcement action brought directly under Section 1621.”<sup>53</sup> Accordingly, the Fourth Circuit concluded that “[t]he lack of a private right of action in Section 1621 is fatal to the plaintiffs’ claim.”<sup>54</sup> The court explained, “Were we to agree with the plaintiffs’ view, state common law would govern whether and how a federal statute may be enforced, irrespective of Congressional intent. Such a rule not only would run afoul of common sense, but also would violate basic constitutional principles.”<sup>55</sup>

Even though the Fourth Circuit is the only federal appeals court to have decided this issue to date, *Bauer* may be a bellwether decision marking the demise of private enforcement of section 1621.

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<sup>47</sup> *Id.* at 298. Maryland law authorizes taxpayers to “seek the aid of courts, exercising equity powers, to enjoin illegal and *ultra vires* acts of [Maryland] public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer.” *Id.* (citation omitted). The Maryland taxpayer standing doctrine “combines the traditionally distinct concepts of standing and cause of action into a single analytical construct, labeled as standing, to determine whether the plaintiff has shown that he or she is entitled to invoke the judicial process in a particular instance.” *Id.* (internal quotation marks and citation omitted).

<sup>48</sup> *Id.* at 297.

<sup>49</sup> *Id.* at 298 (citations omitted).

<sup>50</sup> *Id.* at 299.

<sup>51</sup> *Id.* (citations omitted).

<sup>52</sup> *Id.* (internal quotation marks and citation omitted).

<sup>53</sup> *Id.* at 300 (internal quotation marks and citations omitted).

<sup>54</sup> *Id.* at 299. However, it may continue to be the subject of debate in other cases whether, in a given context, allowing a state law claim based on an alleged violation of a federal law that does not authorize private enforcement would impermissibly function as an end-run around the federal law. *See id.* at 302, 305-08 (Quattlebaum, C.J., dissenting).

<sup>55</sup> *Id.* at 299.

Indeed, the opinion is not necessarily surprising, given the judicial trend against finding a private right of action when evidence of Congressional intent to create such a right is deemed lacking.<sup>56</sup>

### B. 8 U.S.C. § 1621(d) violates the Tenth Amendment to the U.S. Constitution

While the lack of a private right of action could function to preclude enforcement of section 1621 in the majority of cases, the possibility of federal government enforcement still exists. A Tenth Amendment objection to section 1621, however, could serve as the ultimate trump card. Section 1621(d) ostensibly permits a state to opt out of the federal law's bar against eligibility of undocumented individuals for a state or local public benefit, but the statute prescribes that to opt out, **a state must enact a law affirmatively providing for such eligibility**. That prescription, it could be argued, violates the Tenth Amendment's anticommandeering doctrine.

Under the Tenth Amendment, "[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." The U.S. Supreme Court has remarked that this system of "dual sovereignty" reflects "[t]he great innovation of [the] design [of federalism]...that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other—a legal system unprecedented in form and design, establishing 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."<sup>57</sup> The anticommandeering doctrine is rooted in the Court's view that this "fundamental structural decision [is] incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."<sup>58</sup>

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<sup>56</sup> See Erwin Chemerinsky, *Federal Jurisdiction* § 6.3.3 (4th ed. 2003); *Maine Cmty. Health Options v. U.S.*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1308, 1331 (2020) (Alito, J., dissenting) (remarking that the Supreme Court has "basically gotten out of the business of recognizing private rights of action not expressly created by Congress"). The Tenth Circuit has also interpreted a sister provision to section 1621, 8 U.S.C. § 1623, as lacking a private right of action. Section 1623 states that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State ... for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit ... without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a). In *Day v. Bond*, the Tenth Circuit held that section 1623 "entirely lacks the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." 500 F.3d 1127, 1139 (10th Cir. 2007) (internal quotation marks, brackets, and citation omitted). The plaintiffs in *Day* (students and parents who were U.S. citizens and did not reside in Kansas) sought to overturn a provision of Kansas law that permitted certain individuals not lawfully present in the U.S. to qualify for in-state tuition rates. They contended, *inter alia*, that the Kansas law was preempted by 8 U.S.C. § 1623. *Day*, 500 F.3d at 1130-31. Finding that section 1623 "addresses itself to the institutions affected and their authority to provide benefits to illegal aliens, not to the class of nonresident citizens who incidentally benefit from its provisions," the Tenth Circuit determined that "federal, not private, enforcement of § 1623 was contemplated by Congress." *Id.* at 1139. The court emphasized that "[t]he only form of injury that the Plaintiffs assert in support of their standing to make this preemption claim is the invasion of a putative statutory right conferred on them by § 1623." *Id.* at 1136. But the court found that section 1623 "does not vest any federal right in nonresident citizen students like the Plaintiffs" and that therefore, Plaintiffs "cannot claim such a right as the basis of an injury supporting standing." *Id.* Thus, the court held that Plaintiffs lacked standing to pursue their preemption claim. *Id.* at 1136, 1139.

