TOWARD AN INCLUSIVE UNEMPLOYMENT INSURANCE FUND: REIMAGINING INCOME REPLACEMENT IN CALIFORNIA

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ABSTRACT

Unemployment Insurance (UI)—ordinarily an unimposing social policy—emerges in times of crisis as the boogeyman of financial dependence. Yet the program has become a foundational benefit of the COVID-19 pandemic and remains a vital safety net for crises to come. It is therefore imperative that UI broaden its reach to all who face the economic precarity of unemployment. To that end, this Note advocates for the creation of a state UI fund capable of servicing workers without documentation and provides the legal framework to do so. It first reflects on the eligibility boundaries of relief programs and the history of exclusionary benefit regimes. It then examines UI's legal and financial mechanics, looking backward at the program's formation, and forward toward the consequences of California's insolvency crisis. This analysis exposes UI's greatest limitations, all products of its technical design.

As its core contribution, this Note charts the course for an inclusive income replacement scheme with the reinforcement to withstand both privacy and preemption implications. The proposal designates a percentage of income taxes toward a separate revenue pool that operates entirely independent of, but mechanically comparable to, the existing infrastructure. To prevent the fund from transforming into a registry, the proposal contemplates a secure means of data-sharing, insulated from nefarious inquiries and probes. The Note analyzes sanctuary laws through the lens of federal preemption to propose new state policy that can further protect immigration data. It also explores litigation channels by applying the Tenth Amendment's anti-commandeering doctrine to existing federal immigration law. After making the case for legal viability, this Note concludes by emphasizing the growing political appetite for such a proposal, as demonstrated by New York's Excluded Workers Fund.

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INTRODUCTION

In March 2020, Congress passed the Families First Coronavirus Response Act[1] and the Coronavirus Aid, Relief, and Economic Security (CARES) Act[2] in response to the coronavirus pandemic. Two subsequent federal stimulus bills have since been signed into law, distributing funds to states, localities, and the American public.[3] Perhaps the most critical lifeline provided by these packages, Unemployment Insurance (UI) has been issued in multiple iterations and assumed various forms.[4] Yet for each UI program, undocumented immigrants have been precluded from eligibility.[5] This preclusion is not unique to federal emergency legislation; undocumented workers are restricted from UI across the board, in good times and bad. California is no exception; despite plenty of popular rhetoric suggesting otherwise,[6] undocumented immigrants pay more than their share of the aggregate tax burden. In fact, undocumented immigrants contribute roughly $11.74 billion each year in state and local taxes alone.[7] The economic contributions of undocumented immigrants have been consistently borne out by the data and defended in fact sheets and non-partisan reports.[8]

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1. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

2. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

3. Coronavirus Response and Relief Supplemental Appropriations Act of 2021, Pub. L. No. 116-260 (2021); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

4. *See, e.g.,* Julie A. Su, *Open Letter to Californians Regarding Unemployment Insurance (UI) Payments and Pandemic Unemployment Assistance Timeline*, LAB. & WORKFORCE DEV. AGENCY (Apr. 14, 2020), https://perma.cc/R355-TE9J (describing the distinction between traditional UI and the federally funded Pandemic Unemployment Assistance (PUA) benefits).

5. UI eligibility is premised on three conditions: applicants must be unemployed "through no fault of their own"; they must have enough wages earned or hours worked in their "base period" to establish a claim; and they must be "able and available" to work. Undocumented immigrants do not qualify for UI under state or federal law because they are explicitly barred by law and they do not have valid work authorization, which is mandated during the base period, at the time they apply for benefits, and throughout the period they are receiving benefits. Program eligibility is discussed in greater detail in Part I below. *See* Rebecca Smith, *Immigrant Workers' Eligibility for Unemployment Insurance*, NAT'L EMP. L. PROJECT (Mar. 2020), https://perma.cc/CD7A-BETC.

6. *See e.g.,* Donald Trump, U.S. President, Address Before a Joint Session of the Congress on the State of the Union (Feb. 5, 2019) *in* AUTHENTICATED U.S. GOV'T INFO., DCPD-201900063 at 4 ("Meanwhile, working-class Americans are left to pay the price for mass illegal immigration."); Mitch McConnel Jr., Senator Ky., Senate Floor Remarks (Feb. 3, 2021) *in* REPUBLICAN LEADER NEWSROOM, https://perma.cc/YP3B-BWCH ("We'll be getting Senators on the record about whether tax payers should fund checks for illegal immigrants . . . .").

7. LISA CHRISTENSEN GEE, MATTHEW GARDNER, MISHA E. HILL & MEG WIEHE, INST. ON TAXATION AND ECONOMIC POLICY, UNDOCUMENTED IMMIGRANTS' STATE AND LOCAL TAX CONTRIBUTIONS 2 (2017).

8. *See, e.g.*, U.S. CONG. BUDGET OFF., THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007) (concluding that undocumented immigrants contribute more in federal taxes than the cost of providing services); David Becerra, David K. Androff, Cecilia Ayon & Jason T. Castillo, *Fear vs. Facts: Examining the Economic Impact of Undocumented Immigrants in the U.S.*, 39 J. SOC. & SOC. WELFARE 111, 111 (2012) (confirming that even in states with high numbers of unauthorized immigrants, undocumented workers contribute more in state and local taxes than they consume in services); AM. IMMIGR. COUNCIL, IMMIGRANTS IN THE UNITED STATES (2021) (reporting that despite only comprising 3 percent of the total U.S. population in 2016, undocumented immigrants comprised 5 percent of its workforce and contributed an estimated $11.8 billion in combined state and local taxes in 2018).

Absent from these reports, however, is any acknowledgment of the assumptions inherent in an apples-to-apples comparison of "tax revenue raised" versus "public benefits spent." To measure the economic impact of undocumented immigrants as dollar-for-dollar "revenue versus spending" ignores well-settled principles of vertical equity dating back to the Lincoln administration.[9] Notwithstanding sales and payroll taxes, the U.S. federal and state revenue codes are designed to distribute tax burdens across ability to pay.[10] Undocumented immigrants are among the most impoverished populations in the United States,[11] rendering such 1:1 methodologies inapposite as a metric for perceived "economic impact." By its very structure, the Internal Revenue Code implies that the lowest quintile of earners can and should extract more in benefits than they contribute in revenue, which is in fact the entire purpose of a *refundable* Earned Income Tax Credit (EITC).[12]

With this assumption baked into fundamental U.S. conceptions of fairness and fiscal responsibility, the proper gauge for whether undocumented immigrants are an economic "cost" or "benefit" should likewise be weighted proportionately to ability to pay.[13] For example, that a state might collect $1 million to $2 million more annually from undocumented immigrants than it spends on education for those same undocumented immigrants is a testament to their disproportionate contributions relative to the documented poor.[14] In fact, among households in the lowest quintile, individual income taxes were negative eleven percent on average in 2017[15] due to refundable credits that reduce the amount of taxes owed.[16] Because undocumented immigrants are categorically excluded from the EITC, the largest of these refundable credits, it follows that they account for fewer reductions in revenue than filers with status. On balance, unauthorized workers pay a higher effective tax rate than similarly situated documented immigrants or U.S. citizens.[17] Furthermore,

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9. *See* Revenue Act of 1862, ch. 119, 12 Stat. 432 (repealed 1864) (establishing the first progressive tax regime in United States history). Indeed, even the Father of Capitalism himself Adam Smith once remarked, "It is not very unreasonable that the rich should contribute to the public expense not only in proportion to their revenue but something more than that proportion." 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 435 (1869).

10. *See* WILLIAM RAYMOND GREEN, THEORY AND PRACTICE OF MODERN TAXATION 218 (1933).

11. *See* KARINA FORTUNY, RANDY CAPPS & JEFFREY S. PASSEL, THE CHARACTERISTICS OF UNAUTHORIZED IMMIGRANTS IN CALIFORNIA, LOS ANGELES COUNTY, AND THE UNITED STATES, URBAN INST. 22–23 (2007); JEFFREY S. PASSEL, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS, PEW HISPANIC CTR. 34 (2005) (background briefing prepared for the Independent Task Force on Immigration and America's Future).

12. S. REP. No. 94-36, at 9 (1975) ("This new refundable credit will provide relief to families who currently pay little or no income tax. These people have been hurt the most by rising food and energy costs. Also, in almost all cases, they are subject to the social security payroll tax on their earnings . . . Moreover, the refundable credit is expected to be effective in stimulating the economy because the low-income people are expected to spend a large fraction of their increased disposable incomes.").

13. To say nothing of the noneconomic, human considerations at stake.

14. *See* U.S. CONG. BUDGET OFF., *supra* note 8, at 10.

15. U.S. CONG. BUDGET OFF., THE DISTRIBUTION OF HOUSEHOLD INCOME 2017 22 (2020).

16. *Id*. at 22.

17. *See* Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 7 (2006); JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 320 (2d ed. Univ. of Mich. Press 1999) (1989) (demonstrating that for

unauthorized immigrants are ineligible for most means-tested public benefits, further widening the gap in net financial contributions between the average earner in their quintile.[18]

These contextual frameworks are significant insofar as they offer a political footing, presenting a strong economic case that undocumented immigrants are "entitled" to a marginal return on their tax investments. But to be clear, normative conditions on benefit eligibility would have no place under a truly equitable benefit scheme. Such a "deservingness analytic" (i.e., a public benefits framework that distinguishes between the "deserving" and "undeserving" poor),[19] may hold the current keys to political feasibility, but it ought not be dispositive in the immediate policy conversation. Instead, the principal (and debatably sole) qualification for UI should be financial need. Acknowledging that even existing program eligibility remains tethered to labor market ties,[20] a mono-conditional UI system (i.e., one that is only conditioned on need) for undocumented workers may be a fight for another day.[21] Still, although the moment calls for bold *and* attainable policy to give these proposals a fighting chance, the importance of a properly (*read* equitably) designed program cannot be overstated. Undocumented people have endured too great an injustice for the solution to be incomplete.

