No. 20-1707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHARON BAUER et al.,

Plaintiffs-Appellants,

v.

MARC ELRICH, in his official capacity
as Montgomery County Executive, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR UNITED STATES AS INTERVENOR

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

DANIEL TENNY
LINDSEY POWELL
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-5372

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INTRODUCTION

Having determined that prior "eligibility rules for public assistance . . . ha[d] proved wholly incapable of assuring that individual aliens not burden the public benefits system," 8 U.S.C. § 1601(4), Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) to provide "a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits." *Korab v. Finke*, 797 F.3d 572, 580 (9th Cir. 2014). As part of that federal scheme, 8 U.S.C. § 1621(a) establishes a default rule making undocumented individuals ineligible for state or local public benefits while authorizing States to override that default in limited circumstances. Pursuant to § 1621(d), "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."

Plaintiffs challenge a Montgomery County relief program as inconsistent with 8 U.S.C. § 1621. The program provides cash benefits to individuals based on financial eligibility without regard to immigration status, and it is undisputed that undocumented individuals are among the program beneficiaries. Although plaintiffs seek to enforce § 1621, they concede that Congress did not provide a private right of action. Plaintiffs instead invoke a state-law taxpayer doctrine, but there is no merit to the suggestion that state law authorizes private enforcement of § 1621 in these

circumstances. The district court's judgment that plaintiffs cannot proceed for want of a private right of action should therefore be affirmed.

Were the Court nevertheless to reach the merits, it should conclude that the county program cannot confer benefits on individuals not lawfully present in the United States. As noted, federal law makes such individuals ineligible for state or local public benefits, 8 U.S.C. § 1621(a), unless a State enacts a law overriding that default by affirmatively providing for such eligibility, *id.* § 1621(d). The County's law does not meet the requirements of § 1621(d) for two separate reasons: (1) because the program, which nowhere mentions immigration status, does not affirmatively provide for eligibility for undocumented individuals, and (2) because the County is not a "State" and has not enacted a "State law." *Id.* Contrary to defendants' contention, that reading of § 1621(d) raises no Tenth Amendment concerns. There is no suggestion that Congress exceeded its authority in generally making undocumented individuals ineligible for state and local benefits. And Congress's grant of authority to the States to alter that default eligibility rule likewise presents no constitutional problem as it does not require or prohibit any state action but rather gives States the option of regulating in this distinctly federal field.

STATEMENT OF JURISDICTION

Plaintiffs filed suit in state court in May 2020. JA 9. Defendants removed the action to federal district court and invoked the court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. JA 15; *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g &*

Mfg., 545 U.S. 308, 314 (2005). On June 25, 2020, the district court granted summary judgment for defendants, JA 301, and plaintiffs filed a timely notice of appeal, JA 303; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a state-law taxpayer doctrine provides a basis for enforcing 8 U.S.C. § 1621 when it is undisputed that § 1621 creates no private right of action.

2. Whether the county relief program is inconsistent with § 1621 insofar as it gives local public benefits to unlawfully present individuals in the absence of a "State law" that "affirmatively provides for such eligibility," 8 U.S.C. § 1621(d).

3. Whether the conclusion that the county program is not a "State law" within the meaning of § 1621(d) is consistent with the Tenth Amendment.

PERTINENT STATUTES AND REGULATIONS

The text of 8 U.S.C. § 1621 and other pertinent provisions is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. PRWORA announced a "national policy with respect to welfare and immigration." 8 U.S.C. § 1601; *see* Pub. L. No. 104-193, § 400, 110 Stat. 2105, 2260 (1996). Congress explained that it is "the immigration policy of the United States that (A) aliens within the Nation's borders not depend on public resources to meet their needs, . . . and (B) the availability of public benefits not constitute an incentive for

immigration to the United States." 8 U.S.C. § 1601(2). Having determined that prior "eligibility rules for public assistance . . . proved wholly incapable of assuring that individual aliens not burden the public benefits system," *id.* § 1601(4), Congress "set[] out a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits." *Korab v. Finke*, 797 F.3d 572, 580 (9th Cir. 2014).

Title IV of PRWORA prohibits individuals in certain immigration categories from obtaining various public benefits. Section 1621 concerns eligibility for state and local benefits. That provision first states that an "alien" who is not a "qualified alien" (as defined in 8 U.S.C. § 1641), a "nonimmigrant" (as defined in 8 U.S.C. § 1101(a)(15)), or "paroled into the United States" (under 8 U.S.C. § 1182(d)(5)) for less than one year is "not eligible for any State or local public benefit." 8 U.S.C. § 1621(a). Individuals in other immigration categories, including those who lack lawful immigration status, are ineligible for state or local benefits unless the State takes deliberate action to provide for eligibility, as discussed below. A parallel statute, § 1611, addresses the availability of benefits provided by the federal government.

Section 1621(c) defines the "State or local public benefit[s]" for which the specified categories of individuals are ineligible. Subject to certain exceptions not relevant here, those benefits include "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." 8 U.S.C. § 1621(c)(1)(B).

Section 1621(d) authorizes States to make additional categories of individuals eligible for public benefits. A "State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a)" of this section. 8 U.S.C. § 1621(d). The statute specifies, however, that a State may do so "only through the enactment of a State law after August 22, 1996"—the date on which PRWORA was signed into law—"which affirmatively provides for such eligibility." *Id.*; *see In re Garcia*, 315 P.3d 117, 127-28 (Cal. 2014) (noting passage of such legislation in California regarding licenses to practice law); Fla. Stat. Ann. § 454.021(3) (similar legislation in Florida).

2. On April 27, 2020, Montgomery County announced the Emergency Assistance Relief Payment Program, which provides one-time emergency assistance payments to low-income county residents not eligible for federal pandemic relief funding. There is no dispute that payments under this program are a public benefit within the meaning of § 1621(c). The County appropriated $10 million for the program, JA 109, to be distributed in direct payments of $500 for single adults and up to $1,450 for families with children, JA 144. To qualify for this benefit, county residents must not be eligible to file state or federal taxes or receive unemployment benefits, and must have an income below 50% of the federal poverty level. JA 143-

44. The eligibility criteria do not mention immigration status. According to the complaint, however, the narrow eligibility criteria ensure that undocumented individuals "will be the primary—if not exclusive—recipients of" benefits under the program." JA 12.