<sup>57</sup> *Printz v. U.S.*, 521 U.S. 898, 920 (1997) (internal quotation marks and citation omitted).

<sup>58</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018).

In *New York v. U.S.*—the “pioneering case” on the anticommandeering principle<sup>59</sup>—the Court addressed an attempt by Congress to regulate state disposal of low-level radioactive waste. The federal law at issue provided that, *inter alia*, states must either regulate according to the instructions of Congress on how to dispose of radioactive waste generated within the state, or the state would be forced to “take title” to the waste.<sup>60</sup> This provision “effectively requir[ed] the States either to legislate pursuant to Congress’s directions, or to implement an administrative solution.”<sup>61</sup> Finding that this “commandeered” the legislative processes of the states “by directly compelling them to enact and enforce a federal regulatory program,” the Court held this part of the statute violated the Tenth Amendment.<sup>62</sup> In so holding, the Court stated:

“[N]o Member of the Court has ever suggested that [even a particularly strong] federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. 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.”<sup>63</sup>

Subsequently, in *Printz v. U.S.*, the High Court ruled that certain provisions of the Brady Handgun Violence Prevention Act, requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violated the Tenth Amendment.<sup>64</sup> The Court declared, “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>65</sup> This was so because “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”<sup>66</sup>

Most recently, in *Murphy v. National Collegiate Athletic Association*, the Supreme Court held that a provision of federal law that prohibited state authorization of sports gambling violated the Tenth Amendment’s anticommandeering principle because it “unequivocally dictates what a state legislature may and may not do.”<sup>67</sup> The fact that the federal provision was styled as a prohibition against state enactment of new laws authorizing gambling, and not as an affirmative edict to enact legislation, was viewed by the Court as a distinction without a difference.<sup>68</sup> Rather, the Court underscored that the “affront to state sovereignty” was that the statute put “state legislatures...under the direct control of Congress.”<sup>69</sup> The “basic principle,” the Court emphasized, is

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<sup>59</sup> See *id.* at 1476.

<sup>60</sup> *New York v. U.S.*, 505 U.S. 144, 174-76 (1992).

<sup>61</sup> See *Printz*, 521 U.S. at 926 (discussing *New York*, 505 U.S. at 175-76).

<sup>62</sup> *New York*, 505 U.S. at 161, 176-77 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

<sup>63</sup> *New York*, 505 U.S. at 178 (emphasis in original).

<sup>64</sup> *Printz*, 521 U.S. at 902, 935.

<sup>65</sup> *Id.* at 935.

<sup>66</sup> *Id.* at 928 (citation omitted).

<sup>67</sup> *Murphy*, 138 S.Ct. at 1478.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

that “Congress cannot issue direct orders to state legislatures.”<sup>70</sup> Indeed, as the Court explained decades earlier, “[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature.”<sup>71</sup>

Based on U.S. Supreme Court precedent, a persuasive argument could be made that 8 U.S.C. § 1621(d) contravenes the Tenth Amendment. Instead of attempting to outlaw altogether the provision of state or local public benefits to undocumented persons (and seeking to preempt any contrary state law), Congress gave states the option under subsection (d) to provide such benefits—but only if a state **adopts a law after August 22, 1996, “which affirmatively provides for such eligibility.”**<sup>72</sup> While framed as an option for states, section 1621(d) is no less a “command” to a state government to enact legislation if it wants to provide benefits to undocumented individuals—even arguably dictating what that state law must say. Indeed, the California Supreme Court has construed section 1621(d) to require an affirmative legislative enactment that “expressly state[s]...it applies to undocumented aliens”; it would likely not satisfy subsection (d) if a law were worded more “generally without specifying that its beneficiaries may include undocumented aliens.”<sup>73</sup> However, once given a choice to provide public benefits to undocumented individuals, a state should possess the constitutional right to determine how to set and effectuate state policy on this issue. Having this authority is “what gives the State its sovereign nature.”<sup>74</sup> Instead, section 1621(d) impermissibly coerces a state wishing to provide benefits to enact specifically-worded legislation, thus putting “state legislatures...under the direct control of Congress.”<sup>75</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982). In *F.E.R.C.*, the Supreme Court noted that it had “never... sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.” *Id.* at 761-62 (citation omitted).

<sup>72</sup> See 8 U.S.C. §1621(d) (emphasis added); see also *Martinez*, 50 Cal.4th at 1294-95.