That injustice has been magnified by the COVID-19 crisis, as undocumented immigrants found little, if any, salvation from the relief programs they helped fund. Instead, they were merely reminded of the precarity of their

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undocumented immigrants, "when the sum of the tax contributions to city, state and federal government are allowed for, those tax payments vastly exceed the cost of the services used, by a factor of perhaps five, ten, or more."); Michael J. Rosenfeld & Marta Tienda, *Labor Market Implications of Mexican Migration: Economies of Scale, Innovation, and Entrepreneurship*, *in* AT THE CROSSROADS: MEXICO AND U.S. IMMIGRATION POLICY, 185, 185–86 (eds. Frank D. Bean, Rodolfo O. de la Garza, Bryan R. Roberts & Sidney Weintraub, 1997) (concluding that, because of their limited access to social services but significant tax contributions, undocumented immigrants "are essentially a fiscal windfall for employers and also for state and national coffers" and "may be the most fiscally beneficial of migrants"); *see also* Luis Larrea, *Taxation Inequality and Undocumented Immigrants*, 5 L. RAZA 2 (2013).

18. While this Note confronts the methodological flaws (or at minimum, misguided conclusions) in macroeconomic impact studies of undocumented immigrants, the field remains fertile for extensive analysis beyond the limitations of this Note. For instance, it remains unclear the extent to which the more regressive excise, property, and sales taxes further inflate the effective tax rates of undocumented immigrants, leading to continued statistical misrepresentations. Moreover, certain impacts will remain unknown due to irreconcilable technical requirements. For example, ITINs must be used for reporting income but cannot be used for reporting wages or paying payroll taxes to the SSA or IRS, resulting in billions of unrealized Social Security-covered earnings. Francine Lipman rightly describes this outcome as "clearly separate and unequal." Lipman, *supra* note 17, at 26.

19. Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550 (2012) (challenging the divide between deservingness and need in antipoverty programs).

20. *See* Noah Zatz, *Where is the Care in the CARES Act?*, L. & POL. ECON. PROJECT (July 27, 2020), https://perma.cc/8Y5L-7AHU (scrutinizing PUA means-testing, particularly for care workers, as a devaluation of caregiving).

21. *See generally* Rema Hanna and Benjamin A. Olken, *Universal Basic Incomes versus Targeted Transfers: Anti-Poverty Programs in Developing Countries*, 32 J. ECON. PERSPECTIVES 201, 223 (2018) (describing conditional cash transfer programs as "more politically palatable, since voters in many countries may prefer that individuals do something in return for receiving aid."). *But see* Gabriela Schulte, *Poll: Majority of Voters Now Say the Government Should Have a Universal Basic Income Program*, HILL (Aug. 14, 2020), https://perma.cc/C2U5-B9SL.

work and indifference toward their health. Now is the time to imagine an inclusive UI fund capable of servicing unemployed people without documentation. This Note offers both the policy building blocks to devise an undocumented UI fund, and the political ammunition to reinforce it. Part I examines the history of undocumented exclusion from U.S. benefit programs, punctuated with the devastation of undocumented workers during the COVID-19 economic recession. Part II unpacks the legal mechanics of UI and discusses peculiarities to the California system. Part III aims to devise a new system, proposing a segregated pool of revenue running parallel to existing benefit systems. Paying particular attention to the privacy concerns implicated by the proposal, this Part offers a menu of legislative solutions and potential litigation tactics. Lastly, Part IV explores other existing UI programs to spotlight policy fractures across jurisdictions and to emphasize the political viability of such a proposal.

I. THE ORIGINS OF BENEFITS EXCLUSION AND THE COVID-19 LABOR MARKET

A. *A History of Race- and Ethnicity-Based Exclusion from Public Benefits in the United States*

At the root of UI's discriminatory boundaries lies a long history of categorical exclusion from public benefits and unequal protection under the law.[22] Explicitly prejudiced and sometimes coded prohibitions have plagued U.S. public benefit programs from their inception, but it was not until the advent of 1996 welfare and immigration reform that immigrants received nearly absolute restrictions on eligibility.[23] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) created two classifications of immigrants for purposes of eligibility: "qualified" and "not qualified."[24] Undocumented immigrants were given "not qualified" status, while

22. White supremacist and anti-Black principles permeate U.S. legal doctrine, where the relics of African slave laws persist today. *See, e.g.*, 29 U.S.C. § 152(3) (1935) (excluding agricultural and domestic workers from the protections available under the National Labor Relations Act, a product of the major New Deal Era statutes' intentional design); 42 U.S.C. § 603 (1935) (conditioning TANF family assistance grants on marriage, where marriage rates among Black women are disproportionately low), *see* R. Kelly Raley, Megan M. Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns,* 25 FUTURE CHILD. 89, 90 (2015) (examining why Black women "display lower marriage rates than do other racial and ethnic groups.").

23. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104– 193, 110 Stat. 2105 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3008 (1996); TANYA BRODER, AVIDEH MOUSSAVIAN & JONATHAN BLAZER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, NAT'L IMMIGR. LAW CTR. 15 (2021).

24. BRODER, MOUSSAVIAN & BLAZER, *supra* note 23, at 2–3. The "qualified" immigrant category includes: (i) lawful permanent residents; (ii) refugees, people granted asylum or withholding of deportation/removal, and conditional entrants; (iii) people granted parole by the U.S. Department of Homeland Security (DHS) for a period of at least one year; (iv) Cuban and Haitian entrants; (v) certain abused immigrants, their children, and/or their parents; (vi) certain survivors of trafficking; and (vii) individuals residing in the U.S. pursuant to a Compact of Free Association (COFA) (for Medicaid purposes only). "All other immigrants, including undocumented immigrants, as well as many people who are lawfully present in the U.S., are considered 'not qualified.'" *Id.*

the "qualified" category itself was deceptively exclusionary.[25] Although most states adopted this federal framework for regional benefit qualification, California continues to provide state and locally funded services to immigrants under the previous eligibility criteria called "permanently residing in the [United States] under color of law" (PRUCOL).[26]

The PRUCOL standard controls in the UI context. The Federal Unemployment Tax Act (FUTA)[27] gives states the authority to credit wages earned toward the Unemployment Trust Fund (established by section 904 of the Social Security Act (SSA)).[28] As a condition of certification of the state's UI legislation, the same federal law requires states to impose restrictions on the payment of UI benefits to undocumented immigrants.[29] The relevant provision reads in part "compensation shall not be payable on the basis of services performed by an alien unless such alien . . . was permanently residing in the United States under color of law at the time such services were performed."[30] Compensation refers to "cash benefits payable to individuals with respect to their unemployment."[31] Although courts have read PRUCOL expansively to include instances where "those charged with the power to deport have allowed [the immigrant] to remain a resident,"[32] the U.S. Department of Labor (DOL) has ascribed a more narrow definition to the standard that excludes undocumented workers.[33] The federal PRUCOL standard sets the floor, so while states have discretion to adopt their own standards, they cannot circumvent the minimum restrictions under federal law.[34]

As a result, California's UI Code Section 1264, subdivision (a) virtually mirrors 26 United States Code Section 3304, subdivision (a)(14)(A). It provides, in pertinent part:

> Unemployment compensation benefits, extended duration benefits, and federal-state extended benefits *shall not be payable on the basis of*

25. *Id.*

26. *Id.* ("PRUCOL is not an immigration status, but a benefit eligibility category that has been interpreted differently depending on the benefit program and the region. Generally, it means that the Dept. of Homeland Security (DHS) is aware of a person's presence in the U.S. but has no plans to deport or remove him or her from the country.").

27. 26 U.S.C. § 3304.

28. 42 U.S.C. § 1104; *see also* 26 U.S.C. § 3306(f) ("[f]or purposes of this chapter, the term 'unemployment fund' means a special fund, established under a State law and administered by a State agency, for the payment of compensation.").

29. 26 U.S.C. § 3304(a)(14)(A).

30. *Id.* The provision also allows states to credit wages earned by immigrants who were "lawfully admitted for permanent residence at the time such services were performed" and "lawfully present for purposes of performing such services." *Id.*

31. 26 U.S.C. § 3306(h).

32. Holley v. Lavine, 553 F.2d 845, 850 (2d Cir. 1977).

33. U.S. Dep't of Labor, Emp. And Training Admin., Unemployment Insurance Program Letter No. 1-86, Change 1, 56 Fed. Reg. 29719, 29720–21 (June 28, 1991) [hereinafter UI Program Letter No. 1-86] (excepting immigrants "under deferred action status who have been notified by the INS in writing that deportation will not be pursued at the present time are in PRUCOL status . . . ," thereby granting Deferred Action for Childhood Arrivals (DACA) recipients PRUCOL status).

34. Smith, *supra* note 5.

> *services performed by an alien unless the alien is an individual who* was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for purposes of performing the services, or *was permanently residing in the United States under color of law at the time the services were performed*, including an alien who was lawfully present in the United States as a result of the application of the provisions of Section 203(a)(7) or Section 212(d)(5) of the Immigration and Nationality Act.[35]

This blanket exclusion from UI is provided in one form or another by each state's operative UI code. Even if an immigrant claimant falls within one of the three exceptions, their eligibility for benefits is far from guaranteed. From its inception, FUTA's administrative agencies (most recently the DOL) have interpreted its provisions to require that states limit benefit payments to individuals who are "able and available" for work.[36] In a 2007 Final Rule addressing the issue, the DOL stated "[a]lthough this interpretation is longstanding, it has never been comprehensively addressed in a rule in the Code of Federal Regulations (CFR)."[37] Accordingly, the Final Rule codified the requirement that state UI laws condition the payment of benefits on the claimant being "able" to work and "available" for work.[38]

Like the federal PRUCOL provision, this Rule is intended as a minimum requirement for participating states. In fact, the Rule merely offered a federal iteration of what was already an established law in California's UI Code.[39] The statute provides, in pertinent part: "[a]n unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that . . . [h]e or she was able to work and available for work for that week."[40] By definition, immigrants without valid work authorization are legally unable to work, and "legal inability to work is as disqualifying as physical inability to work."[41] In other words, if undocumented claimants are not first barred by the sweeping categorical PRUCOL

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35. CAL. UNEMP. INS. CODE § 1264(a)(1) (West 2021) (emphasis added).