B. Prior Proceedings

In May 2020, plaintiffs Sharon Bauer and Richard Jurgena filed suit in state court to enjoin implementation of the County's relief program. JA 9. Plaintiffs allege that the program violates 8 U.S.C. § 1621 by providing financial assistance to undocumented individuals in the absence of a state law affirmatively providing for such eligibility. They contend that, as Montgomery County taxpayers, they are injured by the unlawful expenditure and that state law allows for a taxpayer suit in these circumstances.

Defendants, the Montgomery County Executive and the Director of the County Department of Health and Human Services, removed the action to federal court. JA 15. Defendants contend that plaintiffs lack a private right of action to challenge the county program as inconsistent with § 1621, and that the challenge would in any event fail on the merits because the program satisfies § 1621(d). Defendants further argue that, if the county lacks authority to enact "State law" within the meaning of § 1621(d), the federal statute unduly interferes with the State's delegation of power to its political subdivisions in violation of the Tenth Amendment.

The district court granted summary judgment for defendants, holding that plaintiffs lack an implied private right of action to challenge the program's consistency with § 1621. The court observed that "nothing in § 1621 indicates that Congress contemplated private enforcement of the statute." JA 297. "It contains no semblance of 'rights-creating language,'" *id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001)), and it is not directed at "a class of potentially aggrieved persons or taxpayers more generally," *id.* (citing *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007)). The court rejected plaintiffs' contention that state common law supplies a cause of action in these circumstances for any taxpayer aggrieved by the county's allegedly unlawful expenditure, concluding that "[w]hether a federal statute is privately enforceable is up to Congress, not to State courts." JA 298 (citing *Comcast Corp. v. National Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020)). The court observed that, under a contrary view, a state or local taxpayer "could challenge any State or local official's actions based on any federal statute, irrespective of the law's relevance to the individual litigant" or "whether Congress intended for the statute to be enforced through the judicial branch at all." JA 299. The district court therefore granted defendants' motion for summary judgment. JA 300. The court also granted plaintiffs' unopposed request for an order requiring defendants to reserve fifty dollars of program funds pending appeal. JA 304.

Plaintiffs appealed, and, because defendants' brief called into question the constitutionality of 8 U.S.C. § 1621, the United States intervened to defend the constitutionality of that provision.

SUMMARY OF ARGUMENT

I. The district court correctly dismissed plaintiffs' suit for lack of a cause of action. It is undisputed that 8 U.S.C. § 1621 itself provides no private right of action. The provision establishes that individuals not lawfully present in the United States are ineligible for state or local benefits, while giving States authority to provide for such eligibility. It does not confer federal rights on any private party, much less on every state or municipal taxpayer whose only asserted stake in the issue is a generalized interest in the lawful expenditure of state or local funds.

Although plaintiffs concede that § 1621 confers no rights, they attempt to enforce that provision by asserting a state-law cause of action that they describe as akin to a derivative action in which a plaintiff asserts the State's prerogatives against its officers or municipalities. Plaintiffs cite no authority to support the enforcement of a distinctly federal law through such a state-law cause of action when Congress itself did not provide for private enforcement. Allowing a state-law suit in these circumstances would threaten to undermine Congress's deliberate scheme and would give rise to many instances in which private challenges under § 1621 by disinterested persons could proceed only in state court. The Court should not construe state law to produce that unlikely result.

II. In the event the Court reverses on the private-right-of-action question, it would be appropriate to remand to the district court rather than reaching the merits in the first instance. Were the Court to reach the merits, it should hold that the county program is inconsistent with § 1621 insofar as it provides benefits to individuals not lawfully present in the United States. Congress allowed that "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). The county program falls short of these terms for two separate reasons.

A. First, regardless of whether an action by the County can qualify as a "State law" enacted by a "State" within the meaning of § 1621(d), the program at issue does not "affirmatively provide[] for" eligibility for benefits. The county program sets out eligibility criteria unrelated to immigration status and does not otherwise mention such status. When a state or local benefits program is silent as to whether it imposes immigration-based restrictions on eligibility, the default rule in § 1621(a) applies and make individuals not lawfully present in the United States ineligible for such benefits. Congress provided that States may override the federal default, but they must do so, if at all, through an "enactment . . . which affirmatively provides for [the] eligibility" of a category of noncitizens. 8 U.S.C. § 1621(d). The use of the term "affirmatively" eliminates any doubt that Congress contemplated an express declaration and is

consonant with the provision's evident purpose of requiring States to be clear when departing from the federal eligibility rules established in § 1621(a). *See* H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.) (explaining that "the State law enacted must specify that illegal aliens are eligible for State or local benefits").

B. Second, a county enactment falls outside the scope of § 1621(d) because it is not a "State law" enacted by a "State." Congress was deliberate throughout § 1621 and neighboring provisions in distinguishing between States and their political subdivisions. Section 1621(d) itself illustrates that precision where it provides that a "State" may establish eligibility for any "State or local" public benefit through the enactment of "State law." In total, § 1621 refers to "State" three times, to "State [and/or] local public benefit[s]" seven times, and to "State or local government" four times. Neighboring provisions likewise differentiate between "States" and "political subdivisions of States." *See* 8 U.S.C. §§ 1624, 1625. Congress's choices in this respect are presumed to be deliberate. *See Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020). To give effect to those choices, the Court should read "State" in this context to exclude the political subdivisions of a State. The cases on which defendants rely in advancing a contrary interpretation involved very different circumstances and do not support the same reading here.

III. Contrary to the County's suggestion, reading "State" to exclude the political subdivisions of a State raises no Tenth Amendment concerns. Section 1621 was enacted as part of "a comprehensive set of eligibility requirements governing

aliens' access to both federal and state benefits." *Korab v. Finke*, 797 F.3d 572, 580 (9th Cir. 2014). Congress identified a strong federal "interest [in] remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). And there is no contention that Congress exceeded its authority in establishing a default rule making individuals not lawfully present in the United States ineligible for state and local benefits. *Id.* § 1621(a). The limited grant of authority provided by § 1621(d), allowing States to alter the federal default by enacting a law affirmatively providing for eligibility, does not render the statute unconstitutional. Section 1621(d) neither requires nor prohibits state action. Nor does it undermine the States' ability to structure their affairs vis-à-vis their political subdivisions. A State could satisfy the terms of § 1621(d) by enacting a law affirmatively providing that undocumented individuals are eligible for local benefits to the extent provided by local law, thereby preserving local authority while still ensuring that eligibility determinations are made deliberately and with full accountability for their consequences. In giving States the option of regulating within this distinctly federal sphere, Congress did not impermissibly intrude on state sovereignty.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment. *Calloway v. Lokey*, 948 F.3d 194, 201 (4th Cir. 2020).