<sup>73</sup> *Martinez*, 50 Cal.4th at 1296; see also *In re Garcia*, 58 Cal.4th 440, 456-58 (interpreting a state statute authorizing the California Supreme Court to admit undocumented individuals into the state bar, and discussing the legislative enactment requirement under 8 U.S.C. § 1621(d)). In an advisory opinion, the Florida Supreme Court has also construed 8 U.S.C. § 1621(d) as requiring that the state legislature pass, and the state governor approve, a law affirmatively providing for the eligibility of undocumented individuals for a state public benefit; the court held that despite the applicant’s claim that non-legislative forms of “state law” could meet the requirements of 8 U.S.C. § 1621(d), there was no state law that satisfied section 1621 and permitted the court to issue a law license to an undocumented immigrant. 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 (2014). See *F.E.R.C.*, 456 U.S. at 761.

<sup>74</sup> See *Murphy*, 138 S.Ct. at 1478. One compelling Tenth Amendment challenge to section 1621’s state legislative mandate could be presented when a “local public benefit” is at issue. The boundaries between state and local governmental authority are typically dictated by a state’s “home rule” law, created through state constitutions, statutes, or a blend of the two, and further delineated through judicial interpretation. See NATIONAL LEAGUE OF CITIES & LOCAL SOLUTIONS SUPPORT CENTER, PRINCIPLES OF HOME RULE FOR THE 21<sup>ST</sup> CENTURY 7-13 (National League of Cities, 2020). In California, for example, voter initiatives have resulted in state constitutional amendments that have established the right of local jurisdictions to draft their own charters, to take independent action in order to govern municipal affairs, and to enact local ordinances without state authorization. See generally, J. FRED SILVA & ELISA BARBOUR, THE STATE-LOCAL FISCAL RELATIONSHIP IN CALIFORNIA: A CHANGING BALANCE OF POWER (Public Policy Institute of California, 1999). But section 1621(d) purports to **require a state to pass a law** to enable a city, for instance, to provide city-funded “grants” to undocumented individuals—even if the state’s “home rule” authorizes the city to act autonomously with respect to local fiscal matters and to enact locally applicable legislation. Such federal interference with the state’s governance relationship with its political subdivisions strikes at the “essential attribute of the States’ retained sovereignty

Indeed, in the only published decision to date addressing whether section 1621 violates the Tenth Amendment, the Appellate Division of the New York State Supreme Court in *In re Vargas* held that subsection (d) unconstitutionally infringes on the state's sovereign authority, to the extent the provision requires a state legislative enactment as the only mechanism to opt out of section 1621's restrictions.<sup>76</sup> *In re Vargas* examined whether an undocumented immigrant, who had received DACA and satisfied New York state's eligibility standards and rules of court governing admission to practice law, was nevertheless barred from attorney admission by section 1621.<sup>77</sup>

The court first explained that in New York, "rules governing the admission of attorneys and counselors-at-law, including the proof necessary to sit for the New York State bar examination, are established by the Court of Appeals of the State of New York and, significantly, for the purposes of our determination, not by the state legislature."<sup>78</sup> Thus, the court noted that "the prescribed process for opting out of the restrictions imposed by [section 1621] is at odds with New York's bar eligibility and admission structure where...the authority over bar eligibility and the admission process rests neither with the executive nor the legislative branch of government, but with the coequal judiciary."<sup>79</sup>

Declaring that "the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation [regarding the decision to extend public benefits to undocumented immigrants] is not a legitimate concern of the federal government," the court underscored that "[t]he ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment."<sup>80</sup> The court also emphasized that "[t]he mere fact that the state government decision here involves undocumented immigrants, whose presence in the United States is governed by federal immigration laws and the discretionary policy of [the Department of Homeland Security], does not and cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its [sovereign] authority" over this decision.<sup>81</sup>

Accordingly, the court rejected as constitutionally infirm any authority under 8 U.S.C. § 1621(d) to "mandate the governmental mechanism by which the state may exercise its discretion" to provide public benefits to undocumented individuals.<sup>82</sup> The court concluded that "a narrow reading of section 8 U.S.C. § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted [under section 1621(d)] to opt out of

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that they remain independent and autonomous within their proper sphere of authority." See *Printz*, 521 U.S. at 928 (citation omitted). Ultimately, too, this undercuts political accountability, one of the primary policy rationales for the anticommandeering rule. See *New York*, 505 U.S. at 168-69.

<sup>76</sup> See *In re Vargas*, 10 N.Y.S.3d 579, 582 (App. Div. 2015).

