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Federal Constraints on States' Ability to License an Undocumented Immigrant to Practice Law

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FEDERAL CONSTRAINTS ON STATES' ABILITY TO
 LICENSE AN UNDOCUMENTED IMMIGRANT
 TO PRACTICE LAW

*Adam Wright**

No court has decided whether an undocumented immigrant can be admitted to a state bar in a manner consistent with federal law. At the time of this writing, the issue is pending before the California Supreme Court. Federal law prohibits states from providing public benefits to undocumented immigrants. In its definition of a “public benefit,” 8 U.S.C. § 1621 includes any professional license “provided by an agency of a State . . . or by appropriated funds of a State” The law’s prohibitions, however, are not unqualified. The statute’s “savings clause” allows states to provide public benefits to immigrants unlawfully present through an affirmative enactment of state law. Current scholarship surrounding this issue has primarily focused on public policy implications. This Note sets out to answer the question of whether 8 U.S.C. § 1621 generally precludes states from issuing law licenses to undocumented immigrants, and if so, how a state may circumvent that prohibition. First, this Note addresses the threshold question of whether a law license is a public benefit under the federal statute. Contrary to the argument put forward by the Committee of Bar Examiners of the State Bar of California, I argue that the most straightforward reading of the statute includes law licenses within the category of prohibited public benefits. Second, this Note explores how a state could use the statute’s savings clause to provide law licenses to undocumented immigrants. By requiring an affirmative enactment of state law, Congress likely had in mind legislative enactments. I argue, however, that in the realm of bar admission where state supreme courts have plenary power to set requirements, a court rule allowing for eligibility of undocumented immigrants should be sufficient to trigger the statute’s savings clause.

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INTRODUCTION

In the late 1970s, Sergio Garcia’s parents emigrated from Villa Jimenez, México to the United States without proper documentation for themselves or their seventeen-month-old son.¹ After spending the first years of Garcia’s childhood stateside, the family returned to México, only to again make the trek north to the United States when Garcia was seventeen.² By this time, Garcia’s father had obtained lawful permanent resident (“LPR”) status, and in 1994 he filed a petition to gain LPR status for his son.³ The petition was approved in January of 1995, but because of the inordinate delays that plague the immigration system, Garcia’s visa still has not become available.⁴ His family survived in California on limited resources: his parents worked as farm laborers while he financed his college

1. See Assemb. Con. Res. No. 167, 2012 Leg., Reg. Sess. (Cal. 2012).

2. *Id.*

3. See *Lawful Permanent Resident (Lpr)*, FINDLAW LEGAL DICTIONARY, <http://dictionary.findlaw.com/definition/lawful-permanent-resident-lpr-.html> (last visited Nov. 12, 2013); see also *Chapter 2: LPR Admission for Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter2.html> (last updated June 10, 2013). Mr. Garcia’s father has since gained full citizenship status. See Opening Brief of the Comm. of Bar Exam’rs Re: Motion for Admission of Sergio C. Garcia to the State Bar of California at 1, Sergio C. Garcia on Admission, No. S202512 (Cal. filed June 18, 2012) [hereinafter Opening Brief of the Comm. of Bar Exam’rs].

4. See Assemb. Con. Res. No. 167, 2012 Leg., Reg. Sess. (Cal. 2012). Because the number of immigrant visas available each year is limited, an individual may be approved for a visa, but it may take years for the visa to become available. See *Visa Bulletin for November 2013*, U.S. DEP’T OF STATE (Oct. 9, 2013), http://travel.state.gov/pdf/visabulletin/visabulletin_no-

education by bagging groceries.⁵ After graduating from college, Garcia enrolled in night classes at Cal Northern School of Law, and in 2009, thirty years after his initial arrival to the United States, the Committee of Bar Examiners of the State Bar of California determined that he met all of the necessary requirements for admission to the bar and certified his name to the California Supreme Court.⁶ Garcia is now asking the court to admit him to the bar despite his undocumented immigration status.⁷

Garcia's effort to gain a law license, however, has been frustrated by his undocumented status. Although the Committee certified Garcia's fitness for the bar, the California Supreme Court has the ultimate say in admission.⁸ On May 16, 2012, the court issued an Order to Show Cause to the Committee to explain why an undocumented immigrant should be admitted to the bar.⁹

This issue has the potential to affect a significant number of undocumented immigrants who wish to pursue a legal career.¹⁰ In 2008, there

verember2013.pdf (indicating that visas are only now becoming available for many Mexican nationals who were approved for a family-based visa in the early 1990s).

5. Paloma Esquivel, *Undocumented Chico man passed the bar, but can he practice law?*, L.A. TIMES (June 11, 2012), <http://articles.latimes.com/2012/jun/11/local/la-me-sergio-garcia-20120611>.

6. *Id.*; Assemb. Con. Res. No. 167, 1012 Leg., Reg. Sess. (Cal. 2012). Once the Committee determines an applicant is eligible for admission, it submits the applicant's name to the state supreme court, which makes the final admission decision. See Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 4 ("The State Bar makes recommendations regarding admission matters to [the state supreme court], but its assistance is advisory. It is [the state supreme court] that makes the ultimate decisions under its plenary power over the practice of law in California.").

7. Sergio C. Garcia on Admission, No. S202512 (Cal. filed June 18, 2012). In a similar case, the Florida Board of Bar Examiners asked the Florida Supreme Court to issue an advisory opinion answering the same question. Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to The Florida Bar, No. SC11-2568, at *1 (Fla. Apr. 4, 2013). On April 4, 2013 the Florida Supreme Court denied the bar application of Jose Godinez-Samperio, an undocumented immigrant. The Court denied the application because it said it must first decide the larger issue of whether an undocumented immigrant can be admitted to the state bar. See Miranda Leitsinger, *Florida Court: Undocumented Immigrant Can't Be Admitted to the Bar*, NBC NEWS (Apr. 4, 2013, 6:50 PM), http://usnews.nbcnews.com/_news/2013/04/04/17602126-florida-court-undocumented-immigrant-cant-be-admitted-to-bar. The same question is likely to soon arise in New York. See Bill Kazcor, *Jose Godinez-Samperio, Undocumented Immigrant, Fights For Florida Law License*, HUFFINGTON POST (Oct. 3, 2012, 12:06 PM), http://www.huffingtonpost.com/2012/10/03/undocumented-immigrant-in-fla-law-license_n_1935733.html.

8. See Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 1-2.

9. Order to Show Cause to the Comm. of Bar Exam'rs, Sergio C. Garcia on Admission, No. S202512 (Cal. filed June 18, 2012). In response to this order, the Committee submitted its opening brief explaining why undocumented immigrants are eligible for bar admission. See Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3.

10. The DREAM Bar Association, which represents undocumented lawyers and law students, evidences the rise in the number of such individuals. See DREAM BAR ASSOCIATION, www.dreambarassociation.com (last visited Nov. 12, 2013).

were an estimated 1.5 million undocumented minors living in the United States.¹¹ The millions of undocumented children who benefited from the Supreme Court's decision in *Plyler v. Doe* in 1982¹²—holding that a state cannot withhold the benefit of a public elementary education from undocumented children—are now reaching the age where they may be seeking professional careers. Several states have taken steps to ease the economic burdens that handicap undocumented immigrants' efforts to attend college, increasing the likelihood that more will pursue professional careers.¹³ However, significant obstacles remain, such as ineligibility for federal loans and grants.¹⁴

Many undocumented immigrants who arrived in the United States as children may have a temporary option to gain employment authorization despite their current status. In June of 2012, President Obama announced the Deferred Action for Childhood Arrivals (DACA) directive, which grants eligible individuals work authorization for two years, subject to renewal.¹⁵ Although this program has the potential to benefit those who grew up undocumented in the United States, it is unclear how wide of a net DACA will cast. First, gathering all the necessary documents may prove difficult for many individuals.¹⁶ U.S. Customs and Immigration Services (USCIS) received fewer than one-third of the expected 250,000 applications in the first month of the program.¹⁷ Second, many individuals will not meet the DACA requirements.¹⁸ Mr. Garcia, for example, does not qualify because he was not under the age of thirty-one as of June 15, 2012. Third, the durability of DACA is questionable. The program grants discretionary relief to eligible individuals for only two years and, without

11. Jeffrey Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RESEARCH CENTER (April 14, 2009), <http://www.pewhispanic.org/files/reports/107.pdf>.

12. 458 U.S. 202 (1982).

13. See *Undocumented Student Tuition: State Action*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/educ/undocumented-student-tuition-state-action.aspx> (identifying fourteen states that have affirmative laws allowing for in-state tuition rates for undocumented immigrants, two states allowing for in-state tuition rates for undocumented immigrants through Board of Regent action, and only four states that specifically bar such rates) (last updated July, 2013).

14. See *Young Undocumented Immigrants May Find College Elusive*, THE HUFFINGTON POST (Aug. 17, 2012, 9:15 AM), http://www.huffingtonpost.com/2012/08/17/young-undocumented-immigr_0_n_1795630.html (detailing the challenges that undocumented immigrants face when pursuing college).

15. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/childhoodarrivals> (detailing the guidelines for eligibility) (last updated Jan. 18, 2013).

16. For DACA requirements, see *id.*

17. Kirk Semple, *Undocumented Life Is a Hurdle as Immigrants Seek a Reprieve*, N.Y. TIMES, Oct. 3, 2012, at A1, available at <http://www.nytimes.com/2012/10/04/nyregion/for-illegal-immigrants-seeking-a-reprieve-lack-of-documents-is-again-a-hurdle.html>.

18. See *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 15.

renewal or relief through comprehensive immigration reform, the beneficiaries' status will again be in limbo.¹⁹ Regardless of whether an individual is eligible for DACA, such a temporary work license may not be sufficient to permit permanent entry into a state bar.

Currently, although no state has admitted an undocumented immigrant to its bar, no court has held that such immigrants are ineligible for admission.²⁰ This question of eligibility is now, for the first time, pending before a court.²¹ The main hurdle to admission is the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.²² This federal law prohibits states from providing public benefits to undocumented immigrants. "Public benefit" is defined, in part, as "any . . . professional license . . . provided . . . by an agency of a State or local government or by appropriated funds of a State or local government."²³ However, § 1621(d), referred to as "the savings clause," provides an escape hatch: it allows states to make undocumented immigrants eligible for the prohibited public benefits where there is an "enactment of a state law" that "affirmatively provides for such eligibility."²⁴ Thus, the question under the statute turns on whether a bar license is a "public benefit," and if so, whether there is a positive enactment of state law that would render undocumented immigrants eligible for a bar license.

This Note argues for the same outcome that the Committee of Bar Examiners of the State Bar of California ("the Committee") endorses: that an undocumented immigrant can be admitted to a state bar in a manner that is consistent with § 1621. However, while the Committee and other proponents view the door of § 1621 as wide open to admission, this Note argues that the door is only slightly ajar, and suggests that advocates should focus their attention on a more nuanced path to admission—the savings clause.

Part I first traces the principle legal arguments that have been developed both in favor of and against bar eligibility of undocumented immigrants. Part II, contrary to the Committee's position, argues that a court will likely determine that a law license is a public benefit because it is provided by use of state appropriated funds. Next, Part III argues that although § 1621 generally prohibits granting law licenses to undocumented immigrants, state supreme courts may invoke the statute's savings clause by

19. See *id.* (noting that the discretionary relief is for a period of two years).

20. See Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 2 (describing this issue as one of "first impression").

21. See *id.*

22. 8 U.S.C. § 1621 (1996).

23. 8 U.S.C. § 1621(d).

24. *Id.*

enacting a court rule that permits the admission of undocumented immigrants to the state bar.²⁵

I. THE LEGAL ARGUMENTS

The California Supreme Court is the first to address head on the question of whether an undocumented immigrant can be admitted to a state bar. The decision of that court is still pending at the time of this writing. This section highlights the principal arguments put forth both in favor of and against bar eligibility of undocumented immigrants. First, I describe the U.S. Department of Justice's ("DOJ") argument against admission. Second, I detail the Committee of Bar Examiners of the State Bar of California's position in favor of admission.

A. *The Department of Justice's Argument Against the Eligibility of Undocumented Immigrants For Admission to the State Bar*

In *In re Sergio C. Garcia on Admission*, the DOJ, the most notable opponent to Garcia's admission to the bar, argues that 8 U.S.C. § 1621 precludes Garcia's eligibility for bar admission because a law license is a "public benefit" within the meaning of § 1621.²⁶ The DOJ posits that a law license is a public benefit because it is provided by appropriated state funds.²⁷ Mr. Garcia is seeking a professional license that requires an order from the state supreme court, which operates through state appropriations.²⁸ Therefore, it follows that Mr. Garcia is seeking a professional license provided by appropriated funds of the state—which is prohibited by § 1621.²⁹

Second, the DOJ makes a cursory argument that a law license also falls under the prohibitions of § 1621 because the state supreme court may be considered a state agency. Although the DOJ concedes that the term "agency" is usually meant to exclude courts, it recognizes that because of

25. This Note deals solely with the legal question of whether § 1621 prohibits an undocumented immigrant from being eligible for admission to a state bar. For a persuasive argument in favor of admission on public policy grounds see Kevin R. Johnson, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, 46 U.C. Davis L. Rev. 1655, 1669 (2013). I should also note that even if an undocumented immigrant were admitted to a state bar, federal law would still prohibit an employer from hiring him or her. This employment restriction, however, does not preclude all uses of a law license. See Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 25–28.

26. Application and Proposed Brief For Amicus Curiae The United States of America at 5, *Sergio C. Garcia on Admission*, No. S202512 (Cal. filed June 18, 2012) [hereinafter *Amicus Curiae The United States of America*].

27. *Id.* at 6.

28. *Id.* at 9.

29. *Id.* at 7, 9 ("Whether or not this Court is an 'agency' for purposes of 8 U.S.C. § 1621, there is no doubt that this Court is the entity that issues the license, and that this Court operates using appropriated funds.").

the “broad sweep” of § 1621, it would be possible to interpret “agency” to include “any instrumentality of the State,” thereby including state courts.³⁰

The DOJ suggests it is unlikely that Congress, by enacting a statute with such broad reach, intended to exempt law licenses from the category of “professional licenses.”³¹ The brief states, “[t]hese provisions were plainly designed to preclude undocumented aliens from receiving commercial and professional licenses issued by States and the federal government.”³² The DOJ also argues that it would be odd for the broad proscriptions of the statute to be interpreted as exempting law licenses.³³

B. *The Committee of Bar Examiners of the State Bar of California’s Arguments in Favor of Eligibility of Undocumented Immigrants for Admission to the State Bar*

The Committee, on the other hand, along with several other attorneys, legal scholars, and community groups, has endorsed the admission of Mr. Garcia to the state bar.³⁴ In its brief, the Committee argues that § 1621 does not prohibit Mr. Garcia’s admission because a law license is not a “public benefit” under the statute.³⁵ Contrary to the DOJ’s position, it argues that appropriated funds of the state do not fund bar licenses.³⁶ The Committee focuses on the definition of “appropriate,” meaning, “to set apart for or assign to a particular purpose or use.”³⁷ It takes the position that because the California Legislature has not set aside funds for the California Supreme Court specifically for granting admission to the bar, the California Supreme Court’s involvement in bar admission does not constitute a use of appropriated state funds.³⁸ The functions of administering the bar exam and recommending applicants for licensure to the Supreme Court fall entirely to the Committee, an arm of the State Bar Association.³⁹ The Committee argues that because the Committee’s functions are

30. *Id.* at 9.

31. *Id.* at 7.

32. *Id.*

33. *See id.*

34. Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3, at 5. Brief of Amicus Curiae California Attorney General Kamala D. Harris in Support of Petitioner, Sergio C. Garcia on Admission, No. S202512 (Cal. filed June 18, 2012) [hereinafter Brief Amicus Curiae Kamala D. Harris]. Additionally, several organizations, such as the Mexican American Bar Association, the ACLU, and the DREAM Bar Association, submitted briefs supporting Garcia’s admission.

35. Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3, at 5–11; *see also* Brief Amicus Curiae Kamala D. Harris, *supra* note 34, at 5–10.

36. Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3, at 11–12.

37. *Id.* at 12.

38. *Id.*

39. *Id.*

funded entirely through applicants' license fees, no appropriated state funds are utilized when the state provides a law license.⁴⁰

The fact that the state supreme court issues the final order of admission, the Committee says, "does not change the fact that the license is not 'provided by appropriated funds.'"⁴¹ In its response to the DOJ brief, the Committee states that the overly broad view taken by the DOJ would lead to absurd practical consequences.⁴² For example, if state supreme court action were considered a use of appropriated state funds, the court would be prohibited from enforcing the terms of a contract in favor of an undocumented immigrant, because § 1621's prohibitions include contracts provided by state appropriated funds.⁴³

The Committee dismisses the DOJ's argument that the state supreme court may be considered a "state agency" under the statute.⁴⁴ The Committee argues that the California Supreme Court is not an "agency," but rather one of three co-equal branches of the California government.⁴⁵ Both the Committee and the DOJ agree that "it would be strange indeed to refer to a court as an 'agency.'"⁴⁶

In its opening brief, the Committee briefly addresses the possibility that even if § 1621 were applicable, the state supreme court could enact a court rule allowing for the eligibility of undocumented immigrants for admission to the State Bar.⁴⁷ This would invoke the savings clause—§ 1621(d)—and permit undocumented immigrants to become eligible for admission to the bar through an enactment of state law.⁴⁸ In its reply brief, the Committee further argues that because the state supreme court has the inherent power of regulating the legal profession, it serves in a quasi-legislative capacity when exercising that power.⁴⁹ In this way, the Committee suggests, the California Supreme Court may enact a state law providing for the admission of undocumented immigrants to the state bar.

C. Summary of Arguments

The DOJ's principal argument is that a law license is granted by a state supreme court through use of appropriated funds; thus, undocu-

40. *Id.* at 13.

41. *Id.*

42. Answer of the Comm. of Bar Exam'rs of the State Bar of California to Amicus Brief of The United States of America at 10, Sergio C. Garcia on Admission, No. S202512 (Cal. filed June 18, 2012) [hereinafter Answer of the Comm. of Bar Exam'rs].

43. *Id.* at 6.

44. *Id.* at 9.

45. *Id.*

46. *Id.* at 10–11 (quoting *Hubbard v. United States*, 514 U.S. 695, 699 (1995)).

47. Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 18 n.11.

48. *Id.*

49. Answer of the Comm. of Bar Exam'rs, *supra* note 42, at 9.

mented immigrants are rendered ineligible for bar admission by § 1621. The Committee argues that § 1621 is not implicated because a law license is funded only through applicant fees and a state supreme court order granting admission does not amount to a use of “appropriated funds.” Although these arguments are specific to the California case, they will apply broadly as bar admission procedures are similar throughout the country.⁵⁰

II. A LAW LICENSE IS A “PUBLIC BENEFIT” UNDER § 1621

The most obvious reading of § 1621 seems to include law licenses within its broad proscription of undocumented immigrants’ eligibility for public benefits. Part A argues that courts are likely to determine that a law license is provided by state-appropriated funds. Part B briefly notes that even if a court concludes that a law license is not a public benefit, advocates still face another problem, albeit one they are more likely to overcome: a court could determine that state Boards of Bar Examiners function as state agencies in providing law licenses and thus § 1621 would prohibit states from providing law licenses to undocumented immigrants.

A. *A Law License is Provided by State-Appropriated Funds*

On October 2, 2012, the Florida Supreme Court heard oral arguments regarding whether an undocumented immigrant could be admitted to the Florida State Bar.⁵¹ When considering whether a state supreme court order issuing a law license constitutes a use of appropriated state funds, one justice remarked, “I think we’re using appropriated fund [sic] as we sit here this morning, wouldn’t you agree?”⁵² Of course, this justice’s initial reaction will not be determinative of the legal question, but his response is likely indicative of the presumption from which judges will approach their analysis. The simplicity of the logic is enticingly persuasive: state appropriations fund the court; the court uses those funds to issue the final order granting a law license; therefore, appropriated state funds are utilized to provide a law license.⁵³

The Committee makes three arguments to refute this interpretation.⁵⁴ First, it argues for a narrow construction of the word “appropri-

50. See *Basic Overview*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Nov. 14, 2013) (“In order to obtain a license to practice law, almost all law school graduates must apply for bar admission through a state board of bar examiners. Most often this board is an agency of the highest state court in the jurisdiction . . .”).

51. Florida Board of Bar Exam’rs Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to The Florida Bar, No. SC11-2568, at *1 (Fla. Apr. 4, 2013).

52. Transcript of Oral Argument at 9, Florida Board of Bar Exam’rs, No. SC11-2568 (Fla. Apr. 4, 2013).

53. See *Amicus Curiae The United States of America*, *supra* note 26, at 9.

54. See Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3; Answer of the Comm. of Bar Exam’rs, *supra* note 42.

ated.”⁵⁵ Second, it asserts that bar applicant fees are the sole source of funding for law licenses, and thus appropriated funds are not utilized in providing licenses.⁵⁶ Third, the Committee points to absurd consequences that would result if bar licenses were considered public benefits.⁵⁷ I argue that each of these is ultimately unpersuasive.

1. The Committee’s Narrow Interpretation of “Appropriated” is Unwarranted

The Committee relies on a dictionary definition of “appropriated” that requires funds to be set aside for a particular use—here, the granting of a law license.⁵⁸ The conclusion of this argument, therefore, is that because no appropriated state funds are specifically earmarked for the issuance of law licenses, appropriated state funds are not used to provide law licenses.⁵⁹

This argument, however, fails to point to anything in the language or legislative history of § 1621 that explains why such a particular level of specificity would be required. It is not evident why funds set aside by a state legislature specifically for use by a state supreme court should not be considered an “appropriation” within the meaning of the statute. The legislature presumably knew when setting aside these funds that a certain amount of them would be used to provide law licenses. The Committee presents no evidence that suggests Congress intended to use the word “appropriated” as a legal term of art with such a circumscribed meaning.

Under Federal Appropriations Law, funds that Congress sets aside for an agency may be used, under certain circumstances, for expenditures not specifically authorized in an appropriations act.⁶⁰ Spending agencies are afforded discretion in deciding “how to carry out the objects of the appropriation.”⁶¹ However, using appropriated funds in a discretionary manner not specifically designated by the legislature does not “un-appropriate” those funds.

55. See Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3, at 11–12.

56. See *id.* at 13.

57. Answer of the Comm. of Bar Exam’rs, *supra* note 42, at 7–8.

58. Opening Brief of the Comm. of Bar Exam’rs, *supra* note 3, at 11 (“The term ‘appropriated’ means ‘to set apart for or assign to a particular purpose or use.’ (Merriam Webster Online Dict. www.merriam-webster.com/dictionary/appropriated . . .)”).

59. *Id.* at 12 (“The question here is whether the California Legislature has set apart funds for the California Supreme Court for a particular use prohibited by section 1621. The answer is no.”); *c.f.* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 2:33 (2013) (discussing the shortfalls of relying on dictionary definitions to make arguments).

60. See OFFICE OF THE GENERAL COUNSEL, UNITED STATES GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATION LAW 251–52 (3d ed. 2004); see also *Ass’n of Civilian Technicians v. F.L.R.A.*, 370 F.3d 1214, 1221–22 (D.C. Cir. 2004) (stating that federal law “does not require that every authorized expenditure be expressly authorized in an appropriations act”).

61. PRINCIPLES OF FEDERAL APPROPRIATION LAW, *supra* note 60, at 255.

Therefore, to fall within the ambit of § 1621's prohibitions, it is not necessary that a state legislature appropriate funds expressly for the purpose of providing bar licenses. The language of the statute makes no requirement that appropriations attain a certain level of specificity of purpose.⁶² Additionally, it is inconsequential that the majority of the bar admission process is carried out by the Committee because it is not the Committee, but rather the court, that ultimately provides bar licenses to applicants.⁶³ Even though the amount of appropriated funds used by state supreme courts to issue law licenses may be minimal, appropriated funds are nevertheless put to use to provide the license. "Prohibitions on the use of appropriated funds for a particular purpose prohibit the use of *any* appropriated funds for that purpose."⁶⁴ Section 1621 does not distinguish between different amounts of appropriated funds utilized. It is a clear proscription of using appropriated funds, whether one dollar or one billion dollars, to provide public benefits to undocumented immigrants.

2. Bar Applicant Fees Do Not Provide Law Licenses

The Committee also argues that because applicant fees alone fund the state bar's functions of administering the state bar exam and certifying applicants for licensure, no appropriated funds are used to provide the license.⁶⁵ The Committee recognizes that the state supreme court issues the final order granting the license, but says that this "does not change the fact that the license is not provided by appropriated state funds."⁶⁶ The Committee cites *Campos v. Anderson* to support the proposition that government involvement does not convert private funds into public benefits, but fails to note important distinctions between *Campos* and the case at hand.⁶⁷ In *Campos*, the court determined whether child support enforcement services provided by the District Attorney's (D.A.) Office constituted "aid" to needy persons under a public social services statute. The court held that these services did not amount to "aid" because "[a]ny payments recovered by [the D.A. Office] are not *provided by* the [office] but by the errant parent."

The Committee's reliance on *Campos* is unpersuasive; focusing on the plain meaning of the word "provide" distinguishes *Campos* from the issue at hand. In *Campos*, that Court was correct to note that the "errant parent," not the D.A. Office, *provides* the child support payments recov-

62. See 8 U.S.C. § 1621 (1998).

63. *Keller v. State Bar of California*, 496 U.S. 1, 11 (1990) ("The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court.")

64. Amicus Curiae The United States of America, *supra* note 26, at 11.

65. Opening Brief of the Comm. of Bar Exam'rs, *supra* note 3, at 12.

66. *Id.* at 13.