ARGUMENT

I. Plaintiffs Lack a Private Right of Action To Challenge the County Program as Inconsistent with 8 U.S.C. § 1621.

Plaintiffs acknowledge that "§ 1621 does not contain a private right of action." Pls. Br. 15. But plaintiffs nonetheless instituted this lawsuit to enforce that federal provision. Citing only their interest as municipal taxpayers in the County's expenditure of funds, plaintiffs seek to ensure that individuals not lawfully present in the United States do not access certain benefits. Nothing in § 1621 suggests that Congress intended to allow suit on that basis, and state law is not properly understood to permit a private enforcement action that Congress declined to create.

A. As plaintiffs concede, § 1621 does not create any enforceable rights in anyone other than the federal government. When Congress intends to confer an enforceable right, it generally phrases the statute "in terms of the persons benefited," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotation marks omitted), and uses "rights-creating language" to show that it is vesting a right in a particular class of individuals or entities, *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (quotation marks omitted). Section 1621 does nothing of the kind. Subsection (a) establishes a default rule of ineligibility for state and local benefits based on immigration status. 8 U.S.C. § 1621(a). And subsection (d) identifies limited circumstances in which a State may override the federal default and provide for such eligibility. By their terms, these provisions confer no rights on any individual, much less individuals in plaintiffs'

position, whom the statute nowhere addresses. JA 297; *see Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (holding that 8 U.S.C. § 1623—a related provision making undocumented individuals ineligible for certain education benefits—does not confer a private right of action).

Plaintiffs do not assert that they have federal rights at stake in this case. But they nevertheless urge that they can bring suit to enforce § 1621 under the guise of protecting their rights under state law as municipal taxpayers. In addition to the inherent mismatch between the asserted right and the substantive law invoked, plaintiffs' theory would yield highly unusual consequences. Although plaintiffs are municipal taxpayers and thus appear to have Article III standing, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006), their theory of suit would likewise encompass a challenge by state taxpayers alleging that state officials were providing benefits in violation of § 1621—a surprising result given that state taxpayers would lack Article III standing and could not proceed in federal court, *see id.* at 345. Under plaintiffs' approach, an entire category of suits to enforce § 1621 would thus be confined to state court. And unless the plaintiffs prevailed in state court and the Supreme Court deemed the issue worthy of review, the state court would have the final word on the meaning of the federal statute. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (holding that the Supreme Court has jurisdiction where a plaintiff lacks standing only if the defendant is injured by the state-court order).

The particular subject matter at issue in this case underscores the oddity of the scheme plaintiffs contemplate. Section 1621 regulates according to immigration classifications—an area in which the federal government's interest is paramount—and it secondarily allocates responsibility between the federal government and the States. There is no basis for presuming that Congress, having declined to create a federal cause of action, would have intended to authorize enforcement of this provision in state court (and exclusively so in the more common instance where state, rather than municipal, funds are concerned).

Nor is there reason to construe Maryland law to provide such an unusual cause of action. Plaintiffs urge that a state-law doctrine authorizes suit any time a state or local taxpayer alleges that state or local officials acted unlawfully in a manner that injuriously affected the taxpayer's rights or property. Pls. Br. 13. Plaintiffs state that the doctrine allows taxpayers to "assert the rights of their government against local administrators," bringing a cause of action akin "to a derivative shareholder suit, the shareholders of a government being the taxpayers." *Id.* (quoting *Bennett v. Montgomery County*, No. 425210-V, 2019 WL 4187399, at *13 (Md. Ct. Spec. App. Sept. 3, 2019)). Thus, according to plaintiffs, they are asserting Maryland's right to prevent its officers from providing benefits to unlawfully present individuals when doing so is prohibited by federal law. The cases plaintiffs cite, however, entailed enforcement of state or local law. *See* Pls. Br. 13-15. Plaintiffs identify no case in which a party has invoked this doctrine to assert the State's ostensible right to act against its officers in order to

enforce an exclusively federal requirement, much less one that concededly does not confer any federal rights. Indeed, Maryland itself disputes the existence of the cause of action that plaintiffs assert on its behalf. *See* Maryland Amicus Br. 4-7 (urging the Court to affirm based on the lack of a private right of action).

The authority plaintiffs cite (at 14) in any event makes clear that state law requires a showing that the challenged action "reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes." *Floyd v. Mayor & City Council of Balt.*, 205 A.3d 928, 931 (Md. 2019) (quotation marks omitted). For a taxpayer to have a cause of action under state law, "[t]here must be a connection between the allegedly illegal or *ultra vires* act, the harm caused to the taxpayer, and the potential for the remedy to alleviate the harm incurred." *Id.* (alterations and quotation marks omitted). "If the taxpayers cannot show a pecuniary loss or that the statute results in increased taxes to them, they have no standing to challenge it." *Murray v. Comptroller of Treasury*, 216 A.2d 897, 901 (1966). It is far from clear that plaintiffs have made the required showing in these circumstances, where they allege only that the funds disbursed through the county program are taxpayer funds and that, as taxpayers, plaintiffs have suffered a pecuniary injury as a result of the allegedly unlawful disbursement. JA 13.

B. Plaintiffs' reliance on the state-law cause of action should also be rejected because it would interfere with the scheme that Congress created. Through PRWORA, Congress "set[] out a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits," *Korab v. Finke*, 797 F.3d

572, 580 (9th Cir. 2014), while granting States limited authority to depart from those default rules on terms established by Congress.

As discussed, Congress did not create any private rights whatsoever through § 1621, much less a right in taxpayers to enforce the federal immigration laws or to police the relationship between the federal government and the States in this regard. But the entire purpose of plaintiffs' suit is to enforce federal law. Plaintiffs seek a "judgment declaring the direct assistance Defendants intend to provide to unlawfully present aliens violates 8 U.S.C. § 1621." JA 14. Plaintiffs' request for such relief under a state-law cause of action is particularly remarkable given the uniquely federal interests that § 1621 protects by implementing Congress's immigration priorities and delineating the respective roles of the federal and state governments in this area. By declining to create a private enforcement mechanism, Congress preserved the federal government's authority to determine whether and how to enforce these requirements—through suits by the United States in federal court or through more informal action—rather than leaving these delicate issues affecting immigration and federal-state relations to be resolved by state courts at the behest of private plaintiffs with no direct interest in the matter.