<sup>77</sup> *Id.* The court found that attorney bar admissions "fall within the scope of the restrictions imposed by the federal statute because professional licenses are included among the specifically defined state and local benefits and because attorney admissions are financed by 'appropriated funds' of the state." *Id.* at 590 (citing 8 U.S.C. § 1621(c)(1)(A)).

<sup>78</sup> *In re Vargas*, 10 N.Y.S.3d at 585 (citations omitted).

<sup>79</sup> *Id.* at 594 (citations omitted).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 596.

<sup>82</sup> *Id.* at 597.

the restrictions on the issuance of licenses imposed by 8 U.S.C. § 1621(a), unconstitutionally infringes on the sovereign authority of the state to divide power among its three coequal branches of government.”<sup>83</sup> Hence, “in light of [New York] state's allocation of authority to the judiciary to regulate the granting of professional licenses to practice law,” the court held that “the judiciary may exercise its authority as the state sovereign to opt out of the restrictions imposed by [section 1621]....”<sup>84</sup>

Ultimately, the court was careful to confine its holding to the issue of admitting undocumented individuals to the practice of law in New York.<sup>85</sup> Nonetheless, the court’s underlying reasoning could presage broader application of the Tenth Amendment to invalidate section 1621’s state legislative mandate in other cases that may arise.<sup>86</sup>

## PART 4

## Conclusion

State or locally funded worker equity initiatives that provide some form of monetary assistance to undocumented individuals (such as grant or loan programs) can avert the risk of a legal challenge under 8 U.S.C. § 1621, an anti-immigrant provision of federal welfare law. Section 1621 renders undocumented individuals ineligible for “state or local public benefits.” However, the law also contains a provision, subsection (d), that enables states to provide for such eligibility, but only by enacting a state law.

In states where political will affords this path, expressly codifying that undocumented individuals are eligible to participate in the public program and receive its benefits, as California has done with its SEED program, may be the preferred course of action. Such a statutory enactment blocks the possibility of an opportunistic attack to the program based on section 1621, and saves public resources that would otherwise be drawn into litigation should a lawsuit be filed in the alleged absence of a statute that meets the requirements of the federal law. States choosing this route may

<sup>83</sup> *Id.* at 582.

<sup>84</sup> *Id.* The court construed section 1621(d) “in order to be consistent with the Judiciary Law of the State of New York and the sovereignty guaranteed by the Tenth Amendment.” *Id.* at 597. In so holding, the court’s interpretation avoided a Tenth Amendment conflict. *See generally, Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272 (1973) (stating that “no Act of Congress can authorize a violation of the Constitution” and that statutes must be construed, “if possible, in a manner consistent with” the Constitution); *but see Jennings v. Rodriguez*, 583 U.S. \_\_\_, \_\_\_, 138 S.Ct. 830, 842-43 (2018) (canon of constitutional avoidance is applicable only if the statute is susceptible to more than one plausible construction, and a court may not “rewrite a statute as it pleases”).

<sup>85</sup> *In re Vargas*, 10 N.Y.S.3d at 597.

<sup>86</sup> At the very least, like the court in *In re Vargas*, other courts may be inclined to read section 1621(d) to avoid a constitutional problem—for example, by construing the federal law so that it does not require a state law to contain certain “magic words” in order to “affirmatively provide” for the eligibility of undocumented persons, or by interpreting section 1621(d)’s “state law” mandate so that it may be satisfied by certain non-legislative acts of a state or by an act of a local jurisdiction. Such arguments were made by the county defendants in *Bauer* (discussed *supra*, Part 3.A.). *See* Memorandum in Support of Defendants’ Motion for Summary Judgment at 15-20, *Bauer v. Elrich*, 468 F.Supp.3d 704 (D.Md. 2020) (Crim. No. PJM 20-1212), *aff’d*, 8 F.4th 291 (4th Cir. 2021). The district court in *Bauer* had no occasion to reach these arguments after holding the plaintiffs could not maintain their claim due to the lack of a private right of action under section 1621. *See* 468 F.Supp.3d at 708-09, 713.

also consider enacting a catch-all provision—California Welfare & Institutions Code § 17851 serves as one example—affirming the ability of local jurisdictions to provide undocumented individuals with “aid” that is otherwise denied to them under section 1621.

Even when there is no state law that satisfies the directives of section 1621, states or municipalities facing a lawsuit based on the federal law can assert strong legal defenses against such a suit. A court could rule that section 1621 cannot be enforced through an action brought by a private party. Furthermore, a court could find section 1621’s mandate that a state must enact a law in order to provide a “state or local public benefit” to undocumented individuals is an impermissible infringement on state sovereignty that violates the Tenth Amendment.