

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, MARYLAND

SHARON BAUER and RICHARD JURGENA,)	
)	
Plaintiffs,)	
)	Civil Action No.
v.)	
)	
MARC ELRICH, in his official capacity)	
as Montgomery County Executive,)	
)	
and)	
)	
RAYMOND L. CROWEL, in his official)	
capacity as Director of Montgomery County)	
Department of Health and Human Services,)	
)	
Defendants.)	
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**PLAINTIFFS’ MOTION FOR
TEMPORARY RESTRAINING ORDER**

Plaintiffs Sharon Bauer and Richard Jurgena, by counsel and pursuant to Md. Rule 15-504, respectfully move for a temporary restraining order enjoining Defendants Marc Elrich and Raymond L. Crowel from expending at least \$5 million of taxpayer monies in violation of federal law.

MEMORANDUM OF LAW

I. Introduction.

In May 2020, Defendants intend to provide \$5 million of taxpayer monies in direct cash benefits to unlawfully present aliens in violation of 8 U.S.C. § 1621. Plaintiffs seek to prevent this illegal expenditure before it’s too late. Once the money is spent, Plaintiffs and all Montgomery County taxpayers will have suffered a pecuniary loss. A restraining order is proper because Plaintiffs can demonstrate that they are likely to succeed on the merits and that they and

all Montgomery County taxpayers will suffer immediate, substantial, and irreparable harm without it. Plaintiffs therefore respectfully request the Court grant Plaintiffs' request.

II. Factual Background.

On April 15, 2020 County Executive Elrich stated that Montgomery County would soon provide \$5 million of support to individuals who do not qualify for unemployment insurance or other benefits. *See* Affidavit of Michael Bekesha at ¶ 3. He also stated unlawfully present aliens do not qualify for unemployment or other benefits. *See id.* Then, on April 27, 2020, Montgomery County released a press statement announcing a new initiative to provide cash payments to certain Montgomery County residents. *See id.* at ¶ 4. The initiative is known as the “Emergency Assistance Relief Payment Program” or “EARP.” *See id.*

According to the press statement, “[a]pproximately \$2.5 million will be disbursed to residents by the Department of Health & Human Services and another \$2.5 million will be targeted to individuals and families served by nonprofit organizations in the community. Funding for the initiative is based on actions by County Executive Marc Elrich and the County Council.” *See id.* at ¶ 5. The County Council approved the \$5 million appropriation from the General Fund on April 30, 2020. *See id.* at ¶ 6. The General Fund is comprised entirely of taxpayer monies. *See id.* at ¶ 7.

DHHS also created a website providing additional information about EARP. *See id.* at ¶

8. According to DHHS, the payments under EARP are:

- Single Adult - \$500;
- Family with one child - \$1,000;
- Families with children - \$1,000 (family with one child) with an additional \$150 for each additional child, with a maximum of \$1,450;
- Head of household should be 18 years or older, the claimed child should be

less and not equal to 19 years old; and

- The benefit increases by \$150 per child to a maximum of \$1,450.

See id. at ¶ 9. These payments are grants, not loans, and do not have to be paid back by the individuals or families. *See id.* at ¶ 10. To be eligible for a payment, an individual must:

- not be eligible to file for Federal or State taxes;
- not have filed nor are eligible to receive unemployment;
- have an annual income below 50% of the federal poverty level; and
- must be a Montgomery County resident.

See id. at ¶ 11.

Based on the narrow set of eligibility criteria, unlawfully present aliens will be the primary – if not exclusive – recipients of EARP’s cash payments. In addition, according to DHHS spokesperson Mary Anderson, unlawfully present aliens are eligible to apply for and receive cash payments. *See id.* at ¶ 12.

Of particular importance to Plaintiffs’ request for a restraining order, DHHS will begin providing payment checks during the week of May 4, 2020 and anticipates disbursing the \$5 million by the end of May 2020. *See id.* at ¶ 13.