In circumstances in which Congress has chosen to reserve enforcement authority to the federal government, States may not provide an additional means of enforcing federal law. *See Arizona v. United States*, 567 U.S. 387, 402 (2012). But as invoked by plaintiffs in these circumstances, the state taxpayer cause of action "serves

plainly as a means of enforcing" federal law. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 287 (1986). The federal government is "amply empower[ed]" to detect violations of § 1621 and enforce its provisions consistent with the broader immigration policy and other "inherently federal" interests that Congress sought to balance through PRWORA. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). Allowing taxpayer enforcement of § 1621 through a state-law cause of action "would conflict with the careful framework Congress adopted" and with its decision not to provide a private right of action. *Arizona*, 567 U.S. at 402; *see Salk v. Regents of Univ. of Cal.*, No. A120289, 2008 WL 5274536, at *5-6 (Cal. Ct. App. 2008) (declining to allow a state taxpayer suit to enforce the Animal Welfare Act on similar grounds). Given that Congress has "set[] out a comprehensive set of eligibility requirements," *Korab*, 797 F.3d at 580, and granted only very limited residual authority to the States, there is "no room for the States to supplement" federal law other than on the terms Congress provided. *Arizona*, 567 U.S. at 399 (quotation marks omitted).

The cases on which plaintiffs rely to support their invocation of a state-law cause of action are inapposite because they involve traditional state-law actions that only incidentally implicate federal law. In *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148 (4th Cir. 1994), and *Clark v. Velsicol Chemical Corp.*, 944 F.2d 196 (4th Cir. 1991), the plaintiffs asserted state-law negligence claims, and federal law merely informed the standard of care owed by the defendant. Rather than invoking a state-law rule as a means of enforcing federal law, the plaintiffs in those cases asserted

traditional state-law tort claims. Similarly, *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 814-15 (4th Cir. 2004) (en banc), involved a state-law employment provision that made it unlawful to discharge an employee based on political opinions or the exercise of federally protected rights. Again, the federal question was relevant only to establishing an element of the traditional state-law claim, and there was no suggestion that the state-law cause of action intruded into a distinctly federal field.

Because § 1621 governs individuals' eligibility for state benefits, questions regarding the statute's scope might similarly arise in some traditional state-court actions, such as those brought by putative beneficiaries who urge that they should not be disqualified from receiving state benefits based on the provision. *See, e.g.*, *E.M. v. Nebraska Dep't of Health & Human Servs.*, 944 N.W.2d 252 (Neb. 2020); *In re Vargas*, 131 A.D.3d 4 (N.Y. App. Div. 2015); *In re Garcia*, 315 P.3d 117 (Cal. 2014); *cf. also Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855 (Cal. 2010) (addressing claim that plaintiffs were illegally denied exemption from nonresident tuition under a state-law provision allegedly preempted by federal law). But it is a different matter entirely to suggest that any state or municipal taxpayer may file a cause of action solely to invoke the federal provision, and plaintiffs cite no case holding that such actions are available.[1] The question presented here is through and through a federal one,

[1] We are aware of one intermediate state court that addressed a § 1621 challenge in a state taxpayer suit, but the parties did not appear to raise, and the court did not consider, the issues discussed here. *See Kaider v. Hamos*, 975 N.E.2d 667 (Ill. App. Ct. 2012).

addressing Congress's immigration priorities and the relationship between the federal and state governments. Accordingly, in order to obtain review of that federal question, plaintiffs must show that Congress intended that result.

As the district court observed, a contrary conclusion would allow any Maryland taxpayer to bring any number of suits to enforce federal laws "irrespective of the law's relevance to the individual litigant" or "whether Congress intended for the statute to be enforced through the judicial branch at all." JA 299. Indeed, it appears that a majority of States allow for some sort of taxpayer suit of this type, underscoring the legion of state-court suits to enforce federal law that might ensue if the Court endorsed plaintiffs' theory. *See* 13B Charles Alan Wright et al., Federal Practice & Procedure § 3531.10.1 (3d ed. 2020) ("Most state courts have long allowed municipal taxpayers to challenge municipal expenditures, and state taxpayers to challenge state expenditures."). The resulting suits would also form a strange patchwork, with federal laws privately enforceable in some States but not others.

II. The County's Relief Program Does Not Satisfy the Terms of § 1621(d) for Two Separate Reasons.

If the Court reverses on the private-right-of-action question, it would be appropriate to remand to the district court rather than reaching the merits in the first instance. Were the Court to reach the merits, it should hold that the county program fails to satisfy § 1621(d) and therefore cannot confer benefits on undocumented individuals. Section 1621(a) establishes a default rule regarding eligibility for state and

local public benefits, providing that individuals not lawfully present in the United States are "not eligible for any State or local public benefit." Congress gave the States authority to "provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit . . . only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). Here, the program's eligibility requirements do not mention immigration status and thus do not "affirmatively provide[] for" eligibility of individuals who are not lawfully present, and the enactments creating the program are in any event not "State law" enacted by a "State."

A. The county program does not "affirmatively provide[] for" eligibility for individuals not lawfully present in the United States.

The county program does not satisfy the terms of § 1621(d) because, in offering benefits to individuals based on financial criteria—without reference to immigration status—the program does not "affirmatively provide[] for" the eligibility of otherwise ineligible individuals. Although the parties' briefs to date have elided this issue,[2] it provides the most straightforward way to resolve the statutory question and avoid the constitutional issue, so the government respectfully suggests that the Court address this issue in the event it reaches the merits.

[2] Plaintiffs have not argued that the county program does not "affirmatively provide[] for" eligibility for undocumented individuals, and the County accordingly has not provided a defense. *See* Defs' Br. 43 n.13.

The county enactment lists a series of eligibility criteria, none of which relates to immigration status. *See* JA 143-44. When a state or local benefits program is silent as to whether it imposes immigration-based restrictions on eligibility, the default rule in § 1621(a) applies and makes individuals not lawfully present in the United States ineligible for such benefits. That federal provision is the only immigration-related eligibility criterion that governs the county program, and it should be enforced according to its terms.