36. Unemployment Compensation—Eligibility, 72 F.R. 1890, 1890–94 (Feb. 15, 2007) (codified at 20 C.F.R. pt. 604).

37. *Id.* at 1890.

38. The federal guidelines for ability to work are a shade tautological. But, essentially, a claimant is "able" to work if she physically could have worked for all or a portion of the week for which unemployment is claimed. Ability is also satisfied where a claimant "has previously demonstrated his or her ability to work and availability for work following the most recent separation from employment," despite illness or injury, unless the claimant has "refused an offer of suitable work due to such illness or injury." 20 C.F.R. § 604.4 (2021). Availability for work provides a similarly fraught definition, including a provision that expressly deems unavailable those not "legally authorized to work in the United States." 20 C.F.R. § 604.5 (f) (2021) (citing 42 U.S.C. 1320b-7(d), which relates to verification and determination of an immigrant's status).

39. CAL. UNEMP. INS. CODE § 1253 (West 2021).

40. *Id.*

41. Pinilla v. Bd. Of Rev. In Dep't of Lab. & Indus., 382 A.2d 921, 923 (N.J. Super. Ct. App. Div. 1978).

provisions, they will encounter subsequent barricades under the "able and available" requirement.[42]

B. *Job Precarity in the COVID-19 Labor Market: The Disparate Impact on Undocumented Immigrants*

These preclusive provisions have caused real destruction for those seeking temporary relief from joblessness. In the COVID-19 pandemic, the financial harms of these statutes have been layered with profound public health implications. Without the security provided by income replacement, many undocumented workers faced the impossible choice between depleting their savings by remaining home safe or risking infection to themselves and family members by seeking alternate work. Those fortunate enough to find a replacement job sacrificed their health in occupational sectors—namely agriculture, retail trade, transportation and utilities, and leisure and hospitality—that require physical proximity in order to operate. These are the sectors identified as the most at risk of COVID-19 exposure,[43] where neither social distancing nor remote work is possible, and the availability of personal protective equipment (PPE) is limited. There is now ample medical evidence demonstrating excess pandemic-related mortality in high-risk occupational sectors, especially for Latinx, Black, and Asian workers.[44] These same sectors are those with the greatest concentration of immigrant workers, and concurrently those with the highest rates of pandemic-related unemployment.[45]

The coronavirus pandemic has eviscerated jobs on a global scale, including in California, resulting in over 11.5 million initial UI claims in the 2020 calendar year.[46] This is a 9.5 million increase from the prior year, or a 453 percent increase.[47] Yet, of the nearly 30 percent of California residents receiving UI relief, almost none of them are undocumented.[48] At the same time, the state's immigrant population has sustained the harshest rates of unemployment, with the steepest losses (nearly half of all workers) in the

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42. For variations on the "able and available" requirement in the PUA model, *see* Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, § 2102, 15 U.S.C. § 9021(a)(3)(A)(ii)(I) (establishing an "*otherwise* able to work and available for work" requirement) (emphasis added); *see also* Zatz, *supra* note 20.

43. *See* Michael Zhang, *Estimation of Differential Occupational Risk of COVID-19 by Comparing Risk Factors with Case Data by Occupational Group*, 64 AM. J. INDUS. MED. 39, 42 (2020) (assessing the differential risk of COVID-19 by worker occupation).

44. *See, e.g.*, Yea-Hung Chen, Maria Glymour, Alicia Riley, John Balmes, Kate Duchowny, Robert Harrison, Ellicott Matthay & Kirsten Bibbins-Domingo, *Excess Mortality Associated with the COVID-19 Pandemic among Californians 18-65 Years of Age, by Occupational Sector and Occupation: March through October 2020*, MEDRXIV (2021) (finding pandemic-related risks highest among food/agriculture and transportation/logistics sectors).

45. Randy Capps, Jeanne Batalova & Julia Gelatt, *Covid-19 and Unemployment: Assessing the Early Fallout for Immigrants and Other U.S. Workers*, MIGRATION POLICY INST. (June 2020); *see also U.S. Unemployment Trends by Nativity, Gender, Industry, & More, before and during Pandemic*, MIGRATION POLICY INST. (2021), https://perma.cc/7CK4-2BMF.

46. *Unemployment Insurance Quick Statistics*, STATE OF CAL. EMP'T DEV. DEP'T (2020) (10,852,047 Jan. – Nov. + 782,058 Dec. = 11,634,105 UI claims).

47. *Id.*

48. There are minor exceptions for DACA recipients or those with Temporary Protected Status, who have work authorization. *See* UI Program Letter No. 1-86, *supra* note 33.

nonessential service sectors that employ large numbers of immigrant workers and generally require lower levels of formal education.[49] Latinx immigrants, especially, are quite familiar with this pattern, having also experienced higher unemployment than other groups in the 2008-09 recession.[50] Immigrants face these stark unemployment rates not only because of the major industry groups that they overwhelmingly occupy, but also due to the young age and lower educational attainment of immigrant workers.[51]

Regardless of the underlying causes, the disparate effects of the COVID-19 labor market magnify the imperative need for income replacement in the undocumented community. Latinx immigrants, often single-earner families, are especially susceptible to the collateral consequences of uninsured joblessness.[52] Chronic job insecurity has dire significance for both economic stability and public health. Medical researchers have opined that economic outcomes represent variable social determinants of health, which "may lend support to social insurance as a means to reduce hardship in particularly vulnerable workers."[53] Thus, as undocumented immigrants continue to pay into a system that offers nothing in return, it is time for state and local policymakers to look to complementary UI policies for the immigrant population that has borne the brunt of the COVID-19 pandemic.[54] Undocumented Californians should enjoy access to an unemployment safety net not only in times of crisis, but as a permanent fund that reflects the money they consistently contribute to federal, state, and local coffers. To better understand how to implement such a system, it is important to untangle the basic mechanics of UI's existing infrastructure.

II. THE LEGAL AND FINANCIAL MECHANICS OF UNEMPLOYMENT INSURANCE

A. *The History and Mechanics of Unemployment Insurance in the United States*

Established in 1935 under the SSA[55] as part of the major federal New Deal programs, the United States UI regime is a joint federal-state system of social

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49. Capps, Batalova & Gelatt, *supra* note 45, at 2.

50. *Id*. at 2–3.

51. *Id*. at 12 ("[a]ll workers without a high school education, regardless of nativity, are facing sharp increases in unemployment, even as joblessness has also risen among high school graduates and those with a college education. Unemployment rose among all age groups, but it was twice as high in April for workers under age 25 as for those age 25 and older—a reality for both immigrants and natives. These patterns are similar to those noted during the 2008-09 recession.").

52. *Id*.

53. Zhang, *supra* note 43 (citing Raj Chetty & Nathaniel Hendren, *How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data*, NAT'L BUREAU OF ECON. RSCH. (2020) (concluding that because "traditional macroeconomic tools have diminished capacity to fully restore employment when demand is constrained by health concerns . . . it may be especially valuable to provide social insurance to reduce hardship for those who have lost their jobs, e.g., via unemployment benefit extensions.").

54. Yesenia Amaro, *Undocumented Workers Hit Hardest by Pandemic, Study Says. Will California 'Do More?*,' FRESNO BEE, https://perma.cc/529D-N4VJ (last updated June 17, 2020, 5:24 PM).

55. Social Security Act, ch. 531, 49 Stat. 620 (1935) (Titles III & IX); Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3311 (1994).

insurance for unemployed workers. Under FUTA, Congress imposes a federal excise tax on all employers, but credits employers for taxes paid under a state UI system conditioned on compliance with minimum federal standards.[56] This tax-offset scheme enables a relatively uniform interstate design that still gives room for states to individualize their programs.[57] The program's decentralized design was actually a calculated legal maneuver suggested by Justice Louis Brandeis in anticipation of Commerce Clause challenges to a single national system.[58] The chief goals of this system are to alleviate hardship, prevent unemployment, and promote reemployment.[59] As measured by economists and wonks alike, UI's success in these areas is nearly unanimous.[60] In most states, the program provides up to twenty-six weeks of benefits to unemployed workers at half the value of their previous wage, with the states funding the benefit payment itself and the federal government footing the bill for administrative expenses.[61]

California's UI structure follows this formula. Administered by the Department of Labor's federal-state program under the SSA, California UI runs through the state's Employment Development Department (EDD).[62] The insurance is supported by the state's UI Trust Fund, which is financed by a payroll tax that employers must pay to the state, and is supplemented by a smaller tax that employers pay to the federal government. While the payroll taxes are technically levied on employers, economists generally regard these as employee taxes under the notion that the funds employers pay in tax would otherwise funnel directly to worker paychecks.[63] Indeed, over the past ten years $4.4 billion was paid in UI taxes in California based on the work of

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56. Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3311 (1994). The federal excise tax is calculated by multiplying 6 percent times the employer's taxable wages, and the employer offset credit is up to 5.4 percent. *See* 26 U.S.C. §§ 3303–3304 (allowing up to 5.4 percent credit for actual unemployment taxes paid, with an additional state tax credit of up to 5.4 percent for employers that paid less than a 5.4 percent rate in state UI taxes); *Unemployment Insurance Tax Topic*, U.S. DEP'T OF LABOR (Mar. 29, 2004), https://perma.cc/XZ3H-NUSF.

57. *See* Sachin S. Pandya, *Retrofitting Unemployment Insurance to Cover Temporary Workers*, 17 YALE L. & POL'Y REV. 907 (1999).

58. *Id.* at n.1 ("[a]lthough many favored a single national system, Congress adopted this decentralized state-based UI system because it feared that the Supreme Court would find a national system unconstitutional, as it had other early New Deal legislation. *See, e.g.*, L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating early New Deal legislation as an unconstitutional exercise of the federal Commerce Clause power)").

59. SAUL J. BLAUSTEIN, UNEMPLOYMENT INSURANCE IN THE UNITED STATES: THE FIRST HALF CENTURY 46 (1993) (quoting Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Funds or Employer Reserve Account Types 1 (1936)).