67. *Id.*; see also *Campos v. Anderson*, 57 Cal. App. 4th 784 (Cal. Ct. App. 1997).

ered by the Office. The payment originates with the parent. Similarly, a law license originates with the state supreme court's order issuing the license, and therefore a state supreme court is more analogous to the parent than the D.A. Office. Thus, a court plays a much more direct role in providing a law license than the D.A. Office played in providing the child support payment. A court functions as more than a conduit; its role is more than a mere formality, as the *Sergio Garcia* case plainly shows: if the California Supreme Court just passed along a license provided by the Committee, Mr. Garcia would already be a member of the California bar.⁶⁸

The Committee also fails to appreciate the fact that funding for the bar admission process can come from multiple sources—here, bar applicant fees *and* appropriated funds utilized by the state supreme court. Bar applicant fees are undeniably used in the bar admission process, and the Committee is right to argue that the process of granting law licenses does not convert those funds into public benefits. But this misses the point. Although non-appropriated state funds may finance the majority of the licensing process, it is the state supreme court, operating through appropriated state funds, that ultimately provides bar licenses.

3. The Committee's Warnings of Absurd Practical Consequences are Unfounded

The Committee next warns of the practical consequences that would follow if the use of the state supreme court's time were considered a use of appropriated funds under the statute.⁶⁹ Taken to its extreme, the Committee cautions, counting such action as a use of state-appropriated funds would mean that a court could not adjudicate a private contract matter in which an undocumented immigrant was the beneficiary.⁷⁰ However, this argument is unpersuasive.

This argument sets up a false analogy by equating a court's action in enforcing the terms of a private contract with issuing the final order to grant a law license. In the former, a court is not using appropriated funds to *provide* a contract; it is this *providing* that § 1621 expressly prohibits.⁷¹ Enforcing the terms of a contract is distinct from providing a contract. A private contract is provided by the parties who exchange promises, and the contract exists before a court ever becomes involved.⁷² Conversely, the court plays a direct role in providing a law license. Unlike a contract, the

68. See *Sergio C. Garcia on Admission*, No. S202512 (Cal. filed June 18, 2012).

69. Answer of the Comm. of Bar Exam'rs, *supra* note 42, at 7.

70. *Id.* at n.7. § 1621 includes contracts provided by state agencies or appropriated state funds as a "public benefit." 8 U.S.C. § 1621(c)(1)(A) (1998).

71. 8 U.S.C. § 1621(c)(1)(A) (1998).

72. See, e.g., *Bamcor LLC v. Jupiter Aluminum Corp.*, 767 F. Supp. 2d 959, 972 (N.D. Ind. 2011) ("A contract exists when there is an offer, acceptance, consideration, and mutual assent.").

law license does not exist without the court's involvement. Therefore, under § 1621 a court could enforce the terms of a contract to which an undocumented individual is a party even if it cannot provide a law license to the same person.

Other cases that demonstrate the importance of the word "provide" in the statute support the conclusion that the absurd consequences that the Committee points to are unlikely to follow. For example, in *City Plan Development, Inc. v. Office of Labor Commissioner*, the Nevada Supreme Court held that while a public works contract between the county and an employer may have amounted to a "public benefit," payment of the prevailing wage under that contract by the employer to undocumented public works employees did not amount to a "public benefit."⁷³ The court enforced the contract and reasoned that the employer "is simply not the entity 'providing' the public benefit contract"⁷⁴ The court in that case thus rightly focused their analysis on the word "providing."

The Committee cites *City Plan* as authority for the proposition that the issuance of a court order cannot constitute a use of appropriated state funds.⁷⁵ If this were the case, the Committee implies, the court in *City Plan* could not have enforced the contract between an employer and undocumented public works employees since § 1621 prohibits providing contracts to undocumented immigrants.⁷⁶ In a strained reading of the opinion, the Committee attributes this reasoning to the court. The *City Plan* court, however, had no reason to visit the question of whether use of its time amounted to use of appropriated funds because the court did not *provide* the contract. As the court noted, the prevailing wage clause was part of the contract provided by the two contracting parties: the employer and employees.⁷⁷ Whether the court used appropriated funds to enforce the contract was immaterial.

To be sure, the court in *City Plan* was using appropriated funds when it heard the case and made its decision, but the decisive factor is that the use of those appropriated funds played no role in *providing* the contract between the employer and employees. It is entirely consistent for a court, under § 1621, to be permitted to enforce a contract in favor of an undocumented immigrant while being prohibited to provide a law license to the same person.

B. *A Law License Might be Provided by a State Agency*

Even if advocates can successfully convince a court that appropriated funds are not used to provide bar licenses, they still risk running into the

73. 117 P.3d 182 (Nev. 2005).

74. *Id.* at 190 (emphasis added).

75. Answer of the Comm. of Bar Exam'rs, *supra* note 42, at 7.

76. *Id.* at 7 n.7.

77. *City Plan Dev., Inc.*, 117 P.3d at 190.

“state agency” prohibition of § 1621, which renders undocumented immigrants ineligible to receive professional licenses provided by state agencies.⁷⁸ In some contexts, courts have found that state bar associations, as administrative arms of state supreme courts, function as state agencies.⁷⁹ The Committee’s argument may counter this problem by emphasizing that bar licenses are provided by applicant fees utilized by the Committee of Bar Examiners, an arm of the State Bar. However, this is unlikely to pose an insurmountable challenge to advocates, as even the DOJ concedes that “absent contextual indications to the contrary, statutory references to a federal ‘agency’ are generally interpreted to exclude the federal courts.”⁸⁰ The same interpretation can be applied to state agencies and courts, and thus, while possible, it is unlikely that a court providing a bar license would be considered a state agency under § 1621’s proscriptions.

III. A STATE SUPREME COURT CAN INVOKE THE SAVINGS CLAUSE OF § 1621 TO RENDER UNDOCUMENTED IMMIGRANTS ELIGIBLE FOR BAR ADMISSION

Section 1621(d), the savings clause, provides:

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 . . . which affirmatively provides for such eligibility.⁸¹

Absent an enactment of state law to the contrary, federal law leaves undocumented immigrants ineligible for bar licenses, as argued above. The typical understanding is that only a *legislative* enactment of state law triggers the savings clause, meaning that only a state legislature may permit the granting of public benefits to undocumented immigrants. This understanding unnecessarily circumscribes the statute.⁸² A court rule allowing

78. 8 U.S.C. § 1621(c)(1)(A) (1998).

79. See, e.g., *Dubuc v. Michigan Bd. of Law Exam’rs*, 342 F.3d 610, 615 (6th Cir. 2003) (“Because they are arms of the Michigan Supreme Court for all purposes relevant to this lawsuit, the Board and the Bar are state agencies immune from this lawsuit”); see also *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401–02 (7th Cir. 1996), *overruled on different grounds by Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010).

80. See *Amicus Curiae The United States of America*, *supra* note 26, at 8; see also *Hubbard v. United States*, 514 U.S. 695, 699 (1995). The DOJ makes a cursory argument that within the broad sweep of § 1621, “agency” may be defined more broadly as any instrumentality of the state and thus include the state supreme court. But it cites no authority for this position and seems to argue this only half-heartedly. *Amicus Curiae The United States of America*, *supra* note 26, at 9.

81. 8 U.S.C. § 1621(d).

82. Courts repeatedly interpret “enactment of a State law” to mean *legislative* enactment. See, e.g., *Szewczyk v. Dep’t of Soc. Servs.*, 881 A.2d 259, 276 (Conn. 2005); *Dep’t of Health v. Rodriguez ex rel. Melendez*, 5 So. 3d 22, 26 (Fla. Dist. Ct. App. 2009).

for eligibility for admission to a state bar should suffice as “an enactment of state law” under § 1621(d), and advocates have failed to fully explore this as a viable option for Mr. Garcia and similarly situated individuals.⁸³ Indeed, this may be the only practical option available to gain admission under federal law.⁸⁴

First, I note that this interpretation is fully consistent with the text of the statute. Second, I argue that it was Congress’s intent to leave states with some autonomy to provide public benefits for undocumented immigrants. To carry out that intent, a judicial enactment should be treated as a legislative enactment in the context of bar membership. I then argue that contrary legislative history does not justify reading a limitation on state autonomy into the savings clause. Lastly, I address courts’ tendency to interpret the savings clause broadly. I argue that these points, taken together, establish that a state supreme court may provide eligibility for undocumented immigrants under § 1621’s savings clause.

A. *The Plain Language of the Statute Does Not Confine an “Enactment of a State Law” to Legislative Enactments*

The text of the savings clause does not limit “enactments of State law” to legislative enactments.⁸⁵ Opponents, nevertheless, argue that only a legislature may *enact* a law.⁸⁶ However, plain meaning and popular use of the word “enact” is not so limited. The Merriam-Webster Dictionary does not define “enact” as an action exclusive to legislatures; it is merely defined as “to establish by legal and authoritative act,” or “to make into law. . . .”⁸⁷ “Enact” is not defined, nor is it generally thought of, as an action unique to legislatures.

Further, courts commonly refer to court-enacted rules. For example, the California Supreme Court has discussed the “rules of court *enacted* in response to [a] constitutional amendment”,⁸⁸ the Delaware Supreme Court has referenced a “statute or rule of court *enacted* under authority of law”,⁸⁹ and many other state supreme courts and federal appellate courts

83. In Mr. Garcia’s case, the briefs of the Committee and a few others in favor of admission addressed this issue, but only briefly.

84. California may be the exception to this general rule. The California Legislature passed a bill explicitly providing that undocumented immigrants are eligible for bar admission in the state. See Jennifer Medina, *California Gives Expanded Rights to Noncitizens*, N.Y. TIMES, Sept. 20, 2013, at A1, available at <http://www.nytimes.com/2013/09/21/us/california-leads-in-expanding-noncitizens-rights.html>.

85. When interpreting statutes, the U.S. Supreme Court looks first to the text of the statute. See, e.g., *United States v. Wells*, 519 U.S. 482, 490 (1997) (“We begin with the text.”).

86. See Larry DeSha, Amicus Brief in Opposition to Admission at 15, *Sergio C. Garcia on Admission*, No. S202512 (Cal. filed June 18, 2012).

87. *Enact – Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/enact> (last visited Nov. 8, 2013).

88. *Snukal v. Flightways Mfg.*, 3 P.3d 286, 302 (Cal. 2000) (emphasis added).

89. *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939) (emphasis added).

often have pointed to court-enacted rules.⁹⁰ These cases refer to court-enacted rules that deal with bearing the cost of printing a transcript record,⁹¹ rules setting the requirements for appeal in state court proceedings,⁹² and rules prescribing class action requirements.⁹³ The plethora of these examples indicates that courts have not restricted the ability to “enact” a law to the legislature.

The fact that these cases refer to court-enacted “rules” rather than “laws” is of little significance. Similar to legislative enactments of law, court rules have “the force of law” and are in this important way indistinguishable from legislative laws.⁹⁴ The U.S. Court of Appeals for the Second Circuit has stated that “[l]ocal rules have the force of law, as long as they do not conflict with a rule prescribed by the Supreme Court, Congress, or the Constitution.”⁹⁵ The Committee, citing Black’s Law Dictionary, notes, “[L]aw means more than statutes and includes legislation, judicial precedents, rules, and legal principles . . .”⁹⁶ Thus, it follows that a state court may enact a law sufficient to activate § 1621’s savings clause.

B. *Congress Intended to Give States Autonomy in Providing Public Benefits to Undocumented Immigrants*

Not only is a court-enacted rule consistent with the language of the Statute, but it also helps further the purpose of the statute’s savings clause. Although § 1621(d) has never been triggered by a court rule,⁹⁷ the sufficiency of a judicial enactment regarding bar eligibility fully accords with the spirit of the statute. Congress plainly intended to reduce incentives for illegal immigration by denying eligibility for public benefits, but the

90. See, e.g., *American Mill Co. v. Brennan Marine, Inc.*, 623 F.3d 1221, 1224 (8th Cir. 2010); *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009); *McDougall v. Schanz*, 461 Mich. 15, 51 (1999).

91. *Peyton*, 8 A.2d at 91.

92. *Thompson*, 580 F.3d at 443.

93. *Vallario*, 554 F.3d at 1263.

94. See, e.g., *Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008); *Sara M. v. Superior Court*, 116 P.3d 550, 556 (Cal. 2005) (noting that a court rule has the force of a statute as long as not inconsistent with a legislative act or constitutional provision).

95. *Contino*, 535 F.3d at 126.

96. Answer of the Committee of Bar Examiners, *supra* note 42, at 10 n.12 (quoting BLACK’S LAW DICTIONARY 606, 962 (9th ed. 2009)).

97. States have attempted to provide public benefits to undocumented immigrants without a legislative act. For example, the Rhode Island Board of Governors for Higher Education enacted a policy to provide for in-state tuition for undocumented immigrants, despite the repeated failure of a bill providing for this benefit in the legislature. This policy has not yet been subjected to legal challenge. See Residency Policy, R.I. Bd. of Governors for Higher Educ. (Sept. 26, 2011), <http://www.ribghe.org/residency1for2012.pdf>; see also Erika Niedowski, *R.I. education board OK’s in-state tuition for undocumented students*, BOSTON GLOBE, Sept. 27, 2011, available at http://www.boston.com/news/local/rhode_island/articles/2011/09/27/ri_education_board_oks_in_state_tuition_for_undocumented_students/.

prohibitions are not absolute.⁹⁸ By including the savings clause, Congress intended to give states some autonomy in providing public benefits to undocumented immigrants.⁹⁹ If a state so chooses, it may provide a prohibited public benefit through an enactment of state law.¹⁰⁰ This grant of autonomy demonstrates Congress's attempt to balance its perceived need to prohibit the listed public benefits with leaving traditional state powers—such as regulation of bar admission—intact.¹⁰¹

When enacting § 1621, Congress had in mind public benefits that are provided by state legislatures. This is evidenced by the list of prohibited public benefits in § 1621(c): grants, contracts, loans, retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment benefits, all of which are provided by state legislatures or by administrative agencies that have been granted statutory authority. Regarding these public benefits, the savings clause adequately protects state autonomy by allowing for a legislative enactment of state law to provide these benefits.¹⁰²

A bar license is unique among § 1621's prohibited public benefits: the power to grant bar licenses falls almost exclusively to the judiciary.¹⁰³ Regulating admission to the bar is an inherent power of state supreme courts.¹⁰⁴ “[E]very state in the United States recognizes that the power to admit . . . attorneys rests in the judiciary. This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted is a judicial, and not a legislative, question.”¹⁰⁵ Generally, state supreme courts do not share this power with state legislatures.¹⁰⁶ In most other circumstances a statute will trump a contrary court rule. However, when a statute regulating bar admission conflicts with a court rule, “the statutory provi-

98. See 8 U.S.C. § 1601(6) (1996).

99. See, e.g., *Kaider v. Hamos*, 975 N.E.2d 667, 673 (Ill. App. Ct. 2012). States have most frequently invoked the savings clause to provide in-state tuition breaks, a public benefit, to undocumented immigrants. See *Undocumented Student Tuition: State Action*, *supra* note 13 (noting fourteen state legislatures, including those as diverse as Utah, New York, Wisconsin, Kansas, and Illinois, have passed laws allowing for undocumented immigrants to pay in-state tuition); see also CAL. EDUC. CODE § 66021.6(a) (2012) (“The Legislature finds and declares that this section is a state law within the meaning of Section 1621(d) of Title 8 of the United States Code.”); CONN. GEN. STAT. § 10a-29 (2011) (“In accordance with 8 USC 1621(d) . . .”).

100. 8 U.S.C. § 1621(d) (1998).

101. See *Kaider*, 975 N.E.2d at 673 (“Congress recognized a need to give the states autonomy . . .”).

102. 8 U.S.C. § 1621(d).

103. *In re Attorney Discipline System*, 967 P.2d 49, 54 (Cal. 1998).

104. *Id.*

105. *Id.* (internal citation omitted). The court noted, however, that the North Carolina Supreme Court has recognized a partial exception to this general rule. *Id.* at 593 n.6.

106. *Banales v. Jackson*, 601 S.W.2d 508, 512 (Tex. Civ. App. 1980).

sions must yield to the Court's rules," as the judiciary is more authoritative in such circumstances.¹⁰⁷

Congress carefully crafted § 1621 to honor state sovereignty, and in keeping with this intent, a judicial enactment should be treated like a legislative enactment in the realm of bar admissions. A strict requirement that the savings clause be triggered only by a legislative enactment would fail to grant states adequate autonomy to regulate bar admission. State legislatures do not traditionally play a role in setting bar admission rules.¹⁰⁸ As the California Committee of Bar Examiners noted, "[T]he Supreme Court is the authority within the State responsible for enacting laws in this area."¹⁰⁹ In order for the savings clause to preserve state autonomy in regulating bar admission in the way it does for the other prohibited benefits, a judicial enactment must be sufficient to allow for bar eligibility of undocumented immigrants.

The interpretive presumption that the U.S. Supreme Court adopted in *Gregory v. Ashcroft* is protective of federalism interests and serves to bolster the argument that a court rule is sufficient to trigger the savings clause.¹¹⁰ Justice O'Connor, writing for the majority, states, "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' [the usual constitutional balance of federal and state powers]."¹¹¹ Giving "state-displacing weight [to] federal law" must not be based on "mere congressional ambiguity."¹¹² Rather, Congress must give a "plain statement" indicating its intention to override state law.¹¹³

To understand what a "plain statement" looks like, it is helpful to examine the Americans with Disabilities Act ("ADA").¹¹⁴ The ADA applies to, among other groups, "public entities," which are defined to include "any State or local government" and "any department, agency, special purpose district or other instrumentality of a State or States or local government."¹¹⁵ There has been no dispute that the definition of "public

107. *Id.*; see also *Merco Constr. Engineers, Inc. v. Municipal Court*, 581 P.2d 636, 638 (Cal. 1978) ("[L]egislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary. When conflict exists, the legislative enactment must give way.").

108. See *Attorney Discipline System*, 967 P.2d at 54–55.

109. Answer of the Comm. of Bar Exam'rs, *supra* note 42, at 12 (emphasis omitted).

110. 501 U.S. 452 (1991) (holding that because the Age Discrimination in Employment Act did not explicitly apply to state judges, the Court would not assume that Congress intended to infringe on the traditional state function of selecting judicial office).

111. *Id.* at 460 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)).

112. *Id.* at 464 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6–25, at 480 (2d ed. 1988)).

113. *Id.*

114. 42 U.S.C. § 12101 (2008).

115. 42 U.S.C. § 12131.

entities” amounts to a clear statement from Congress that the ADA was intended to reach state court action.¹¹⁶ Therefore, courts hold that the ADA requirements properly apply to the traditional state judicial function of setting fitness requirements for the bar.¹¹⁷

No equivalent clear statement is present in § 1621’s saving clause. It is axiomatic to say that traditional state–federal balancing requires states to have the freedom to set their own bar admission regulations.¹¹⁸ The Second Circuit has stated that federal courts are “particularly chary of intrusion into the relationship between the state and those who seek license to practice in its courts.”¹¹⁹ Within states, it is the judiciary that exercises the power to regulate bar admission.¹²⁰ Section 1621(d) indicates no express intent to require unprecedented state legislative involvement in bar admission by demanding *legislative* enactments to override the statute’s prohibitions. Because Congress provided no clear statement to the contrary, the savings clause should not be construed to require an interference with a basic tenet of state sovereignty—state courts should retain their traditional power of setting bar admission standards.

C. *A Conference Committee Report on the Statute is Not Conclusive*

Opponents of admission are likely to point to legislative history to argue that judicial enactments are insufficient to provide bar eligibility for undocumented immigrants. In particular, a conference committee report on § 1621 states, “Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.”¹²¹ However, the California Supreme Court has stated that this com-

116. See, e.g., *State ex rel. Oklahoma Bar Ass’n v. Busch*, 919 P.2d 1114, 1119 (Okla. 1996) (“The ADA clearly applies to the Oklahoma Bar Association, as an arm of this Court.”); *Petition of Rubenstein*, 637 A.2d 1131, 1136 (Del. 1994) (“The Board, as an instrumentality of this Court, constitutes a public entity within the meaning of [the ADA].”); *Doe v. Jud. Nominating Comm’n for Fifteenth Jud. Cir. of Fla.*, 906 F. Supp. 1534, 1540 (S.D. Fla. 1995) (“[T]he [Judicial Nominating Commission] is a ‘public entity’ within the meaning of the ADA and is subject to its provisions.”).

117. See, e.g., *Busch*, 919 P.2d at 1119; *Petition of Rubenstein*, 637 A.2d at 1136; *Doe v. Judicial Nominating Comm’n*, 906 F.Supp. at 1540.

118. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (noting that states “have broad power to establish standards for licensing practitioners and regulating the practice of professions.”); *In re Griffiths*, 413 U.S. 717, 722–23 (1973) (“It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses the character and general fitness requisite for an attorney and counselor-at-law.”) (internal quotations omitted).

119. *Tang v. App. Div. of the N.Y. Sup. Ct.*, 487 F.2d 138, 143 (2d Cir. 1973).

120. See *In re Attorney Discipline System*, 967 P.2d 49, 54 (Cal. 1998).

121. H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.).

mittee report “cannot change plain statutory language [of § 1621(d)].”¹²² In *Martinez*, the court held that to trigger the savings clause, a law did not have to explicitly reference § 1621(d), despite the fact that the conference committee report explicitly stated that a reference to the provision is required.¹²³ The committee report cannot trump the plain language of the savings clause, which leaves open the possibility that a judicial enactment could provide bar admission eligibility to undocumented immigrants.

Additionally, the committee report does little to illuminate congressional intent regarding the interaction between the savings clause and bar admission regulations. The statement contained in the report likely amounts to only a rough first impression of what the savings clause requires in certain circumstances. To the extent that the statement anticipates a requirement of a legislative enactment, it is probably an accurate interpretation for all but a few attempts to invoke the savings clause. However, as discussed above, at the time of drafting, Congress likely did not appreciate the fact that bar licenses, unlike every other public benefit the statute prohibits, are provided by state judiciaries rather than state legislatures. Because Congress seemingly did not confront this precise issue, the committee report should not be read to infer that Congress intended to exclude judicial enactments from the ambit of the savings clause.

D. Courts Have Interpreted the Savings Clause Broadly

No court has decided whether a court rule regulating bar admission successfully triggers the savings clause. Case law on § 1621(d) has been limited to interpreting whether a legislative act “affirmatively provides” for public benefit eligibility, as the statute requires. On this issue, courts have trended away from a narrow reading of the savings clause, thereby granting states more latitude in providing eligibility.¹²⁴ These cases may indicate courts’ general propensity to interpret the savings clause broadly to accommodate Congress’s intent to let states provide certain public benefits for undocumented immigrants if it chooses.

In *Martinez*, U.S. citizens paying non-resident tuition at state colleges challenged a California law that made undocumented immigrants eligible for in-state tuition.¹²⁵ The California Supreme Court overruled the Court of Appeals decision which held that to satisfy the savings clause, “not only must the state law specify that illegal aliens are eligible, but the state Legis-

122. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 867–68 (Cal. 2010) (determining if a bill triggering the savings clause must specifically reference the clause).

123. *Id.*

124. 8 U.S.C. § 1621(d) (1998); see also *Martinez*, 241 P.3d at 867; *Kaider v. Hamos*, 975 N.E.2d 667, 673 (Ill. App. Ct. 2012). *But see* *Dep’t of Health v. Rodriguez ex rel. Melendez*, 5 So. 3d 22 (Fla. Dist. Ct. App. 2009).

125. *Martinez*, 241 P.3d at 867.

lature must also expressly reference title 8 U.S.C. [§] 1621”¹²⁶ Taking a more expansive view, the California Supreme Court cautioned against reading requirements into the statute that do not appear on its face.¹²⁷ The court held that no specific words were required for a statute to satisfy § 1621(d), and even a statute that provides for eligibility in a “convoluted manner” could be sufficient.¹²⁸

In *Kaider*, an Illinois appellate court addressed the same question with similar results.¹²⁹ Like in *Martinez*, the plaintiffs here argued that § 1621(d) required statutes to make an express reference to “illegal aliens” in order to carry out Congress’ intent to put citizens on notice that public funds were benefiting undocumented immigrants.¹³⁰ However, the court found no evidence to support the plaintiff’s public notice theory.¹³¹ The court noted that by requiring a state law to “affirmatively provide” for eligibility, Congress likely intended only “to prevent the passive or inadvertent override of [the statute’s prohibitions].”¹³² This understanding permits more expansive state action in providing public benefits to undocumented immigrants.

These two interpretations of the savings clause demonstrate courts’ hesitation to read limiting language into the statute, instead favoring a broad reading that strengthens state prerogatives. Laws regulating bar admission are almost invariably promulgated through state court rules. Without clear statutory text and unambiguous legislative history to the contrary, a court rule allowing for eligibility for undocumented immigrants should be considered an “enactment of state law” under the savings clause. This would both pay heed to Congress’s state autonomy concerns and, as the *Kaider* court noted, protect against any unintentional granting of the prohibited public benefits of § 1621.¹³³

CONCLUSION

Courts are likely to determine that bar licenses fall within the category of prohibited public benefits in § 1621 because when issuing licenses, a state supreme court utilizes appropriated state funds. Advocates for eligibility need to recognize that the argument that law licenses are not public benefits is ultimately unpersuasive and the product of a strained reading of

126. *Id.* (citing *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518, 544 (Cal. Ct. App. 2008)).

127. *Id.*

128. *Id.*

129. *Kaider*, 975 N.E.2d at 672.

130. *Id.*

131. *Id.* (“We also see no basis in the statutory text to conclude that Congress intended to impose a public notice requirement.”).

132. *Id.* at 673.

133. *Id.* at 674.

§ 1621. As such, focus should be shifted to the savings clause as the remaining avenue to achieve eligibility. In most cases, traditional separation of powers doctrine will prevent the passage of a state bill allowing for bar eligibility for undocumented immigrants. In these circumstances, advocates should urge state bars and state supreme courts to adopt a rule allowing for eligibility, which would be sufficient to trigger § 1621's savings clause.

Sergio Garcia has overcome innumerable challenges to arrive at this point: he is on the verge of becoming a licensed attorney. He endured two perilous border crossings as a child; he succeeded in school despite his family's desperate circumstances; he worked at a grocery store for twelve years to fund his college education; he worked days and attended law school classes at night. Section 1621 poses another serious obstacle to Mr. Garcia, but it does not signal the death knell for his lawyerly aspirations. Unlike his previous challenges, however, this one will not be surmountable by sheer self-will. But if the California Supreme Court enacts a rule allowing for Garcia's eligibility for bar admission, § 1621 will not stand in his way.