Congress provided that States may override the federal default rule, but they can do so "only" through an "enactment . . . which affirmatively provides for [the] eligibility" of a category of noncitizens. 8 U.S.C. § 1621(d). There is no such enactment here. At most, there are implicit indications, based on the county program's design, that unlawfully present individuals were intended recipients of the program funds (and the County has apparently distributed funds to such individuals, notwithstanding § 1621(a)). But § 1621(d) plainly contemplates an explicit enactment, through which a State expresses its intent to provide benefits to a specified category of individuals according to their immigration status. It is not enough for purposes of § 1621(d) that a program appears to have been designed to provide benefits to individuals falling into one or more groups that § 1621(a) makes ineligible.

Congress made clear that an explicit provision is needed to override the federal default rule by specifying that individuals can be made eligible for benefits only through enactment of a law that "*affirmatively* provides for . . . eligibility" of otherwise-

ineligible individuals. 8 U.S.C. § 1621(d) (emphasis added). The word "affirmatively" commonly means "[b]y way of assertion or express declaration; assertively, expressly; emphatically." *Oxford English Dictionary Online*;[3] *see Webster's Third New International Dictionary* 36 (1986) (defining "affirmative" as: "asserting that the fact is so"; "declaratory of what exists"; or "assertive, positive"). That use makes sense in this context as it requires States to be clear when departing from the federal eligibility rules established in § 1621(a). "The phrase 'affirmatively provides for such eligibility' means that the State law enacted must specify that illegal aliens are eligible for State or local benefits," H.R. Rep. No. 104-725, at 383, thereby ensuring accountability for that choice. Accordingly, to satisfy § 1621(d), a law must say that it is providing eligibility for individuals who are otherwise ineligible for benefits on account of their immigration status; such eligibility cannot merely be implied. The type of explicit enactment that § 1621(d) requires is not difficult to formulate. *See, e.g.*, *In re Garcia*, 315 P.3d at 127-28 (noting passage of such legislation in California regarding licenses to practice law); Fla. Stat. Ann. § 454.021(3) (similar legislation in Florida).

The inclusion of the word "affirmatively" thus eliminates any doubt regarding whether an enactment can confer eligibility on a category of noncitizens without explicitly saying so. Giving the word that clarifying function is consistent with the presumption that "all words [of a statute] ha[ve] a purpose." *Carroll v. Logan*, 735 F.3d

[3] https://www.oed.com/view/Entry/3426?redirectedFrom=affirmatively#eid (last visited Dec. 13, 2020).

147, 150 (4th Cir. 2013); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting." (alteration and quotation marks omitted)). A contrary reading of the statute would assign no separate meaning to the word "affirmatively."

Section 1621(d)'s other terms likewise indicate that Congress intended that the federal default be supplanted only through clear and deliberate state action. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (reiterating "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it" (brackets and quotation marks omitted)). For example, Congress required that, to provide eligibility for otherwise ineligible individuals, a law must be enacted "after August 22, 1996"—*i.e.*, after PRWORA was signed into law. This requirement underscores Congress's intent to require that any action to depart from the federal default be deliberately taken, thereby promoting accountability for the adoption of new rules. Congress also made the criteria set forth in § 1621(d) exclusive, providing the "only" means of establishing eligibility criteria different from those set forth in § 1621(a). By expressly limiting the authority granted the States to depart from federal eligibility rules, Congress again sought to ensure that such departures are effected in a manner that promotes accountability. Reading § 1621(d) to require that a law altering the federal eligibility rules specify that it is doing so is in keeping with these other requirements.

B. A county enactment is not a "State law" enacted by a "State."

1. The county program also fails to satisfy the terms of § 1621(d) because the statute's references to "State" and "State law" do not encompass the County and the provisions creating the relief program. There is no state enactment that even arguably satisfies § 1621(d); all that is claimed here is that the State, prior to 1996, granted its counties general authority to enact laws of local significance, and the County exercised that general authority in providing benefits to individuals meeting certain financial criteria. Had the state legislature, subsequent to 1996, enacted a law providing that undocumented individuals are eligible for benefits to the extent that the State's political subdivisions choose to make them available, the State would have affirmatively provided for eligibility, while still retaining flexibility for local judgments on that score. But as things stand, the County is left to argue that the County's own enactment of relief-program provisions satisfies the requirement that "[a] State may provide" benefits "only through enactment of a State law" after August 22, 1996, 8 U.S.C. § 1621(a).

Defendants' position that the statute must be construed so that "State" encompasses political subdivisions, and that "State law" encompasses local laws, is not supported by the statute's text or purpose. Beginning with the text, Congress distinguished between States and localities throughout PRWORA, indicating that its use of the singular "State" in § 1621(d) was intentional. Section 1621 itself makes this

distinction where it repeatedly refers to "State or local government" and to "State or local public benefit[s]." 8 U.S.C. § 1621(a)-(d). If, as defendants contend, "State" was intended in this context to include the State and its political subdivisions, references to "State or local" government or benefits would be unnecessary, and the latter part of the phrase superfluous, because "State" would encompass "local."

Other provisions of PRWORA further indicate that Congress's use of the singular "State" in § 1621(d) was intentional. For example, Congress specified that "a State or political subdivision of a State" may prohibit or restrict eligibility for programs of general cash public assistance "furnished under the law of the State or a political subdivision of a State" based on an individuals' immigration status. 8 U.S.C. § 1624(a). And it provided that "a State or political subdivision of a State" may require an applicant for benefits to provide proof of eligibility. *Id.* § 1625. Like the authority provided in § 1621(d), these provisions allow for a limited non-federal role within the comprehensive federal scheme. But unlike § 1621(d), §§ 1624 and 1625 expressly contemplate a role for both the States and their political subdivisions in making the relevant determinations. Courts "generally presume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (brackets omitted) (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994)), and there is every reason to apply that presumption here.

That Congress took a different approach in §§ 1624 and 1625 is consistent with PRWORA's overarching purpose of generally restricting eligibility for benefits. It is unsurprising that where Congress authorized the enactment of further restrictions consistent with that purpose, it gave both States and localities power to act. *See* 8 U.S.C. §§ 1624, 1625. But where Congress granted authority to enlarge eligibility—and thereby override the federal default—it reserved that authority solely for "State[s]," which are more broadly accountable to the electorate. *Id.* § 1621(d); *see* H.R. Rep. No. 104-725, at 383 (confirming that such authority may be exercised exclusively by the States and that "[l]aws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits" to individuals not lawfully present in the United States). The difference in approach also promotes Congress's goal of "establish[ing] a uniform federal structure for providing welfare benefits to distinct classes of aliens." *Korab*, 797 F.3d at 581. As the Ninth Circuit observed in a related context, "a state's limited discretion to implement a plan for a specified category of aliens does not defeat or undermine uniformity," *id.*, but allowing tens of thousands of political subdivisions to enact distinct eligibility rules would produce an entirely different result.