60. *See, e.g.*, Jonathan Gruber, *The Consumption Smoothing Benefits of Unemployment Insurance*, 87 AM. ECON. REV. 192 (1997); Franklin D. Roosevelt, U.S. President, Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934).

61. *See* Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET AND POL'Y PRIORITIES (2014).

62. CAL. UNEMP. INS. CODE § 301 (West 2021) (vesting the EDD with the duties, purposes, responsibilities, and jurisdiction of approving elections for coverage or for financing unemployment and disability insurance coverage).

63. Stone & Chen, *supra* note 61.

undocumented immigrants,[64] yet those payments are never realized, spreading the fruits of undocumented labor only to those deemed worthy by law. California has pieced together one-off UI substitutes through offshoots like the $125 million Disaster Relief Assistance Fund,[65] but a one-time $500 payment falls short of one month's rent for an efficiency apartment in even the most inexpensive counties.[66]

B. *California's Unemployment Insurance Insolvency Crisis*

Apart from its restrictive eligibility conditions, California UI has its own unique problems. The employer payroll tax is collected on *up to* $7,000 in wages paid to each worker, with the tax rate varying depending in part on the amount of UI benefits paid to former employees.[67] Thus, federal law sets the floor for states to collect on *at least* the first $7,000 of an individual's earnings, giving states total discretion to impose a higher "taxable wage base" to raise sufficient revenue.[68] California has not adjusted its taxable wage base since it last raised its minimum wage in 1983 to comply with the then-new federal standard.[69] That was nearly forty years ago, at a time when the federal minimum wage was still $3.35 per hour.[70] To put this in perspective, only three other states still maintain the same $7,000 minimum base, and twenty-four states now index their taxable wage bases to account for wage increases.[71] In fact, three of California's closest neighbors—Nevada, Oregon, and Washington—averaged a 2020 minimum base of $42,433.[72] As a matter of financing policy, California's dated regime not only neglects modern economic realities, but also creates a UI system that is inequitably subsidized by low-wage workers and their employers.[73]

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64. *Unemployment Insurance Taxed Paid for Undocumented workers in NYS*, FISCAL POL'Y INST. (based on an analysis conducted for the Fiscal Policy Institute by the Institute on Taxation and Economic Policy (ITEP)), https://perma.cc/VP5J-8XLK.

65. *Governor Newsom Announces New Initiatives to Support California Workers Impacted by COVID-19*, OFF. OF GOV. GAVIN NEWSOM (Apr. 15, 2020), https://perma.cc/R8GR-GFQW.

66. *FY 2021 Fair Market Rent Documentation System: The FY 2021 FMR Summary*, HUD USER (2021), https://perma.cc/U5BL-E7MP.

67. *Fact Sheet: Unemployment Insurance Program*, STATE OF CA EMP'T DEV. DEP'T 1 (2015), https://perma.cc/J3VN-MMSY (comparing the UI tax to an insurance premium because "[a]n employer may earn a lower tax rate when fewer claims are made on the employer's account by former employees.").

68. *See* MAURICE EMSELLEM, MIKE EVANGELIST & CLAIRE MCKENNA, THE PATH TO RESPONSIBLE FINANCING OF CALIFORNIA'S UNEMPLOYMENT INSURANCE SYSTEM, NAT'L EMP. L. PROJECT 1–6 (2013), https://perma.cc/7UEW-TDSN (diagnosing CA's UI debt problem and devising a four-step plan to address the issue).

69. *Id*. at 3.

70. *Id*.

71. U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 2-5–2-6 (2020), https://perma.cc/6DEV-8A2A (providing state-by-state information on workers covered, benefit eligibility, methods of financing, and other areas of interest in the UI program).

72. *Id*. at 2–5 (NV: 32,500 + OR: 42,100 + WA: 52,700 = 127,300 / 3 = $42,433.33).

73. EMSELLEM, EVANGELIST & MCKENNA, *supra* note 68, at 3 (noting additional deficiencies in CA's UI financing system, including its relatively low maximum tax rate and its failure to index its benefits to account for the costs of living and wage increases).

This all amounts to a gross underfunding of the California UI program. States such as California that inevitably exhaust their UI reserves are free to borrow from the Treasury, but they must repay the federal government within two to three years.[74] This means that as a borrower of UTF funds, California must, in addition to continuing regular benefit payments, repay its federal debts plus any interest due.[75] Predictably, this is the precise predicament in which California (along with twenty other states) finds itself.[76] The numbers are bleak; California owes more in UTF debts than any other state, with over $20 billion in its outstanding advance balance, and counting.[77] The practical effect of all of this debt is significant. When a state fails to repay outstanding UTF loans, it faces an effective federal tax increase,[78] the brunt of which is borne by workers, employers, and taxpayers.[79]

In spite of their blanket exclusion from UI, undocumented Californians are not shielded from the effects of their state's insolvency. The tax penalties and corresponding interest rates are spread across the labor force, and disproportionately so in the low-wage sectors given California's refusal to modify its taxable wage base. Although unauthorized immigrants are not eligible for Social Security Numbers (SSNs), they and their employers provide false SSNs to comply with state and federal employment taxes.[80] It is through this unfortunate "convergence of mutually exclusive requirements"[81] that undocumented workers contribute to a UI regime from which they will never benefit. For UI to remain an effective defense against economic crises, it must be expanded to protect every worker, regardless of status or classification.[82]

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74. To further the basic goal of countering economic fluctuations, UI was designed for revenues to swell in moments of economic boon, so those surplus funds can later be exploited during downturns. Reserve balances are accordingly credited to state accounts within the Unemployment Trust Fund (UTF) for workers to utilize, helping curb the ripple effects of lost earnings by injecting additional funds into the economy. *See* JULIE M. WHITTAKER, CONG. RSCH. SERV., THE UNEMPLOYMENT TRUST FUND (UTF): STATE INSOLVENCY AND FEDERAL LOANS TO STATES RS22954 (2020), https://perma.cc/KE9P-E9VC (summarizing how insolvent states may borrow funds from the UTF loan account to meet their UC benefit obligations).

75. *Id*. at 3.

76. *See* Tim Henderson, *20 States Borrow from Feds to Pay Unemployment Benefits*, PEW RSCH. CTR. (Sept. 21, 2020), https://perma.cc/F7Q2-YWGT.

77. *Title XII Advance Activities Schedule*, TREASURY DIRECT (Oct. 14, 2021). But for recent interest deferrals, California's debt figure would be even greater. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9021, 135 Stat. 4, 120 (2021) (to be codified at 42 U.S.C. § 1322(b)(10)(A)).

78. Whittaker, *supra* note 74, at 4.

79. EMSELLEM, EVANGELIST & MCKENNA, *supra* note 68, at 1 (describing how each year, "California's employers are charged an additional $21 per worker in federal unemployment insurance (UI) taxes until the loan is paid back").

80. *See* Lipman, *supra* note 17, at 22–26 (in describing the ITIN and/or SSN "mismatch made in hell").

81. *Id*. at 25.

82. Though beyond the scope of this Note, independent contractors have also been historically excluded from UI benefits. The CARES Act's PUA supplement made inroads toward an inclusive fund that embraces these "gig workers," but such inclusion has not yet been adopted by conventional UI. For more discussion on the controversy over independent contractors, misclassification, and definitions of employment in the UI context, see *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLASNMATICS, INC. (2000) (studying the extent of misclassification of employees as independent contractors and its effects on UI trust funds); Jason Salgado, *Covid-19*

UI's limitations exert profound pressures on recovering economies that would otherwise benefit from the consumption of the unemployed.[83] More importantly, its exclusions leave working families vulnerable to health risks and financial ruin. With existing federal laws rendering immediate UI reform unlikely, it is time to develop a separate state fund built to service those who have been left behind.

III. DEVISING A NEW SYSTEM

To avoid running afoul of federal law, any new state fund must be distinct from existing UI but can be separately financed by the state and parallel to what other workers receive.[84] In looking to structure a new program, the state might consider redirecting existing tax revenue as opposed to passing an entirely new tax—a pursuit often deemed imperiled if not futile thanks to fixture Propositions 13 and 26, which fastened a tight seal around new state levies and charges.[85] One potential solution is to explore whether a percentage of income taxes from Individual Taxpayer Identification Number (ITIN) filers can be earmarked for an undocumented UI program pool. There is no state or federal legislation directing specific spending purposes for income taxes raised from ITIN filers. In the absence of specific legislation (as with the social security trust fund), the tax dollars collected from ITIN filers would be general revenue. Indeed, the manner in which the state government uses revenue generated through income tax is within the Legislature's discretion.[86] Because this shift in technical design would simply redirect income taxes already being collected, it would not result in "raising revenues" for the state, thus leaving untouched Proposition 13 or 26 implications.

A. *Information-Sharing: Tapping into the Existing Infrastructure*

With no significant legal roadblocks vis-à-vis earmarking the tax dollars, the next principal challenge to developing a UI program from ITIN revenue is data-sharing. The mechanics of such a system would likely require

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Shows Urgent Need to Hold Gig-Companies Accountable for Misclassification, ONLABOR (Apr. 15, 2020), https://perma.cc/6P5U-VTCH (advocating for a presumption of gig-worker eligibility in state unemployment benefits); Katharine G. Abraham, Susan N. Houseman & Christopher J. O'Leary, *Extending Unemployment Insurance Benefits to Workers in Precarious and Nonstandard Arrangements*, MIT WORK OF FUTURE (Nov. 2020) (arguing that the basic structure of UI in the United States. "has not adequately adapted to changes in the nature of organizing of work"); Zatz, *supra* note 20.

83. *See* Gruber, *supra* note 60, at 203.

84. FISCAL POL'Y INST., *supra* note 64.

85. Under CAL. CONST. art. XIII A § 3, any changes in state taxes enacted for the purpose of increasing revenues must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the legislature. Proposition 26 expanded the definition of a tax and a tax increase so that more proposals would require approval by two-thirds of the Legislature or by local voters. Proposition 26, CAL. LEGIS. ANALYST'S OFF. (July 15, 2010), https://perma.cc/M28X-DHQ8.

86. CAL. GOV'T CODE § 13337.5 (West 2021); *see also* Assemb. Bill No. 1876 (Cal. 2020) (expanding the state Earned Income Tax Credit (EITC) access to undocumented immigrants); *Golden State Stimulus*, FRANCHISE TAX BOARD, STATE OF CAL. (Sept. 19, 20201), https://perma.cc/D3XA-Z8WQ (passing a $600 stimulus check plus boost for undocumented workers).

information sharing from the Internal Revenue Service (IRS) to EDD. In order to segregate the proper amount collected on behalf of ITIN filers, EDD will need to collect data from federal tax return filings. However, Section 6103 of the Internal Revenue Code (IRC) explicitly bars the IRS from releasing taxpayer information to other government agencies apart from providing information to the Treasury Department for investigations that pertain to tax administration or under a court order related to a non-tax criminal investigation.[87] The datasets released by the IRS do not provide separate categories for ITIN filers. Expanding information-sharing to permit segregating based on ITIN filer status may require a new law.

Alternatively, because California has now expanded eligibility of the CalEITC to encompass ITIN filers, the Franchise Tax Board (FTB) may now be properly equipped to provide EDD with the requisite information to administer a separate UI.[88] In fact, California's Revenue and Tax Code already contains two statutes granting the authority to disclose ITIN information between state agencies. California Revenue and Tax Code Section 19548.2 requires the State Department of Public Health to disclose "the name and individual taxpayer identification number" of applicants for or recipients of the state's HIV/AIDS treatment subsidies, and vice versa.[89] Similarly, California Revenue and Tax Code Section 19548.3 requires the Scholarshare Investment Board, the state's 529 college investment plan, to "disclose the name and individual taxpayer identification number . . . of a participant in a qualified tuition program," and vice versa.[90] Both statutes also mandate the return or destruction of all information upon completion of the disclosure. Moreover, FTB is already engaged in the business of information-sharing with EDD specifically *for* the administration of the state's UI program. California Revenue and Tax Code Section 19551.2 instructs FTB to disclose to EDD "[tax] return or return information . . . through information sharing agreements or data interfaces" upon request and when necessary for unemployment program administration.[91] Such a precedent for secure data transfers suggests that a similar FTB-to-EDD arrangement may well be seamless under a new UI regime.

B. *Data Privacy for ITIN Filers Under a New Unemployment Insurance Regime*

These state-to-state or even federal-to-state disclosure laws, however, are not the chief concern for advocates of a new UI. Rather, the converse state-to-federal transfer requires special attention and must be heavily fortified to protect the privacy of ITIN filers. Federal immigration agencies have a

87. 26 U.S.C. § 6103.
88. CAL. REV. & TAX. CODE § 17052 (West 2021).
89. CAL. REV. & TAX. CODE § 19548.2 (West 2021).
90. CAL. REV. & TAX. CODE § 19548.3 (West 2021).
91. CAL. REV. & TAX. CODE § 19551.2 (West 2020).

history of exploiting both public and private databases, including commercial records, in their quests for deportation.[92] With the line between so-called "sensitive locations"[93] becoming increasingly blurred, many undocumented immigrants have been hesitant to even seek medical care for fear of detainment.[94] It is therefore essential to enforce strong protections against federal data requests, without which state ITIN records could be converted into a federal registry.

Whether federal immigration agencies such as the Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS) can mandate state dissemination of immigration information is a question of federal preemption and Constitutional law. The recent rise of local sanctuary laws as a sort of "progressive federalism" has become a cornerstone in the fight for immigrant rights.[95] General proscriptions against cooperation with federal immigration authorities have been almost exclusively codified at the *local* level through city ordinances and university policies.[96] Cities like San Francisco, Los Angeles,[97] and New York City explicitly bar the sharing of immigration status information "unless required by federal law."[98] Such safeguards have withstood preemption challenges and executive attacks[99] but do not offer the broad reach of state law. California's recently enacted Values Act (SB 54) limits law enforcement's cooperation with

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92. Raymond G. Lahoud, *ICE Investigators Use Private Database Covering Millions of Individuals to Pursue Immigration Violations*, 11 NAT. L. REV. (2021), https://perma.cc/FNY8-BBTM.

93. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) operate under "sensitive locations" policies, which bar agents from making arrests at churches, schools, and hospitals except in extraordinary circumstances. Memorandum from ICE Dir. John Morton to Field Off. Dirs., Special Agents in Charge, and Chief Counsel (Oct. 24, 2011), https://perma.cc/2Y8G-R7XC.

94. Jeff Gammage, *Will I Get Detained by ICE If I Go to a Hospital? What You Need to Know During the Coronavirus Pandemic If You're Undocumented*, PHILADELPHIA INQUIRER (Apr. 6, 2020), https://perma.cc/SJG8-5DYH.

95. *See, e.g.*, Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY JOURNAL, (last visited Oct. 17, 2021), https://perma.cc/2AVK-TP8S; Shannon Mariotti, *The New Progressive Federalism: Common Benefits, State Constitutional Rights, and Democratic Political Action*, 41 NEW POL. SCI. 98 (2018).

96. *See* Natasha Newman, *A Place to Call Home: Defining the Legal Significance of the Sanctuary Campus Movement*, 8 COLUM. J. RACE AND L. 122 (2018); Alyssa Garcia, *Much Ado About Nothing?: Local Resistance and the Significance of Sanctuary Laws*, 42 SEATTLE U.L. REV. 185 (2018).

97. Instead of a city ordinance, Los Angeles has a "sanctuary" police department policy. *See* L.A. Police Dep't Special Order No. 40, Undocumented Aliens (Nov. 27, 1979); Sturgeon v. Bratton, 95 Cal. Rptr. 3d 718, 724 (Cal. Ct. App. 2009) ("Special Order 40 (SO40) is the policy of the Los Angeles Police Department (LAPD) governing interactions with illegal immigrants. It prohibits LAPD officers from initiating police action with the *sole* objective of discovering the immigration status of an individual and arresting individuals for illegal entry into the United States."). *But see Sanctuary City? Not L.A.*, L.A. TIMES (Aug. 26, 2011, 12:00 AM), https://perma.cc/8REL-C57 (challenging Los Angeles' "sanctuary" designation given the areas in which local police cooperate with federal immigration officers).

98. S.F., CAL., ADMIN. CODE §§ 12H, 12I (1989)); OFF. OF CIVIC ENGAGEMENT AND IMMIGR. AFF., *Sanctuary City Ordinance*, SFGOV, https://perma.cc/6JTR-V76L; *see generally* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 279 (2012).

99. *See generally* City and Cnty. of San Francisco v. Barr 965 F.3d 753, 763 (9th Cir. 2020), *cert. dismissed, sub nom.* Wilkinson v. City and Cnty. of San Francisco, Cal., 141 S. Ct. 1292 (2021); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Exec. Order 13768].

federal immigration authorities,[100] but its privacy protections are confined to the criminal context. Put simply, SB 54 is California's attempt to disentangle local law enforcement from federal civil immigration enforcement in order to foster trust between California's immigrant community and state and local law enforcement.[101] Thus, it may require a new state law to scale these more general proscriptions that are necessary to protect ITIN filer information under an undocumented UI program. A law of such broad scope must be designed to withstand challenges under federal preemption. Moreover, the privacy concerns at issue in this proposal invite core anti-commandeering questions under the Tenth Amendment. Accordingly, I visit each doctrine in turn.

C. *Federal Preemption*

The Constitution's Supremacy Clause provides that the Constitution and the laws "made in pursuance thereof" are the supreme law of the land.[102] When state and federal law conflict, state law must yield.[103] It is also well settled that the federal government, through its plenary power, has exclusive authority to enforce immigration law.[104] The comprehensive Hart-Cellar Act of 1965 (INA) demonstrates the sweeping degree to which the federal government has exercised its immigration authority.[105] It therefore follows that a state law placing restrictions on the sharing of immigration information must neither occupy the field of, nor directly conflict with federal law. Before penning new legislation, it is worthwhile to examine existing federal law for obvious preemptive provisions.

Unequivocally, Section 1373 (§ 1373) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) has been the largest thorn in the side of sanctuary jurisdictions.[106] The Section provides:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual in the United States.[107]

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100. *See* S.B. 54, 2017 Reg. Sess. (Cal. 2017) (codified at Cal. Gov't Code §§ 7282-7284.12).

101. *Id.*; Jerome Ma & Nicholas Pavlovic, *California Divided: The Restrictions and Vulnerabilities in Implementing SB 54*, 26 ASIAN AM. L.J. 1, 6 (2019).

102. U.S. CONST. art. VI.

103. *See generally* Grade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our preemption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'").

104. De Canas v. Bica, 42 U.S. 351, 354 (1976).

105. Immigration and Nationality (Hart-Celler) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101-1537).

106. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3008 (1996); *see also* 8 U.S.C. § 1644 (1996). Section 1644 is the statute upon which § 1373 expands. Although both sections prohibit nearly identical activities, and the two are often scrutinized as a pair, this Note examines only § 1373 for the sake of brevity.

107. 8 U.S.C. § 1373.

The Section goes on to prohibit local entities from restricting government entities from "[m]aintaining such information" or "[e]xchanging such information with any other Federal, State, or local government entity."[108] Its purpose is plainly to prohibit state and local governments from enacting laws that limit certain types of communication with the federal government about immigration and citizenship status information.[109] A brief scan of § 1373's legislative history and Senate Reports confirms that the Section was indeed a direct response to the rise of municipal sanctuary policies.[110] Section 1373 was conceived to invalidate attempts to restrict local officials from cooperating with federal authorities.[111]

1. *Sanctuary Policies: "Don't Ask?" or "Don't Tell?"*

Enter sanctuary jurisdictions. Though there is no single definition of, and often debate over the term "sanctuary jurisdiction," the designation is commonly used to describe states and localities that have adopted measures to "limit their participation in enforcing federal immigration laws."[112] Thus, sanctuary ordinances and policies implicate preemption doctrine to the extent that they impact federal immigration law. Sanctuary jurisdictions have historically withstood preemption challenges under §1373 because they simply bar inquiry into immigration status ("don't ask"), so they have nothing to "tell" ICE.[113] San Francisco's "City and County of Refuge" ordinance is an example of a "don't ask" policy in action. It provides, in pertinent part:

> No department, agency, commission, officer, or employee of the City and County of San Francisco shall use any City funds or resources to

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108. *Id.*

109. *See* H.R. Rep. No. 104-469 at 277 (1996) ("[t]he Committee intends to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, and activities of illegal aliens. This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS. The Committee believes that immigration law enforcement is as high a priority as other aspects of Federal law enforcement and that illegal aliens do not have the right to remain in the U.S. undetected and unapprehended."); *see also* City of New York v. United States, 179 F.3d 29 (2d Cir. 1999) (indicating that § 1373 was a direct response to sanctuary policies, aimed to invalidate attempts to restrict local officials from cooperating with federal immigration authorities).

110. *See City of New York*, 179 F.3d at 29 (discussing the context of § 1373's passage immediately following New York City Mayor Edward Koch's Executive Order No. 124, which expressly "prohibits any City officer or employee from transmitting information regarding the immigration status of any individual to federal immigration status of any individual to federal immigration authorities").

111. Hing, *supra* note 98, at 268.

112. *See, e.g.*, Steven Papazian, Note, *Secure Communities, Sanctuary Laws, & Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 S. CAL. REV. L. & SOC. JUST. 283, 290–91 (2012); Rose Cuison Villazor, *What Is a "Sanctuary?*," 61 SMU L. REV. 133, 147–48, n.91 (2008); SARAH HERMAN PECK, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION, CONG. RSCH. SERV. (2019).

113. *See, e.g.*, PECK, *supra* note 112, at "Summary" (describing the three categories of sanctuary policies as 1) "don't enforce," i.e., policies that "generally bar state or local police from assisting federal immigration authorities," 2) "don't ask," i.e., "policies that generally bar certain state or local officials from inquiring into a person's immigration status," and 3) "don't tell," i.e., policies that "typically restrict information sharing between state or local law enforcement and federal immigration authorities.").

> assist in the enforcement of Federal immigration law *or to gather or disseminate information* regarding release status of individuals or any other such personal information as defined in Chapter 12I in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation, or court decision.[114]

At first blush it seems that such a general prohibition of inquiry may not be an option under this Note's UI proposal because EDD will, by necessity, be collecting funds specifically from undocumented immigrants. However, there are certain measures the state could take that might leave open the possibility of a workable "don't ask" policy.

A second, albeit riskier option, would be for California to enact a state law following a "don't tell" approach to sanctuary laws.[115] In other words, the immigration information will have already been collected; it is now a matter of restricting the *sharing* ("telling") of that information with federal immigration authorities. Chicago is one of the few localities to broach the "don't tell" territory.[116] The operative language of Chicago's municipal code reads:

> . . . no agent or agency shall disclose information regarding the citizenship or immigration status of any person unless required to do so by legal process or such disclosure has been authorized in writing by the individual to whom such information pertains, or if such individual is a minor or is otherwise not legally competent, by such individual's parent or guardian.[117]

Though the law's constitutionality has not been directly challenged, its prohibition of disclosure may conflict with the "sending" language of § 1373. Nevertheless, it helpfully models the statutory muscle that may be required to protect ITIN filer information under the proposed UI regime.

It is worth noting, however, that there are significant differences between the typical sanctuary law, which ordinarily aims to curtail data-sharing in the criminal context, and a law designed to safeguard taxpayer information. For one, ITIN information is technically *not* "information regarding the citizenship or immigration status, lawful or unlawful, of any individual," which is what must be shared under § 1373.[118] This nuance may be the key to ensuring a secure UI system under a "don't ask" policy. The trick is to design the program in a way that only requires EDD to maintain a skeletal database for administering its UI benefits. In fact, EDD already engages in this sort of "limited disclosure" practice in its present UI data exchanges with FTB. The

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114. S.F., CAL., ADMIN. CODE §§ 12H, 12I (1989) (emphasis added).
115. PECK, *supra* note 112, at "Summary."
116. CHI., ILL., MUN. CODE §§ 2-173-030, 2-173-042 (2018); *see also* Garcia, *supra* note 96, at 202–03.
117. CHI., ILL., MUN. CODE § 2-173-030 (2018).
118. 8 U.S.C. § 1373(a).

policy is codified in California Revenue and Tax Code Section 19551.2, subdivision (b), stating:

> The return and return information authorized to be disclosed pursuant to this section are *limited to information necessary to verify income*, which may include, but not be limited to, earnings, identifying information, net profit and loss, self-employment, or other information needed for administration of the unemployment programs administered by the EDD.[119]

A nearly identical provision would suffice under a new UI regime for ITIN filers, perhaps with additional protective language expressly outlawing the sharing or maintenance of immigration status information. It is noteworthy that many ITIN filers *are not undocumented*. ITIN filers include, among other categories, nonresident immigrants required to file U.S. tax returns, resident immigrants with green cards or work visas, and nonresident immigrants claiming a tax treaty benefit.[120] This fact is central to the success of a secure ITIN-UI fund. If ITIN filers are not exclusively undocumented, it prevents the mere title of "ITIN filer" from being used as a proxy for immigration status.

2. *Section 6103 versus Section 1373: A Clash of Federal Statutes*

Furthermore, "a fair reading of the text [of Section 1373] and history of the statute[] suggests that the anti-sanctuary provisions were not intended to and do not repeal conflicting privacy protections in federal law."[121] This has held true for IRC Section 6103 (§ 6103), as the IRS' strict privacy laws are key to tax compliance and maintaining public trust.[122] Significantly, the protections provided by § 6103 extend beyond only federal officials. The relevant provision, § 6103, subsection (a), reads:

> Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee *of any State, any local law enforcement agency* receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency

119. CAL. REV. & TAX. CODE § 19551.2(b) (West 2021) (emphasis added).

120. *Individual Taxpayer Identification Number*, IRS (Jan. 8, 2021), https://perma.cc/KTZ4-HEFS.

121. Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 202 (2016); *see also* Randolph D. Moss, *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, DEPT. OF COM. (May 18, 1999) (concluding that 8 U.S.C. § 1373(a) does not repeal 13 U.S.C. § 9(a), a statute prohibiting census officials from disclosing covered information); Newman, *supra* note 96, at 160.

122. *See* 26 U.S.C. § 6103; *The Facts About the Individual Taxpayer Identification Number*, AM. IMMIGR. COUNCIL (Sept. 2021), https://perma.cc/8LFJ-CMDL.

> administering a program listed in subsection (I)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection . . .shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section . . .[123]

The Section plainly prohibits state and local governments, agencies, and officers from disclosing "return or return information," thereby standing directly at odds with § 1373's proscription against "prohibit[ing], or in any way restrict[ing], any government entity or official from sending . . . information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[124]

Yet, despite this seemingly irreconcilable conflict, the two federal laws have never been the subject of shared litigation. This may be because ICE generally maintains a safe distance from the IRS. Even when conservative activist groups and the DHS have attempted to obtain SSA's "no-match" records to conduct immigration enforcement,[125] there has been swift judicial intervention to enforce § 6103.[126] Were such a clash between §§ 1373 and 6103 ever to find itself before a federal judge, the two statutes and their respective histories would face a maelstrom of judicial hand wringing. That § 1373 asserts its effect "notwithstanding" any other provision of law "does not evidence an express repeal" of the other statute.[127] Instead, a reviewing court would determine "the extent that Congress has clearly indicated which of two statutes it wishes to prevail in the event of a conflict" then "interpret and apply them in a way that preserves the purposes of both and fosters harmony between them."[128] Where both cannot apply, as would likely be the case between § 6103 and § 1373, the court would "look to their fundamental purpose to choose which one must give way."[129] Whether § 6103 would carry the day is a question for tomorrow.

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123. 26 U.S.C. § 6103(a)(1)–(3) (emphasis added).

124. 8 U.S.C. § 1373.

125. *See* Jennifer Chang Newell, *Will Immigration Authorities Use Our Taxes to Go After Immigrants?*, ACLU (Apr. 23, 2018, 5:15 PM), https://perma.cc/FKV5-AY3H.

126. *See, e.g.*, Jud. Watch, Inc. v. Soc. Sec. Admin., 701 F.3d 379, 380 (D.C. Cir. 2012) (concluding that records requested by Judicial Watch, Inc. were exempt from disclosure by 26 U.S.C. § 6103).

127. Moyle v. Dir., Off. of Workers' Comp. Programs, 147 F.3d 1116, 1124 n.4 (9th Cir. 1998) (citing *In re* the Glacier Bay, 944 F.2d 577, 582 (9th Cir. 1991)).

128. Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498, 1507 (10th Cir. 1995) (holding that where the purposes of federal patent laws conflict with the purposes of federal trademark laws, the patent law prevails).

129. *Id.*

3. *Modeling New Policy*

The point stands that the same strict privacy constraints governing the IRS also govern state and local bodies, including EDD, insulating any new UI program from federal data requests. Moreover, California maintains its own privacy laws unique to FTB's tax administration, offering extra padding around ITIN filer security.[130] Nevertheless, lawmakers would be wise to enact a "don't ask" state policy to accompany the rollout of a new UI program. Whether as a series of amendments to existing data-sharing laws or a new statute entirely, the policy's primary aim should be to: 1) avoid the collection of immigration information to begin with; and 2) affirmatively prohibit the sharing of personal information with federal immigration officials. The policy would reflect the basic form and spirit of the following model:

(a) California tax and employment agencies shall not:

(1) Use agency or department moneys or personnel to investigate or interrogate persons for immigration enforcement purposes, including any of the following:

(A) Inquiring into his or her immigration status.

(B) Providing information regarding an individual's return or return information, or responding to requests for notification by disclosing confidential tax records or other data unless that information is available to the public.

(C) Providing personal information, as defined in Section 1798.3 of the Civil Code,[131] about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public.[132]

Absent from this black-letter legal analysis is the pragmatic question of how often the practice of undocumented data collection actually occurs. That is, how many times and to what extent the federal government has requested information from California agencies like EDD and FTB about programs that serve undocumented people. Before pursuing a UI program of this magnitude, community-based organizations and advocates should submit requests under the California Public Records Act (CPRA)[133] to EDD, FTB, and other relevant agencies seeking release of this information. A complementary UI

130. CAL. REV. & TAX. CODE § 19542.1 (West 1998).
131. CAL. CIV. CODE § 1798.3 (West 2013).
132. This sample policy is modeled in part after Senate Bill 54. *See* S.B. 54, 2017 Reg. Sess. (Cal. 2017).
133. CAL. GOV'T CODE §§ 6250–6270 (West 1970).

program built upon ITIN revenue should not be pursued without a clear understanding of the prevalence of immigration inquiries and instances of data-sharing. Indications of frequent data-sharing need not hinder program development entirely but should be used to inform the framework of any accompanying privacy protections.

Lastly, the recently enacted AB 2660 has added yet another wrinkle to this discussion. As of January 1, 2021, FTB "shall" no longer require unauthorized immigrants to provide an SSN *or* an ITIN in order to file a state tax return.[134] This change was in part motivated by the burdensome and lengthy process of obtaining an ITIN, offering workers the ability to pay their taxes without waiting for the issuance of an SSN or ITIN.[135] The bill is a positive step for undocumented workers, but it raises questions for a UI system based entirely on ITIN revenue. The taxpayers filing without ITIN status would need to be included in the fund, and their revenue must be considered for earmarking purposes. The degree to which AB 2660 might frustrate EDD's administrative burdens ought to be further explored.

D. *Constitutional Law: Applying the Tenth Amendment's Anti-Commandeering Doctrine*

This Note joins a chorus of Constitutional law scholars in calling for the abrogation of § 1373 as unconstitutionally infringing upon the state and local sovereignty guaranteed by the Tenth Amendment.[136] The federal power to preempt state or local immigration activity is not absolute. Even if the state of California can ensure the preservation of taxpayer records, § 1373 remains a threat to both the safety of immigrants and the sovereign power of state governments. Executive Order 13768 stands as a reminder of the executive's capacity to weaponize federal spending powers in heavy reliance on § 1373.[137] Left untouched, § 1373 empowers federal overreach, vulnerable to the whims of partisanship. Yet, despite *City of New York v. United States*' failed attempt to overturn § 1373,[138] the fresh doctrinal boundaries set forth in *Murphy v. National Collegiate Athletic Association*[139] forecast a changing tide. This Part first reviews Tenth Amendment challenges to § 1373 and corresponding developments in the anti-commandeering doctrine. It then briefly

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134. CAL. REV. & TAX. CODE § 18624(f)(1)–(2) (West 2021).

135. S. 2019–2020, S. Floor Analysis Assemb. B. 2660, Reg. Sess., at 3–4 (Cal. 2020) (arguing that SSNs and ITINs are often "either not available" or "extremely challenging to obtain," and that the bill "provides a significant benefit to the business community by easing tax compliance and administrative burdens for both companies and employees alike.").

136. *See, e.g.*, Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 RUTGERS U.L. REV. 1553 (2017); Nathaniel F. Sussman, *On Immigration, Information, and the New Jurisprudence of Federalism*, 93 S. CAL. L. REV. 129 (2019); Mary Ann McNulty, *A Doctrine Without Exception: Critiquing an Immigration Exception to the Anticommandeering Rule*, 169 U. PA. L. REV. 241 (2020); Hing, *supra* note 98.

137. Exec. Order 13768, *supra* note 99.

138. City of New York v. United States, 179 F.3d 29 (2d Cir. 1999).

139. Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

contemplates the merits of a constitutional challenge in light of the Supreme Court's new composition.

1. *Litigation Challenging § 1373, and Related Doctrinal Developments*

Guided by seminal Tenth Amendment cases *New York v. United States*[140] and *Printz v. United States*,[141] the anti-commandeering doctrine prevents the federal government from "compel[ling] the States to enact or administer a federal regulatory program"[142] or "conscripting the State's officers directly."[143] If § 1373 is interpreted as merely preventing states and cities from blocking voluntary cooperation—a distinction that walks a fine line of federal conscription—then it may fall outside the bounds of compelled enactment, administration, or conscription. Under this reading of the statute, § 1373 could arguably survive *Printz* because it does not actually *mandate* local action, it simply prevents the prohibition of local cooperation. Indeed, this framing ultimately prevailed in the *City of New York* challenge of § 1373.[144] In *City of New York*, the Second Circuit concluded that § 1373 does "not directly compel states or localities to require or prohibit anything. Rather, [it] prohibit[s] state and local government entities or officials only from directly restricting the voluntary exchange of immigration information with the INS."[145]

City of New York falters, and scholars dissent, in the court's characterization of New York City's Executive Order No. 124 as not "integral" to local government operations.[146] The Order, akin to Chicago's "don't-ask-don't-tell" Ordinance,[147] prohibits "any City officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities . . . ."[148] In finding the Order non-integral, the Second Circuit refused to find an "impermissible intrusion on state and local power" because the Order merely operated "to reduce the effectiveness of a federal policy" and was not "a general policy that limits the disclosure of confidential information."[149] Through this line of reasoning, the court clearly signaled that whether the "state or local power" at issue was "integral" was dispositive for its anti-commandeering analysis.[150]

This offers an opening for litigants to demonstrate just how "integral" local sanctuary policies are to the operation of city government. The most

140. New York v. United States, 505 U.S. 144 (1992).
141. Printz v. United States, 521 U.S. 898 (1997).
142. *New York*, 505 U.S. at 188.
143. *Printz*, 521 U.S. at 935.
144. *City of New York*, 179 F.3d 29 (2d Cir. 1999) (upholding §§ 1373 and 1644 as facially constitutional).
145. *Id.* at 35 (citing *Printz*, 521 U.S. at 917–18).
146. *Id.* at 37; *see also* Hing, *supra* note 98, at 267.
147. CHI., ILL., MUN. CODE §§ 2-173-030, 2-173-042 (2018).
148. *City of New York*, 179 F.3d 29 at 31 (2d Cir. 199).
149. *Id.* at 36–37.
150. *See id.*; Hing, *supra* note 98, at 279.

persuasive framing under this approach, is to establish how sanctuary laws are in fact public safety laws, i.e., a legitimate, non-immigration purpose.[151] Courts should look no further than the text of municipal codes themselves for evidence of this public safety purpose. The vast majority of local sanctuary laws contain some sort of language to this effect, or have been characterized as such by local law enforcement authorities.[152] The theory being that it is in the best interest of communities to trust local law enforcement, so if an undocumented immigrant witnesses or falls victim to a violent crime, they should not be wary of coming forward for fear of deportation. Sanctuary policies could mitigate that fear and encourage community trust. Another common rationale is an economic one: cities have limited resources and do not want to waste law enforcement time on federal immigration enforcement. By explaining that sanctuary laws are a matter of community safety and local economic sovereignty, § 1373 begins to look much more like a mandate to permit voluntary cooperation subject to the anti-commandeering principles of the Tenth Amendment.

Following *City of New York*, two 2018 cases began to alter the anti-commandeering terrain. The first, *Murphy v. NCAA*, recently clarified the doctrine's scope.[153] In a 6 – 3 decision, the Supreme Court held the Professional and Amateur Sports Protection Act (PASPA) "anti-authorization provision," which prohibited states from "authorizing" sports gambling "by law," violated the anti-commandeering doctrine.[154] The Court's holding that "the anti-commandeering doctrine applies with equal force to federal statutes which tell states . . . to '*refrain*' from enacting certain types of laws,"[155] has enabled courts to scrutinize, and in one instance, invalidate the continuing constitutional viability of § 1373.[156]

That invalidation came from the United States District Court for the District of Oregon, in the second significant 2018 anti-commandeering decision *Oregon v. Trump*.[157] Relying on the new boundaries set forth in *Murphy*, the *Oregon* court found that §§ 1373 and 1644 "fail under a straightforward application of anti-commandeering principles."[158] Crucial to the court's

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151. *See* Hing, *supra* note 98, at 279.

152. *See, e.g.*, OR. REV. STAT. § 181A.820 (2021); City of Takoma Park, Md., Ordinance No. 2007-58 (Oct. 29, 2007), https://perma.cc/CRJ5-XARG; *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., & Int'l Law and the Subcomm. on the Const., Civ. Rights, & Civ. Liberties of the Comm. on the Judiciary H.R.*, 111th Cong. 84 (2009) (testimony of George Gascón, Chief, Mesa Police Dep't); Sean Webby, *San Jose: Chief Says Local Cops Shouldn't Be Involved in Immigration Enforcement*, MERCURY NEWS (Mar. 16, 2011), https://perma.cc/FR97-METX; Gregory Smith, *ICE Gains Access to R.I. Arrest*, PROVIDENCE J. A1 (Apr. 06, 2011); Hing, *supra* note 98, at 297.

153. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

154. *Id.*

155. Oregon v. Trump, 406 F. Supp. 3d 940, 971 (D. Or. 2019) (paraphrasing *Murphy*, 138 S. Ct. at 1478) (emphasis in original).

156. *See* PECK, *supra* note 112, at 13; *Oregon*, 406 F. Supp. 3d at 973.

157. *See Trump*, 406 F. Supp. 3d at 973.

158. *Id.* at 972.

reasoning was § 1373's restriction of local officials from *enacting* rules that "in any way restrict" the sharing of immigration information.[159] This restriction, the court held, "dictates what a state legislature may and may not do," in plain violation of the Tenth Amendment.[160] Moreover, the court found persuasive plaintiffs' argument that "the health, welfare, and public safety of their residents is best served by refraining from the enforcement and administration of federal immigration laws."[161] The defendants naturally appealed to the Ninth Circuit, where the appeals are presently being held in abeyance on administrative closure. When the appellate court resumes this proceeding, it is within reason that the combined force of *Murphy* and the "integral" public safety arguments outlined above will prevail.[162]

2. *Federalism in the Amy Coney Barret Era: Deference to Whom?*

Given *Oregon's* present posture, this Note warrants a brief discussion of whether the highest Court would grant certiorari or overturn § 1373 on federalism grounds. The Court's composition has transformed since *Murphy* came down to encapsulate perhaps an even stronger federalism jurisprudence. Two votes in the *Murphy* decision, Justices Ginsburg and Kennedy, have since been replaced by Justices Barrett and Kavanaugh. Although Justice Kennedy voted with the majority in *Murphy* and other federalism decisions, he "nonetheless tended to favor a somewhat broader conception of federal power in a few contexts."[163] Most relevant to the § 1373 context, *Murphy* seemed to be an outlier in Justice Kennedy's preemption record, as he "commonly voted to invalidate state statutes or common law doctrines on the ground that they conflicted with federal law."[164] Not unlike Justice Kennedy's moderate federalism record, the late Justice Ginsburg has been described as a "centrist on federalism in the preemption doctrine context," and even as "one of the Supreme Court's secure 'anti-preemption' votes."[165]

Nevertheless, Justice Ginsburg did cast a pro-preemption vote in *Murphy*, and Justice Kennedy's moderate federalism record lies in contrast to the jurisprudence of Justices Barrett and Kavanaugh. During her brief tenure with the Seventh Circuit, federalism concerns "animate[ed] several" of Justice

159. *Id.*
160. *Murphy*, 138 S. Ct. at 1478.
161. *Trump*, 406 F. Supp. 3d at 954.
162. This Note owes a great deal of credit to Professor Bill O. Hing, Director of the Immigration and Deportation Defense Clinic, and Dean's Circle Scholar at the University of San Francisco School of Law. Professor Hing's remarkable contributions to Immigration and Constitutional law inspired much of this writing. This Note joins Professor Hing in solidarity by adopting his statement that "if local experimentation tyrannizes a particular minority group (e.g., immigrants) then the values of the Tenth Amendment are not achieved through protecting state's rights."
163. ANDREW NOLAN, VALERIE C. BRANNON & KEVIN M. LEWIS, JUSTICE ANTHONY KENNEDY: HIS JURISPRUDENCE AND THE FUTURE OF THE COURT, CONG. RSCH. SERV. (2018) (citing Haywood v. Drown, 556 U.S. 729, 731–42 (2009)); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 6–22 (2007).
164. NOLAN, BRANNON & LEWIS, *supra* note 163, at 21.
165. Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 271 (2010).

Barrett's decisions.[166] However, Justice Barrett's strict textualism may complicate her vote in a § 1373 challenge. Her method of Constitutional interpretation may militate toward a rigid reading of the Supremacy Clause and a corresponding presumption of federal preemption. Barrett has published on the subject, writing on how to be a "faithful agent" of strict textualism across legal doctrines, including federal preemption.[167] A similarly green Kavanaugh likewise offers few glimpses into his federalism jurisprudence. The closest Justice Kavanaugh has come to addressing pure issues of federalism came in his 2017 speech on Chief Justice Rehnquist's legacy. In the speech, Kavanaugh "voiced general agreement with the Rehnquist Court's Commerce Clause decisions, outlining Chief Justice Rehnquist's reasoning in *Lopez* and *Morrison* and describing those cases as 'critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power.'"[168] With a great degree of speculation, there is at least room for argument that the Supreme Court's newest members may deem § 1373 an unconstitutional contravention of state power if the issue reaches the Courthouse steps. The Section's invalidation would be a monumental step in the fight for immigrants' rights.

IV. EXTRATERRITORIAL SAFETY NETS AND THE POLITICAL FIGHT

Notwithstanding the current state of the law, some localities have helped nonprofit charitable organizations establish their own patchwork protections for workers without status. In July 2020, the city of Denver invested $750,000 into a relief fund for Denver residents who lost their jobs but were ineligible for state and federal aid.[169] Hosted by a Denver-based nonprofit, Impact Charitable, the Left Behind Workers Fund operates largely through philanthropic commitments, though a subsequent $1 million contribution from the City has helped support additional payouts.[170] The diversion fund disperses payments of $1,000 "per eligible, displaced worker to help them address their most pressing emergency needs such as food, rent, bills,

166. VALERIE C. BRANNON, MICHAEL J. GARCIA & CAITLAIN D. LEWIS, JUDGE AMY CONEY BARRETT: HER JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT, CONG. RSCH. SERV. 18 (2020) (citing Sims v. Hyatte, 914 F.3d 1078, 1092, 1099 (7th Cir. 2019) (Barrett, J., dissenting)); Schmidt v. Foster, 891 F.3d 302, 328 (7th Cir. 2018), *reh'g en banc granted, opinion vacated*, 732 F. App'x 470 (7th Cir. 2018), and *on reh'g en banc*, 911 F.3d 469 (7th Cir. 2018) *cert. denied*, 140 S. Ct. 96 (2019).

167. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U.L. REV. 109 (2010); *see also* Mitchell P. Morinec, *What Is Amy Coney Barrett's Record on Federal Preemption and What Does It Mean for Future SCOTUS Rulings in Drug and Medical Device Litigation*, SEGAL MCCAMBRIDGE LITIG. BLOG (Oct. 27, 2020), https://perma.cc/WN6D-4PCN.

168. ANDREW NOLAN & CAITLAIN D. LEWIS, JUDGE BRETT M. KAVANAUGH: HIS JURISPRUDENCE & POTENTIAL IMPACT ON THE SUPREME COURT, CONG. RSCH. SERV. 108–09 (2018).

169. *Denver to Jumpstart 'Left Behind Workers Fund' to Help Residents Who Do Not Qualify for State, Federal Aid*, CITY AND CNTY. OF DENVER (June 4, 2020), https://perma.cc/P3A3-GFBT.

170. *Id.*; *see also Denver Adds Another $1 Million to 'Left Behind Workers Fund' for Residents Who Do Not Qualify for State, Federal Aid*, CITY AND CNTY. OF DENVER (Oct. 6, 2020), https://perma.cc/G4HS-D9LG [hereinafter *Denver Adds Another $1 Million*].

healthcare and transportation."[171] By October 2020, 1,900 cash assistance grants had been doled out to families in need, with an expected 990 additional grants to flow from the City's $1 million contribution.[172] That number surged in the months to follow, amounting to 9,067 people who had received direct cash grants of $1,000 as of December 2020.[173] The fund has over thirty non-profit community partners, including the Colorado Immigrant Rights Coalition ("CIRC"), the Village Exchange Center, and Social Venture Partners.[174]

Other private fundraising efforts and even state funds have sprung up across the country to step in where state and federal programs have failed.[175] Much like California's Disaster Relief Assistance Fund, these reserves support one-time cash payments to eligible households, with some expending unprecedented figures toward undocumented workers. New York State's Excluded Workers Fund sets aside payments of up to $15,600 to undocumented immigrants who lost work during the pandemic.[176] But this victory did not come without expense. Community organizers, workers, and activists held frequent protests and pressured lawmakers for months in the #FundExcludedWorkers movement.[177] The statewide advocacy push was fueled by drastic organizing efforts, including one hunger strike in Manhattan.[178]

The success of these programs may carry significant political value in the long term, but they fall far short of a state income replacement fund that would run in perpetuity. While charitable and even state political efforts like these offer critical protection for workers without valid authorization, they must be scaled up in order to meet the needs of all workers, and on a permanent basis. This Note offers ample economic rationale for the creation of an inclusive UI, but it is important to remember the very real human cost at stake. Victor Narro, the project director for the University of California, Los Angeles' Downtown Labor Center and labor studies professor, put a fine point on the issue: "The government should be able to provide for those that really contribute in many ways," he said.[179] "Low-wage work[ers] . . . should

171. *Denver Adds Another $1 Million*, *supra* note 170.

172. *Id.*

173. Victoria De Leon, *Fund Providing Financial Help for Those That Don't Get Federal Aid Because of Their Citizenship Status*, 9NEWS (Mar. 10, 2021), https://perma.cc/XQK2-CB97.

174. *Direct Cash Assistance Funds*, IMPACT CHARITABLE, https://perma.cc/6R4V-LLNL.

175. *See, e.g.*, UNDOCUFUND SF, https://perma.cc/MYE6-Q63J; Amanda Rose, *What N.Y. State's Budget Means*, N.Y. TIMES (Apr. 7, 2021), https://perma.cc/8VCR-4CJR.

176. Kate Selig, *New York Is Giving Over $15k to Undocumented Immigrants in Pandemic Relief Aid, While California Has So Far Offered About $1,700*, MISSION LOCAL (Apr. 28, 2021), https://perma.cc/FGM5-KJWW [hereinafter MISSION LOCAL].

177. Rose, *supra* note 175; Edward McKinley, *How $2.1 Billion for Undocumented Immigrants Landed in the State Budget*, TIMES UNION (Apr. 8, 2021), https://perma.cc/C2BL-7HKT.

178. McKinley, *supra* note 177.

179. MISSION LOCAL, *supra* note 176.

have access to good wages, good affordable housing — they shouldn't have to struggle."[180]

CLOSING

Recent state action brings fresh hope for reimagining income replacement for all. California has extended its Earned Income Tax Credit to workers without status. New York has earmarked over $2 billion of its 2021 state budget toward an undocumented UI pool. The political appetite for a permanent, statewide program may not be busting at the legislative seams, but there is now precedent for developing bold policies for the undocumented workers who have sacrificed so much but received so little. This Note provides a blueprint for an inclusive UI, built entirely from the revenue of undocumented labor, and designed to withstand threats to taxpayer privacy. California lawmakers now face an imperative decision: reconstruct an inclusive benefit system or continue an unbroken pattern of systemic exclusion. In this pivotal moment of a global crisis, that decision carries the force of 3 million lives. Whether the state recognizes the humanity in its undocumented population is now a question of political will.

180. *Id.*