III. Legal Standard.

A. Taxpayer lawsuit.

As the Maryland Court of Appeals affirmed last year:

Taxpayer standing is a common law standing doctrine that permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin illegal and ultra vires acts of public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer. Under the doctrine of taxpayer standing, the taxpayer does not assert a private cause of action but, instead, that of his or her government. Therefore, a taxpayers’ suit is essentially a derivative proceeding akin to a corporate shareholders’ suit. The doctrine of taxpayer standing exists to

ensure that government acts within the bounds of the law, and to protect citizens from the consequence of unauthorized or illegal acts.

Floyd v. Mayor of Baltimore, 464 Md. 226, 242 (2019).

B. Temporary restraining order.

Pursuant to Md. Rule 15-504, “[a] temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.” In addition, a court must “consider the plaintiff’s likelihood of success on the merits, the balance of harm to each party if relief is or is not granted, the potential for irreparable injury to the plaintiff, and the public interest.” *Fuller v. Republican Central Committee*, 444 Md. 613, 635 (2015).

IV. Argument.

Based on the face of the Complaint as well as the facts identified above, it is likely Plaintiffs will prevail on the merits. The Maryland General Assembly has not affirmatively enacted a law authorizing Defendants to provide cash benefits to unlawfully present aliens as part of EARP, as required under 8 U.S.C. § 1621. Nonetheless, Defendants intend to provide such benefits to unlawfully present aliens starting in May 2020. Plaintiffs also can demonstrate that they and all Montgomery County taxpayers will suffer immediate, substantial, and irreparable pecuniary harm as soon as Defendants illegally spend the \$5 million of taxpayer monies.

A. Plaintiffs are likely to succeed on the merits.

i. 8 U.S.C. § 1621 prohibits Defendants from providing cash benefits to unlawfully present aliens without an affirmative enactment by the Maryland General Assembly.

Under federal law, unlawfully present aliens generally are ineligible for State or local public benefits. 8 U.S.C. § 1621(a). With certain exceptions not relevant here, the term “State or local public benefit” means:

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

8 U.S.C. § 1621(c). However, a “State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit ... only through the enactment of a State law ... which affirmatively provides for such eligibility.” 8 U.S.C. § 1621(d). It is indisputable that the direct cash benefits to be provided to unlawfully present aliens under EARP fall within the definition of a “State or local public benefit.” The relevant provision is therefore the exception to the general rule.

Section 1621(d) is unambiguous and sets forth two requirements. First, the provision says “State law,” not executive order or proclamations. Nothing short of a law enacted by the legislature and signed by the governor suffices. Second, the law must expressly authorize provision of the benefits to unlawfully present aliens.

A review of the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” which enacted Section 1621, shows that Congress used the phrases “State agency” and

“State or political subdivision of a State” multiple times, but not in the language that became Section 1621. This distinction further demonstrates that Congress intended Section 1621 to require enactments of state legislatures – statutes – not executive orders or proclamation, and certainly not local municipality orders at issue here. Section 1621 may not be read to include such items in interpreting “only through the enactment of a State law.” *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 169 (1993) (“To supply omissions transcends the judicial function.”), *quoting Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.); *see also Pappas v. Pappas*, 287 Md. 455, 465 (1980) (“A court may not under the guise of interpretation insert or omit words to make a statute express an intention not evidenced in its original form.”), *citing Schmidt v. Beneficial Fin. Co.*, 285 Md. 148, 155 (1979).

In enacting Section 1621, Congress plainly decided to allow the states a small measure of authority in an area – immigration and naturalization – that otherwise is reserved almost entirely to the federal government. Specifically, Congress decided to allow states to extend eligibility for state and local public benefits to unlawfully present aliens, but only if the highest and most visible, politically accountable levels of state government do so affirmatively. Section 1621 is a “stand up and be counted” law designed to ensure political accountability should states wish to enter an area otherwise reserved to the federal government. *See* H.R. Rep. No. 104-725, 2d Sess., p. 383 (1996) (“Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act ... will meet the requirements of [Section 1621].”).

The report accompanying Section 1621 also confirms that Congress intended this section as a political accountability law by requiring action by the people’s elected representatives –

their state legislators and governors. The Conference Agreement accompanying the bill describes the effect of Section 1621 as follows:

No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens.... Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision, will meet the requirements of this section.

H.R. Rep. No. 104-725, 2d Sess., p. 383 (1996). The omission of any reference to executive orders or proclamations was deliberate. *Director, Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 46-47 (1979) (the "legislative history of the 1972 Amendments convinces us that the omission was intentional. Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said").

As will be demonstrated below, the Maryland General Assembly has not enacted a State law authorizing payment of direct cash benefits to unlawfully present aliens under EARP. County Executive Elrich and the County Council established the program and determined its funding source. Accordingly, section 1621(d) has not been satisfied.

ii. The Maryland General Assembly has not authorized direct cash benefits to unlawfully present aliens.

It is indisputable that the Maryland General Assembly has not authorized direct cash benefits to unlawfully present aliens. The appropriation of taxpayer monies to fund the EARP program was approved by the County Council at the request of County Executive Elrich. The Maryland General Assembly had no role whatsoever in the creation of EARP or the appropriation of funds for it.

As discussed above, Section 1621(d) requires an enactment of a State law that affirmatively provides for benefits to unlawfully present aliens. It does not allow a political subdivision of a state to do so. Montgomery County is a political subdivision of the State of Maryland. *See, e.g.*, Md. General Provisions Code Ann. § 4-101(i). It is not the State. The County Council does not enact State laws. It only has the authority to enact “local laws.” *See* Md. Const. art. XI-A, § 3. Therefore, Section 1621(d) simply does not apply. Defendants will be expending at least \$5 million of taxpayer monies in violation of 8 U.S.C. 1621(a).

B. Plaintiffs and all Montgomery County taxpayers will suffer immediate, substantial, and irreparable pecuniary harm.

As noted above, Plaintiffs must not only demonstrate that they will suffer immediate, substantial, and irreparable pecuniary harm if the restraining order is not issued but also that there is a greater harm to Plaintiffs than to Defendants if the restraining order is not issued and that the restraining order is in the public interest. *Fuller*, 444 Md. 613 at 635. In this case, the three factors are inseparable.

Defendants have publicly stated they intend to start disbursing the \$5 million to unlawfully present aliens in May 2020. As of the filing of this motion, such disbursements have either begun or are imminent. In addition, once the \$5 million is disbursed, the money has left the public fisc. Plaintiffs, even if they succeed on the merits, will not be able to recover the taxpayer monies. Importantly, Defendants have also publicly stated they intend to disburse all the funds by the end of May 2020. In other words, both the start and end of the spending will occur in May 2020. Any action by the Court to stay this unlawful expenditure must be immediate.

For the same reasons, the harm is irreparable. Maryland’s taxpayer standing doctrine allows taxpayers to bring an action to prevent the illegal expenditure of taxpayer monies. It does

not allow for a remedy of damages or even recovery of funds. Therefore, once the monies are spent, the case is moot.¹ Preserving the status quo is therefore essential.

Finally, there can be no dispute that the spending of \$5 million is both a substantial and pecuniary harm. In *George v. Baltimore City*, the Maryland Supreme Court found the expenditure of \$2,260,631 in a fiscal year to be a pecuniary loss. 463 Md. 263, 282 (2019). Obviously, \$5 million of spending in one month then is sufficient. It is \$5 million of taxpayer monies that could otherwise be spent on lawful activities, or preserved for a rainy day, not requiring the likely possibility of an increased tax assessment for lawful county taxpayers. Plaintiffs and all Montgomery County residents are harmed by these funds being spent illegally.

If a restraining order is issued, Defendants' injury is that a program they seek to implement will be put on pause until the Court has an opportunity to fully adjudicate the merits of Plaintiff's claim. A momentary pause is not as significant as the loss of \$5 million. If the County is concerned that the unlawfully present aliens will not be able to otherwise pay for essential items without the direct cash payments, such a concern is unfounded. Federal law already authorizes counties and municipalities to provide unlawfully present aliens with certain non-cash benefits during emergencies, such as health and food assistance, without the direct expenditure of taxpayer monies. *See* 8 U.S.C. § 1621(b). And if unlawfully present aliens need direct financial assistance, local Maryland-based non-profit organizations already provide those independent of the \$5 million expenditure. *See* <https://wearecasa.org/updates/mdcovidguide/> ("CASA has a fund that will directly distribute cash benefits to CASA members who were unjustly and summarily ignored by the federal government in the CARES Act stimulus

¹ Of course, it is entirely possible and likely that Defendants will extend EARP beyond the \$5 million they have already announced. If that occurs, the case will not be moot as additional taxpayer monies will be expended.

package.”). In short, there is no harm to unlawfully present aliens or the public from temporarily staying the expenditure. The four factors favor issuing the temporary restraining order.

V. Conclusion.

For all the reasons stated above, Plaintiffs request the Court issue a temporary restraining order and enjoin Defendants from expending \$5 million of taxpayer funds in violation of federal law.

Dated: May 8, 2020

Respectfully Submitted,

/s/ Eric Lee
Eric W. Lee (Md. Bar No. 1612140001)
Michael Bekesha (*Pro Hac Vice* Pending)
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 8th day of May 2020, I served by electronic mail and overnight

Federal Express Plaintiffs' Motion for Temporary Restraining Order on:

Montgomery County Attorney
101 Monroe St., 3rd Floor
Executive Office Building
Rockville, MD 20850
mcgatty@montgomerycountymd.gov

/s/ Michael Bekesha _____
Michael Bekesha

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capacity as Director of Montgomery County)	
Department of Health and Human Services,)	
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Defendants.)	
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Affidavit

I, Michael Bekesha, hereby solemnly affirm:

1. I am over 18 years of age, competent to testify, and have personal knowledge of the facts set forth herein.

2. I am a senior attorney at Judicial Watch, Inc. I have submitted an application to appear *pro hac vice* in this case on behalf of Plaintiffs.

3. On April 15, 2020 County Executive Elrich stated that Montgomery County would soon provide \$5 million of support to individuals who do not qualify for unemployment insurance or other benefits. He also stated unlawfully present aliens do not qualify for unemployment or other benefits.

4. On April 27, 2020, Montgomery County released a press statement announcing a new initiative to provide cash payments to certain Montgomery County residents. The initiative

is known as the “Emergency Assistance Relief Payment Program” or “EARP.” *See* https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=25235.

5. According to the press statement, “[a]pproximately \$2.5 million will be disbursed to residents by the Department of Health & Human Services and another \$2.5 million will be targeted to individuals and families served by nonprofit organizations in the community. Funding for the initiative is based on actions by County Executive Marc Elrich and the County Council.” *See id.*

6. The County Council approved the \$5 million appropriation from the General Fund on April 30, 2020. *See* https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=25258&Dept=1.

7. The General Fund is comprised entirely of taxpayer monies. *See* <https://apps.montgomerycountymd.gov/basisoperating/Common/BudgetFundSnapshot.aspx>.

8. DHHS also created a website providing additional information about EARP. *See* https://www.montgomerycountymd.gov/HHS/RightNav/Coronavirus_EARP.html.

9. According to DHHS, the payments under EARP are:

- Single Adult - \$500;
- Family with one child - \$1,000;
- Families with children - \$1,000 (family with one child) with an additional \$150 for each additional child, with a maximum of \$1,450;
- Head of household should be 18 years or older, the claimed child should be less and not equal to 19 years old; and
- The benefit increases by \$150 per child to a maximum of \$1,450.

See id.

10. These payments are grants, not loans, and do not have to be paid back by the individuals or families. *See id.*

11. To be eligible for a payment, an individual must:

- not be eligible to file for Federal or State taxes;
- not have filed nor are eligible to receive unemployment;
- have an annual income below 50% of the federal poverty level; and
- and must be a Montgomery County resident.

See id.

12. According to DHHS spokesperson Mary Anderson, unlawfully present aliens are eligible to apply for and receive cash payments. *See Hannah Shuster, Montgomery County Offers Aid To Residents Who Won't Get Federal Or State Relief*, WAMU (Apr. 27, 2020, available at <https://wamu.org/story/20/04/27/coronavirus-latest-dc-maryland-virginia-week-of-april-27>).

13. DHHS will begin providing payment checks during the week of May 4, 2020 and anticipates disbursing the \$5 million by the end of May 2020. *See* https://www.montgomerycountymd.gov/HHS/RightNav/Coronavirus_EARP.html.

* * *

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true

Dated: May 8, 2020

Michael Bekesha

Michael Bekesha