2. Defendants cite two cases—*Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002)—for the proposition that "State" is ordinarily construed to encompass both a State and its political subdivisions, and that the provision creating the county's

program should therefore be viewed as a "State" enactment. *See* Defs.' Br. 34. Neither case supports that conclusion. In each instance, the Supreme Court looked to the statutory text and structure, the legislative purpose and history, and the background division of federal and state power against which the statute was enacted. Were defendants correct that, as a rule, statutory references to a "State" include its political subdivisions, this extended analysis would not have been necessary. Consideration of the relevant factors, including the nature of the authority Congress exercised in enacting § 1621, supports a different reading of "State" in this context.

At issue in *Mortier* was a section of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) providing that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a). The plaintiff urged that, by expressly preserving such power to the States without referencing political subdivisions, FIFRA preempted a local ordinance requiring a permit for the use of certain pesticides. *Mortier*, 501 U.S. at 602-03. Reading the statutory scheme as a whole, and noting inconsistencies that would arise from prohibiting localities from engaging in these traditional regulatory activities, the Court held that the federal statute "plainly authorizes the 'States' to regulate pesticides" and that its "silen[ce] with reference to local governments," "in this context, cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *Id.* at 607 (quotation marks omitted).

The Court's resolution of the case was premised in substantial part on its rejection of the notion that FIFRA is "a comprehensive statute that occupied the field of pesticide regulation," and of the attendant suggestion that § 136y(a) "opened specific portions of the field to state regulation." *Mortier*, 501 U.S. at 612. Because FIFRA does not occupy that field, the "specific grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur." *Id.* at 613. The Court observed that it would make little sense to read a provision that expressly preserves the States' traditional power in that field to impliedly diminish that same power by limiting the extent to which local governments can exercise delegated authority. *Id.* at 608-09. Instead, in that context, "the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608.

Similarly, in *Ours Garage*, the Court considered the scope of a provision directing that the Interstate Commerce Act's preemption clause—which generally precludes state or local provisions "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property," 49 U.S.C. § 14501(c)(1)—"shall not restrict the safety regulatory authority of a State with respect to motor

vehicles." *Id.* § 14501(c)(2)(A). As the Court observed, the provision "seeks to save from preemption state power in a field which the States have traditionally occupied," *Ours Garage*, 536 U.S. at 438 (quotation marks omitted), and its clear purpose "is to ensure that its preemption of States' economic authority over motor carriers of property . . . 'not restrict' the preexisting and traditional state police power over safety," *id.* at 439. That preexisting and traditional power "typically includes the choice to delegate the State's 'safety regulatory authority' to localities. Forcing a State to refrain from doing so would effectively 'restrict' that very authority," thereby undermining the provision's express purpose of keeping the States' traditional power in that area intact. *Id.* Thus, as in *Mortier*, the Court construed the provision not to "bar a State from delegating to municipalities and other local units the State's authority to establish [certain] regulations" in order to avoid reading a statute that expressly preserves state power to impliedly intrude on a facet of that power. *Id.* at 428; *see Mortier*, 501 U.S. at 608-09.

This case does not raise the question presented in *Mortier* and *Ours Garage* as to whether Congress impliedly sought to prohibit state delegations of authority, because the government's reading of § 1621(d) would not "bar a State from delegating to municipalities and other local units the State's authority to establish [certain] regulations." *Ours Garage*, 536 U.S. at 428. Consistent with § 1621(d), a State could enact a law that affirmatively makes individuals unlawfully present in the United States eligible for benefits to the extent provided by local law. Through such an enactment,

a State could delegate to its political subdivisions authority to make benefit determinations consistent with the framework Congress provided for overriding the default eligibility rule established by § 1621(a).

This case is further distinguishable from *Mortier* and *Ours Garage* because Congress did not enact § 1621 against the backdrop of the traditional police power but as an exercise of the exclusive federal power to regulate immigration. Through PRWORA, Congress exercised its authority to "establish[] a uniform federal structure for providing welfare benefits to distinct classes of aliens. The entire benefit scheme flows from these classifications," *Korab*, 797 F.3d at 581, with respect to which the States enjoy no traditional authority. While it is "'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, and to 'take into account the character of the relationship between the alien and this country,'" "only rarely are such matters relevant to legislation by a State." *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976)).

Pursuant to that traditionally federal power, § 1621(a) makes eligibility determinations in connection with immigration status. Section 1621(d) then gives the States limited authority within that distinctly federal sphere while underscoring that eligibility can be established only on the terms provided by Congress, and thus "only by federal permission." *Mortier*, 501 U.S. at 614. Unlike the statutes at issue in *Mortier* and *Ours Garage*, PRWORA does not leave the "allocation of regulatory authority to

the 'absolute discretion' of the States themselves," *Mortier*, 501 U.S. at 608, but rather grants the States authority to regulate, if at all, "only" in a certain way—through an affirmative enactment of state law after August 22, 1996. 8 U.S.C. § 1621(d). Consistent with that provision, States may delegate to local governments the ability to provide benefits to otherwise-ineligible individuals, but States may do so only through the type of enactment specified in § 1621(d). That § 1621(d) was enacted as part of Congress's broader regulation of immigration and "serve[s] to hand back to the States powers that the statute had . . . usurped," *Mortier*, 501 U.S. at 614, makes the presumptions that guided the analysis in *Ours Garage* and *Mortier* inapplicable here and militates in favor of a different result. *See id.* at 616 (Scalia, J., concurring in judgment) (noting that when "*authorizing* certain types of state regulation" against a backdrop of field preemption, "it makes eminent sense to authorize States but not their subdivisions").

III. Section 1621 Is Consistent with the Tenth Amendment.

A. Section 1621(d) does not unduly interfere with States' sovereign authority to structure their governments.

Reading § 1621(d) to grant limited immigration powers only to the States and not their political subdivisions raises no constitutional concerns. Accordingly, even if defendants' reading of the statute were more plausible, adoption of that reading would not be warranted as a matter of constitutional avoidance. *See* Defs. Br. 44.

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. "The federal power to determine immigration policy is well settled." *Arizona*, 567 U.S. at 395. By contrast, the States enjoy no traditional role in assigning eligibility for benefits according to immigration status. "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977).

Through PRWORA, Congress exercised this traditional power to announce a "national policy with respect to welfare and immigration," 8 U.S.C. § 1601, and establish a "comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits," *Korab*, 797 F.3d at 580. Defendants elide this context in asserting that "Section 1621 does not regulate immigration or noncitizens directly; it instead purports to regulate States' enactment and administration of their benefits programs." Defs. Br. 48. Contrary to that suggestion, § 1621 addresses noncitizens' eligibility for various benefits as an express and important aspect of federal immigration policy. Congress explained that "[i]t 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). And § 1621 directly addresses such availability, as stated in the provision's title— "[a]liens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits." *Id.* § 1621; *see Florida*

Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) (noting the value of statutory titles and section headings as interpretive tools).

Defendants do not contend that Congress lacked authority to establish PRWORA's eligibility rules generally or to set the specific default rule codified in § 1621(a). The accommodation of state interests provided through § 1621(d) does not cast doubt on this plainly valid exercise of the immigration power. Rather than infringing on States' right to "remain independent and autonomous within their proper sphere of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), Congress has here accorded States an additional measure of respect by allowing them to make eligibility determinations within the federal framework. The statute thereby enhances "the States' integrity" and "their ability to function effectively in a federal system" by expanding their role in formulating immigration policy. *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). This conferral of additional authority in no way intrudes on the powers reserved to the States.

Defendant's contrary view is premised on the notion that this reading of § 1621 "permanently alters the ordinary allocation of authority in 'home rule' States over matters of public benefits, effectively nullifying state constitutional provisions that allow political subdivisions, rather than the state legislature, to control how to spend municipal dollars to address local concerns." Defs. Br. 45. But § 1621(d) does not work the interference defendants suggest. If a State enacted a law, subsequent to 1996, affirmatively providing that individuals not lawfully present in the United States

are eligible for benefits to the extent provided by local law, the State could satisfy the terms of § 1621(d) while still preserving the delegated authority of its political subdivisions to administer local benefits programs and "control how to spend municipal dollars to address local concerns." *Id.* Maryland simply has not enacted such a law.

The cases defendants cite in any event fail to support their contention that Congress cannot require that a departure from federal standards in a traditionally federal field be enacted, if at all, by a State rather than its political subdivisions. Defendants principally rely (at 45) on cases stating in general terms that Congress may not "intrude on state governmental functions." *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). But these cases do not address circumstances remotely analogous to those presented here. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 823 (2015) (holding that the Elections Clause does not preclude the States from creating an independent congressional redistricting commission by ballot initiative); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Congress lacks authority to subject nonconsenting States to private suits in their own courts); *Gregory*, 501 U.S. at 467 (avoiding a reading of the federal Age Discrimination in Employment Act that would intrude on the States' authority to establish qualifications for state officials); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (holding that the U.S. Constitution "has no voice upon" the state legislature's ability to delegate power to a commodity-price-setting commission). These decisions by no means compel the

conclusion that Congress's refusal to treat all local programs as state enactments for purposes of § 1621 impermissibly intrudes on state sovereignty. And there was no suggestion in *Mortier* or *Ours Garage*, on which defendants rely, that the statutes in those cases would have been unconstitutional had they accommodated state enactments but not local ones.

Contrary to defendants' suggestion, "it should not be thought that the States' power to control the relationship between themselves and their political subdivisions . . . has hitherto been regarded as sacrosanct." *See Ours Garage*, 536 U.S. at 448 (Scalia, J., dissenting). "To take only a few examples, the Federal Government routinely gives directly to municipalities substantial grants of funds that cannot be reached or directed by" state officials. *Id.*; *see Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 270 (1985) (holding that States may not restrict local use of funds that the United States makes available to localities to spend at their discretion). And many federal programs "make uniform statewide regulation a condition of funding." *Ours Garage*, 536 U.S. at 438 (majority op.). Under such programs, States enter "voluntary agreements to relinquish authority vis-à-vis their political subdivisions in exchange for federal funds." *Id.* at 439. Presenting States with that choice has not been thought to raise Tenth Amendment concerns. Similarly here, Congress did not interfere with state sovereignty to the extent that it gave States the choice of accepting the federal default or regulating according to specified terms in this traditionally federal field.

Defendants assert that "the only other court to have addressed a constitutional challenge to § 1621 held it unconstitutional" on Tenth Amendment grounds. Defs. Br. 46 (citing *In re Vargas*, 131 A.D.3d 4, 25 (N.Y. App. Div. 2015)). But even if the analysis in *Vargas* were correct, it would not support the same result here. In *Vargas*, a New York appellate court held that a reading of § 1621 that precluded state courts from enacting state law through the adjudication of applications for admission to the state bar impermissibly "prescribed the mechanism by which the states may exercise" authority. 131 A.D.3d at 25.[4] But the court explained that "the Tenth Amendment concerns implicated here by the issuance of law licenses do not exist in regard to the issuance of other types of professional licenses by other arms of our state's government." *Id.* at 27. The court's analysis focused "solely upon the infringement of the judiciary's authority, as an independent and free-standing constitutional branch of state government, to issue law licenses." *Id.* The same concerns are not implicated in this case.

B. Section 1621(d) does not commandeer state or local governments.

Defendants' contention that § 1621(d) violates anti-commandeering principles to the extent that it reserves to the States authority to override federal eligibility rules

[4] Without addressing the constitutional question, the Utah Supreme Court held that it had authority, consistent with 8 U.S.C. § 1621, to adjudicate undocumented immigrants' eligibility for law licenses. *See* Utah S. Ct. Statement (Dec. 9, 2019), https://go.usa.gov/xAaVY.

largely repeats the arguments discussed above, and it fails for largely the same reasons. Anti-commandeering rules reflect Tenth Amendment limits on "the circumstances under which Congress may use the States as implements of regulation" or may "direct or otherwise motivate the States to regulate in a particular field or a particular way." *New York v. United States*, 505 U.S. 144, 161 (1992). Pursuant to those principles, Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). Nor may Congress coerce state action that it cannot compel directly. *New York*, 505 U.S. at 174-78; *see National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012). The same principle prevents Congress from prohibiting certain State actions, just as it prevents Congress from requiring them. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018). Section 1621 does none of those things.

Defendants' anti-commandeering argument is premised on the erroneous view that § 1621(d) requires that States "exercise their lawmaking authority in precisely the manner Congress has dictated" and provides that "States' political subdivisions may *never* confer such benefits." Defs. Br. 48. In carving out a potential role for the States within the distinctly federal sphere of immigration regulation, § 1621(d) does not compel States or their political subdivisions to act or refrain from acting. Instead, the provision authorizes States to expand eligibility for state or local benefits. Whether to provide for such eligibility is expressly left to the States. And a State may exercise that

discretion in a variety of ways, including by directly providing such benefits, or by providing that individuals not lawfully present in the United States are eligible for benefits to the extent provided by local law. Here, the State has not elected to exercise the authority granted by § 1621(d), leaving the federal default rule in place.

The absence of compulsion distinguishes § 1621 from laws found to violate the anti-commandeering doctrine in prior cases. Unlike the provision struck down in *New York*, 505 U.S. at 150-54, which required States to provide for the disposal of radioactive waste generated within their borders or else "take title" to the waste themselves, or the provision struck down in *Printz*, 521 U.S. at 904-05, which required States to run background checks for handgun purchases, § 1621 does not require States to take any action whatsoever. Nor does the law prohibit state action as in *Murphy*, 138 S. Ct. at 1478.

Section 1621 is more like the laws upheld in *Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982), which offered States non-coercive regulatory choices in the context of a broader federal regulatory scheme. In *Hodel*, Congress mandated that States regulate surface-mining operations either by developing their own program consistent with federal standards or by yielding to a federally administered program. 452 U.S. at 271-72. Congress could instead have enacted a statute prohibiting all state surface-mining regulations, and the Supreme Court found no reason the law "should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. Indeed, the Court observed with approval that "[t]he

most that can be said is that the [statute] establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 289. The Court reached a similar conclusion in *FERC v. Mississippi*, holding that the Public Utility Regulatory Policies Act "should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards." 456 U.S. at 765.

Similarly here, States remain free to accept the federal default rule established in § 1621(a) or to provide for greater eligibility consistent with § 1621(d). Section 1621(d) "simply condition[s] . . . state involvement in a pre-emptible area" on the enactment of state law and "do[es] not impair the ability of the States to function effectively in a federal system." *FERC*, 456 U.S. at 765-66 (quotation marks omitted). As noted, defendants do not challenge the general statement of immigration policy codified in § 1621(a), which makes individuals unlawfully present in the United States ineligible for state and local benefits. Instead, defendants take issue with the allowance in § 1621(d), which authorizes States to regulate in that space. But § 1621(d) expressly gives States a choice whether to take any action, and States can choose to exercise that authority by making undocumented individuals eligible for benefits to the extent provided by local law.

The choice provided by § 1621(d) distinguishes this case from *Murphy*, in which the federal law at issue made it unlawful for a State to "authorize" sports gambling schemes. 28 U.S.C. § 3702(1). As construed by the Court, that prohibition prevented States from enacting laws authorizing gambling or selectively repealing laws that prohibited it. The law thus "commanded state legislatures to enact or refrain from enacting state law." *Murphy*, 138 S. Ct. at 1478. The same is not true of § 1621. Because § 1621 "does not require the state to do anything that the state itself [does] not . . . require[], authorize[], or provide[] by its own legislative command," and likewise does not prohibit particular state regulatory choices, it "does not come close to offending the Tenth Amendment." *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 214 (4th Cir. 2002) (quotation marks omitted).

The conclusion that § 1621 is consistent with the Tenth Amendment is reinforced by the fact that none of the rationales underlying the anti-commandeering doctrine suggest a problem in this case. As the Supreme Court recently explained, adherence to anti-commandeering rules is important for three main reasons: (1) it serves as "one of the Constitution's structural protections of liberty," (2) it promotes political accountability, and (3) it prevents Congress from shifting the costs of regulation to the States. *Murphy*, 138 S. Ct. at 1477-78 (quoting *Printz*, 521 U.S. at 921). Section 1621 poses no threat of tyranny or accumulation of excessive federal power. To the contrary, the statute expands state authority over immigration by authorizing a State to enact legislation making additional categories of individuals

eligible for public benefits, if the State so chooses. Furthermore, because only one governmental body—the State—is responsible for altering the default eligibility rules, "the responsibility for the benefits and burdens of the regulation is apparent." *Id.* at 1477; *cf. New York*, 505 U.S. at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."). In addition, the statutory scheme results in no cost-shifting. Because the State decides whether to provide eligibility for benefits, any costs are self-imposed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed on the ground that plaintiffs have no cause of action, but if this Court reaches the merits it should conclude that the county program may not provide benefits to undocumented individuals.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
DANIEL TENNY
s/ Lindsey Powell
LINDSEY POWELL
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
lindsey.e.powell@usdoj.gov
(202) 616-5372

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 10,492 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Lindsey Powell
LINDSEY POWELL

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Lindsey Powell
LINDSEY POWELL

ADDENDUM

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8 U.S.C. § 1601 – Statements of national policy concerning welfare and immigration.

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that—

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

8 U.S.C. § 1621 – Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits.

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

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

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year,

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

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

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

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

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

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

(c) "State or local public benefit" defined

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

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

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

(2) Such term shall not apply—

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

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [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.

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

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

8 U.S.C. § 1624 – Authority of States and political subdivisions of States to limit assistance to aliens and to distinguish among classes of aliens in providing general cash public assistance.

(a) In general

Subject to subsection (b) of this section and notwithstanding any other provision of law, a State or political subdivision of a State is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State.

(b) Limitation

The authority provided for under subsection (a) of this section may be exercised only to the extent that any prohibitions, limitations, or restrictions imposed by a State or political subdivision of a State are not more restrictive than the prohibitions, limitations, or restrictions imposed under comparable Federal programs. For purposes of this section, attribution to an alien of a sponsor's income and resources (as described in section 1631 of this title) for purposes of determining eligibility for, and the amount of, benefits shall be considered less restrictive than a prohibition of eligibility for such benefits.

8 U.S.C. § 1625 – Authorization for verification of eligibility for State and local public benefits.

A State or political subdivision of a State is authorized to require an applicant for State and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility.