U.S. DISTRICT COURT
DISTRICT OF MARYLAND

SHARON BAUER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case Number: 20-cv-01212-PJM
v.	)	
	)	
MARC ELRICH, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Sharon Bauer and Richard Jurgena, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, move for summary judgment and requests the Court permenantly enjoin Defendants Marc Elrich and Raymond Crowel from spending county taxpayer funds in violation of federal law. As grounds therefor, Plaintiffs refer the Court to the attached memorandum. A proposed Order is also attached.

Dated: May 26, 2020

Respectfully Submitted,

/s/ Michael Bekesha
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs Sharon Bauer and Richard Jurgena, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submit this memorandum in support of their motion for summary judgment. Plaintiffs state as follows:

I. Introduction.

Plaintiffs are Montgomery County taxpayers who seek to permanently enjoin Montgomery County officials from spending county taxpayer funds in violation of federal law. Pursuant to its exclusive Constitutional authority to regulate immigration, Congress prohibited certain categories of aliens, including unlawfully present aliens, from receiving specific types of State or local public benefits. Under the same authority, Congress also granted States permission to enact a State law affirmatively providing such benefits to unlawfully present aliens. Nonetheless, Defendants, two county officials, are providing prohibited benefits in the form of cash payments to unlawfully present aliens without an affirmative law passed by the Maryland General Assembly and are using taxpayer funds to do so. Plaintiffs' motion for summary judgment should be granted.

II. Emergency Assistance Relief Payment Program.[1]

In April 2020, Defendant Elrich established a new initiative to provide cash payments to certain Montgomery County residents. *See* Press Release, *Montgomery County to Provide One-Time Emergency Assistance Relief Payment Checks to Low-Income Residents Not Receiving Federal Benefits* (Apr. 27, 2020), https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=25235. The initiative is known as the "Emergency Assistance Relief Payment Program" or "EARP." *See id*. The Montgomery County Council subsequently approved two appropriation resolutions totaling $10 million from the General Fund for EARP. *See* ECF No. 22; *see also* Montgomery County Council Resolutions 19-411[2] and 19-439.[3] The General Fund consists of 96% taxpayer funds. *See FY20 County Council Approved Montgomery County Operating Budget* at 547 (July 2019), https://www.montgomerycountymd.gov/OMB/Resources/Files/omb/pdfs/fy20/psp_pdf/FY2020_Approved_Operating_Budget.pdf.

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[1] Plaintiffs sought to have the parties stipulate to material facts. Defendants declined. Because Defendants have not filed an answer and discovery has not occurred, Plaintiffs are relying on factual information available on Montgomery County's official website and Facebook page. Pursuant to Fed. R. Evid. 201(b)(2), a "court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See Dunn v. Bishop*, 2018 U.S. Dist. LEXIS 138815, *21 n.7 (D. Md. Aug. 14, 2018); *see also Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015). In addition, a court may take judicial notice of factual information contained on government websites. *See Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004); *see also Williams v. Long*, 585 F. Supp. 2d 679, 688 (D. Md. 2008) and *Marsh v. United States*, 2016 U.S. Dist. LEXIS 6926, *5 (D. Md. Jan. 20, 2016). Plaintiffs therefore respectfully request the Court take judicial notice of the facts set forth in this memorandum.

[2] Resolution 19-411 is available at https://apps.montgomerycountymd.gov/ccllims/DownloadFilePage?FileName=9623_1_10564_Resolution_19-411_Adopted_20200331.pdf.

[3] Resolution 19-439 is available ta https://apps.montgomerycountymd.gov/ccllims/DownloadFilePage?FileName=9651_1_10630_Resolution_19-439_Adopted_20200430.pdf.

The program is managed and overseen by the Montgomery County Department of Health and Human Services, headed by Defendant Crowel. *See* April 27, 2020 Press Release. According to DHHS's website, 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 DHHS Website, *COVID-19: Emergency Assistance Relief Payment (EARP)* (as of May 26, 2020), https://www.montgomerycountymd.gov/HHS/RightNav/Coronavirus_EARP.html. These payments are grants, not loans, and do not have to be paid back by the individuals or families. *See id*. To be eligible for a payment, an individual must:

- live in Montgomery County (proof of residence in the county will be required) and need financial assistance to pay for food and essentials; and
- will not receive money from the Federal and State financial relief programs; and
- are not eligible to receive unemployment benefits; and
- have incomes equal to or less than 50 percent of the Federal Poverty Level.

See id. In addition, unlawfully present aliens are eligible for and may receive these cash payments. *See* Transcript, May 15, 2020 Temporary Restraining Order Hearing (ECF No. 21) at 5:5- 5:15; 7:2 – 8:10; 16:3 – 16:9; and 37:3 – 37:14; *see also* Virtual Community Briefing at 30:00 (Apr. 16, 2020), https://www.facebook.com/watch/live/?v=159029398782988.

III. Plaintiffs' Lawsuit.

Plaintiffs filed their lawsuit in the Circuit Court of Montgomery County. Under Maryland common law, taxpayers may "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." *Floyd v. Mayor of Baltimore*, 205 A.3d 928, 937 (Md. 2019) (citation omitted). In doing so, taxpayers are "essentially [bringing] a derivative proceeding akin to a corporate shareholders' suit." *Id.* (citation omitted). Importantly, "taxpayer suits do not require private causes of action." *State Center v. Lexington Charles Limited Partnership*, 92 A.3d 400, 452 (Md. 2014).

Relying on this common law claim, Plaintiffs specifically sought to enjoin Defendants from using taxpayer funds for cash payments to unlawfully present aliens in violation of federal law. Plaintiffs also filed a motion for a temporary restraining order. Defendants subsequently removed the case to federal court, and the motion remains pending. Plaintiffs now move for summary judgment and request the Court issue a permanent injunction.

IV. Argument.

A. The Court has jurisdiction to hear this case.

1. Plaintiffs have standing to bring their claim in federal court.

"[J]udicial resources [must] be spent only in the resolution of Cases or Controversies. Part of this case-or-controversy hurdle requires that the litigants have standing to sue or defend." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999) (citation omitted). In *Koenick*, the Fourth Circuit held the plaintiff "ha[d] standing as a taxpayer in Montgomery County" to sue county officials because she alleged that she was being injured by the county expending her tax revenues on an illegal act. *Id*. Here, Plaintiffs are Montgomery County taxpayers; Defendants

are expending their tax revenues on EARP; and EARP violates 8 U.S.C. § 1621. Plaintiffs satisfy the requirements for standing in this Court.[4]

2. This case presents a substantial federal question.

"Subject matter jurisdiction defines a court's power to adjudicate cases or controversies – its adjudicatory authority – and without it, a court can only decide that it does not have jurisdiction." *United States v. Wilson*, 699 F.3d 789, 793 (4th Cir. 2012) (citation omitted). "Under 28 U.S.C. § 1331, federal courts have federal question jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." *Burrell v. Bayer Corporation*, 918 F.3d 372, 380 (4th Cir. 2019) (internal quotations omitted). "In the 'vast majority of cases,' that means suits 'in which federal law creates the cause of action.'" *Id*. (*quoting Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). However, there is a "slim category" of cases "in which state law supplies the cause of action but federal courts have jurisdiction under § 1331 because 'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Burrell*, 918 F.3d at 380 (*quoting Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 28 (1983)).

To determine whether a case falls within this exception, the Supreme Court has established a four-pronged test: 1) The federal question must be necessarily raised; 2) The federal question must be actually disputed by the parties; 3) The federal question must be substantial; and 4) The federal system must be able to hear the issue without disturbing the proper federal-state judicial balance. *Burrell*, 918 F.3d at 381 (*citing Grable & Sons Metal*

[4] If the Court determines Plaintiffs do not have standing, the case should be remanded to state court. *Khan v. Children's National Health System,* 188 F. Supp. 3d 524, 534-535 (D. Md. 2016).

Products v. Darue Engineering & Manufacturing, 545 U.S. 308, 314 (2005)). Here, all four prongs are satisfied. The federal question is whether EARP violates 8 U.S.C. § 1621. It is "necessarily raised" because it is a necessary element of Plaintiffs' only state claim. *Burrell*, 918 F.3d at 381. Whether EARP violates 8 U.S.C. § 1621 also is disputed by the parties. In addition, whether EARP violates 8 U.S.C. § 1621 is "a pure issue of law" and is important to the federal immigration system as a whole, and not just the parties. *Id*. at 385. Finally, hearing this case would not "upset[] the federal-state judicial balance" because state law, taxpayer claims "only rarely raise substantial questions of federal law." *Id*. at 387. Because all four requirements are met, this Court has jurisdiction over Plaintiffs' state law claim. *Id*. at 386.[5]

B. Defendants are illegally expending taxpayer funds.

As noted above, Plaintiffs bring a state law taxpayer claim. To prevail, Plaintiffs must demonstrate: 1) they are taxpayers; 2) the suit is brought on behalf of all taxpayers; 3) a public official's action is illegal; and 4) the action results in pecuniary loss. *Floyd*, 205 A.3d at 937-939; *see also Anne Arundel County v. Bell,* 113 A.3d 639, 662-663 (Md. 2015).

1. Plaintiffs are Montgomery County taxpayers.

Plaintiffs Bauer and Jurgena are Montgomery County taxpayers. They have owned property in Montgomery County since at least 2001 and 1999, respectively, and have paid and continue to pay property taxes to Montgomery County on their properties. *See* Montgomery County Property Tax Account Information and Bill Payment System.[6]

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[5] If the Court concludes no substantial federal question exists and therefore this case "was not properly removed," the action must be remanded to state court. *Burrell*, 918 F.3d at 379.

[6] Plaintiff Bauer's payment history may be found at https://apps.montgomerycountymd.gov/realpropertytax/ViewParcel.aspx?ParcelCode=02876981. Plaintiff Jurgena's payment history may be found at https://apps.montgomerycountymd.gov/realpropertytax/ViewParcel.aspx?ParcelCode=0163

2. Plaintiffs' lawsuit is brought on behalf of all other taxpayers.

Plaintiffs not only bring this lawsuit on behalf of themselves but also on behalf of all other taxpayers. *See* Complaint at ¶ 26. They seek to ensure Defendants act within the bounds of the law and protect all Montgomery taxpayers from the consequence of an illegal action, namely the expenditure of at least $10 million of taxpayer funds on EARP. *Floyd*, *205* A.3d at 938.

3. EARP violates 8 U.S.C. § 1621.

Federal law generally makes certain categories of aliens, including unlawfully present aliens, ineligible for State or local public benefits. 8 U.S.C. § 1621(a). With certain exceptions, 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 – if it chooses – may provide State or local public benefits to unlawfully present aliens through an enactment of State law. 8 U.S.C. § 1621(d).

There is no dispute EARP provides a local benefit as defined by Section 1621(c). Nor is there a dispute unlawfully present aliens are eligible for and are receiving those benefits. DHHS spokesperson Mary Anderson confirmed as much when speaking to the media. *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). Similarly, on several occasions, Defendant Elrich has

discussed with the public the importance of providing cash benefits to unlawfully present aliens. *See, e.g.,* Virtual Community Briefing at 30:00 (Apr. 16, 2020), https://www.facebook.com/watch/live/?v=159029398782988. Also, during the Temporary Restraining Order Hearing, Defendants' counsel did not dispute the fact that unlawfully present aliens are eligible for EARP payments or that unlawfully present aliens are receiving the benefits. *See* Transcript, May 15, 2020 Temporary Restraining Order Hearing (ECF No. 21) at 5:5- 5:15; 7:2 – 8:10; 16:3 – 16:9; and 37:3 – 37:14. In addition, based on the narrow set of eligibility criteria, it appears as though unlawfully present aliens will be the primary recipients of EARP's cash payments. Therefore, whether Defendants are violating federal law turns on the meaning of Section 1621(d).

a. No "State law" authorizes EARP benefits to unlawfully present aliens.

Section 1621(d) reads, in its entirety, "A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). "The starting point for any issue of statutory interpretation is of course the language of the statute itself." *Project Vote v. Long*, 682 F.3d 331, 335 (4th Cir. 2012) (*citing United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007)). "[W]hen the words of a statute are unambiguous, … the first canon is also the last [and] judicial inquiry is complete." *Id.* (*quoting Willenbring v. United States*, 559 F.3d 225, 235 (4th Cir. 2009) (internal quotation marks omitted)).

Section 1621(d) is unambiguous and sets forth three basic requirements. First, a "State" may provide eligibility for benefits to unlawfully present aliens. Second, if the "State" chooses to provide such eligibility, it must do so through "the enactment of a State law." Third, the

"State law" must affirmatively authorize the eligibility. If all three requirements are not met, unlawfully present aliens are not eligible for "State or local" benefits.

Importantly, the Maryland General Assembly has not passed any law concerning EARP or the cash payments that unlawfully present aliens are eligible for and are receiving under the program. The only legislative enactments are two appropriation resolutions passed by the Montgomery County Council. Montgomery County is a political subdivision of the State of Maryland. *See e.g.,* General Provisions Code Ann. § 4-101(i). Under the Maryland Constitution and the Express Powers Act, Montgomery County is not the State and cannot enact State laws. It can only enact "local laws." *See* Md. Const. art. XI-A, § 3; *see also* Local Government Code, § 102-202. Nonetheless, reading Section 1621(d)'s exception to include Montgomery County's two appropriation resolutions would render Section 1621(d)'s requirement that it be a "State" enactment of a "State law" meaningless. *See In re Total Realty Management, LLC*, 706 F.3d 245, 251 (4th Cir. 2013) ("Principles of statutory construction require 'a court to construe all parts to have meaning' and, accordingly, avoid constructions that would reduce some terms to mere surplusage." (*quoting PSINet, Inc. v. Chapman*, 362 F.3d 227, 232 (4th Cir. 2004))).

Congress explicitly allows for a State – not a local or municipal government – with the option to provide certain benefits to unlawfully present aliens. Congress could have easily inserted "local" "or political subdivision" into the first requirement, but it did not do so. The Court may not insert language into the statute that Congress explicitly left out. *See Schafer v. Astrue*, 641 F.3d 49, 61 (4th Cir. 2011) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement") (citation omitted); *see also Three Lower Counties Community Health Services v. Maryland Department of Health & Mental Hygiene*, 498 F.3d 294, 301 (4th Cir. 2007) ("[C]ourts must presume that a legislature says in a

statute what it means and means in a statute what it says." (*citing Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992))). This is even more true given Congress's use of "State or local" in reference to the types of benefits that could be provided. Had Congress sought to allow for localities or political subdivisions to provide benefits, it would have done so. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 353 (2013) ("Congress' choice of words is presumed to be deliberate") (citation omitted); *Dodd v. United States*, 545 U.S. 353, 357 (2005) ("We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.'") (citation omitted).

In addition, Congress provided in Section 1621 that only an enacted "State law" can make aliens eligible for benefits, and yet in Section 1625 Congress stipulated that "a State **or political subdivision of a state** is authorized to require an applicant… for public benefits… to provide proof of eligibility." 8 U.S.C. § 1625 (emphasis added). Both Section 1621 and Section 1625 are in Chapter 14 of Title 8, "Aliens and Nationality." Chapter 14 is titled "Restricting Welfare and Public Benefits for Aliens." Indeed, both Section 1621 and Section 1625 are in the same *subsection* of Chapter 14, subtitled "Eligibility for State and Local Public Benefits Programs." Section 1625's language demonstrates that the omission of any qualifiers to "State law" in Section 1621 was intentional.

Similarly, Section 1624, which also is in the same chapter and subsection as Section 1621, says "[A] State or **political subdivision of a State** is authorized to prohibit or otherwise limit or restrict the eligibility of aliens or classes of aliens for programs of general cash public assistance furnished under the law of the State or a political subdivision of a State." 8 U.S.C. § 1624 (emphasis added). Since Sections 1621, 1624, and 1625 are in the same subsection of Title 8, Chapter 14, Congress' choice of the words "only through the enactment of a State law" and

the omission of any reference to State agencies or subdivisions or their rules, regulations, or policies must be construed as intentional. *Department of Homeland Security v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress did not use the phrase 'law, rule, or regulation' in the statutory language at issue here; it used the word 'law' standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.") (citation omitted).

Because Congress omitted the words "State agencies or subdivisions" and "rules, regulations, or policies" from Section 1621, the Court must find that only the enactments of a state legislature satisfy this provision. Principles of statutory construction "require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning." *In re Total Realty*, 706 F.3d at 251 (*citing Healthkeepers, Inc. v. Richmond Ambulance Authority*, 642 F.3d 466, 472 (4th Cir. 2011)). The "presumption of consistent usage … ensure[s] that the statutory scheme is coherent and consistent." *Id.* (quotation omitted); *accord Posters 'N' Things v. United States*, 511 U.S. 513, 520 (1994) ("This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's Model Drug Paraphernalia Act, on which § 857 was based, includes [these factors].").

Similarly, any judicial interpretation of Section 1621(d) that disregards the requirement that a State legislature must establish eligibility would omit not only the words "only through the enactment of a State law" from the statute, but also would impermissibly *add* words that are not present in the statute. *Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.") (citation omitted); *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (deliberately omitted word changes meaning of

statute); *Elbert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation."); *Ceres Marine Terminals, Inc. v. Director of Office of Workers' Compensation Programs*, 848 F.3d 115, 122 (4th Cir. 2016) (courts may not "amend [the] statute under the guise of statutory interpretation") (*citing Newport News Shipbuilding & Dry Dock Company v. Hall*, 674 F.2d 248, 251 (4th Cir. 1982)). Section 1621 does not say "state law or administrative rule, regulation or policy." Nor does it say "local law" or "political subdivision law." It says "State law." This means an enactment by a state legislature. *MacLean*, 574 U.S. at 391 (If Congress writes "law" in one section of the U.S. Code and also uses the phrase "law, rule, or regulation" in the same section, the former phrase must be interpreted to include only legislative statutes.). Just as in *MacLean*, Congress uses the phrase "state law and regulation" elsewhere in Title 8. For instance, Section 1182 specifies that aliens who violate "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" are ineligible for visas. 8 U.S.C. § 1182(a)(2)(A)(i)(II). Identical language in Section 1227 provides that aliens violating "any law or regulation of a State" related to controlled substances should be deported. 8 U.S.C. § 1227(a)(2)(B)(i).

Moreover, a review of the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996" or "PRWORA," 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.[7] This distinction further demonstrates Congress intended for Section 1621 to require enactments of state legislatures – statutes – not executive orders or proclamations, and certainly not local appropriation resolutions. Section 1621 may not

[7] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Government Printing Office, available at http://www.gpo.gov/fdsys/pkg/BILLS-104hr3734enr/pdf/BILLS-104hr3734enr.pdf.

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, 168 n.16 (1993) ("To supply omissions transcends the judicial function.") (*quoting Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.)); *see also Hall*, 674 F.2d at 251 ([C]ourts may not "amend a statute under the guise of statutory interpretation.") (internal citation omitted)).

Section 1621 is not ambiguous. The statute's plain meaning therefore controls. Montgomery County is not a "State" and the Council's appropriation resolutions are not "State laws." As such, EARP is in direct violation of federal law and the inquiry ends. *Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). Nonetheless the Conference Agreement accompanying the bill could not be any clearer and only bolsters Plaintiffs' case. It unequivocally states:

> ***Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide 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) (emphasis added). The omission of any reference to political subdivisions, counties, or cities was deliberate. *Director, Office of Workers' Compensation 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"). Both the plain language of Section

1621(d) and its legislative history demonstrate the Council's two appropriation resolutions do not satisfy Congress' stringent requirement.[8]

b. 8 U.S.C. § 1621 does not violate the 10th Amendment.

Plaintiffs anticipate Defendants will argue 8 U.S.C. § 1621 violates the 10th Amendment. Plaintiffs are not aware of a single federal court that has ruled that way.[9] Nor are Plaintiffs aware of any federal court ruling that similar provisions of the PRWORA violate the 10th Amendment. Defendants' argument is without merit.

As the Fourth Circuit has stated, the 10th Amendment "provides, with deceptive simplicity, that 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.'" *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997) (*quoting* U.S. Const. amend X). To determine whether a law violates the 10th Amendment, courts ask two questions: "First, whether the regulation it embodies is within Congress' raw power as being within those enumerated in

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[8] Although the Council's appropriation resolutions do not affirmatively state that unlawfully present aliens are eligible for EARP benefits, Plaintiffs do not focus on this deficiency because Defendants assert – if the Court were to rule the Council's actions satisfied the other requirements of Section 1621(d) – such an omission could be easily fixed by the Council. *See* Transcript, May 15, 2020 Temporary Restraining Order Hearing (ECF No. 21) at 16:3 – 16:9.

[9] Plaintiffs are aware of one state court ruling in which Section 1621(d) was held to violate the 10th Amendment. In *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York*, a division of the New York intermediate appellate court held, "[A] decision to opt out from the restrictions imposed by 8 USC § 1621, to the limited extent that it governs the admission of attorneys as professional licensees, may be lawfully exercised by the judiciary in order to be consistent with the Judiciary Law of the State of New York and the sovereignty guaranteed by the Tenth Amendment." 131 A.D.3d 4, 27 (2nd Dep't 2015). In reaching its ruling, the court noted, "Our focus here is solely upon the infringement of the judiciary's authority, as an independent and freestanding constitutional branch of state government, to issue law licenses." *Id*. It specifically did not address whether the same analysis would apply to "other arms of [the] state[] government." *Id*. Therefore, even the one case concerning a related issue does not advance Defendants' assertion.

the constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty." *Id.* (citation omitted). Answers to both of those questions support a finding that Section 1621 is constitutionally permissible.

i. Section 1621 squarely falls within Congress's Constitutional authority.

"The first question reflects the obvious fact that an exercise of a constitutionally-enumerated power cannot involve a power not delegated to the United States, hence is not within a realm of power reserved by the Tenth Amendment to the states." *Johnson*, 114 F.3d at 480. (internal quotations and alterations omitted). Under Article I, Section 8, clause 4 of the U.S. Constitution, Congress has the exclusive authority "to establish an uniform Rule of Naturalization." *See Graham v. Richardson*, 403 U.S. 365, 382 (1971) (internal quotations omitted); *see also Takahashi v. Fish & Game Commission*, 334 U.S. 410, 416 (1948) ("The authority to control immigration ... is vested solely in the Federal government.") (citation omitted). The United States therefore "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012) (citation omitted). This authority includes both the "power to regulate immigration and the conditions on which aliens remain in the United States." *Korab v. Fink*, 797 F.3d 572, 574 (9th Cir. 2014); *see also De Canas v. Bica*, 424 U.S. 351, 355 (1976).

When Congress enacts a law "touching the rights, privileges, obligations or burdens of aliens as such . . . [n]o state can add to or take from the force and effect" of the law. *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941). In short,

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the States are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by

> Congress upon admission, naturalization and residence of aliens in the United States or the several States.

Takahashi, 334 U.S. at 419 (internal citation omitted).

The PRWORA, which enacted Section 1621, "establishes a uniform federal structure for providing welfare benefits to distinct classes of aliens." *Korab*, 797 F.3d at 581; 8 U.S.C. § 1601. In *Korab*, the Ninth Circuit explained:

> Congress determined that immigrant self-sufficiency was an element of U.S. immigration policy and that there was a compelling national interest in assuring both 'that aliens be self-reliant' and that the availability of public benefits does not serve as an 'incentive for illegal immigration.' 8 U.S.C. § 1601(5)-(6). To accomplish these objectives, the statute sets out a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits. Federal benefits are, of course, strictly circumscribed by designated categories. Even for wholly state-funded benefits, the Act establishes three categories that States must follow: one category of aliens to whom States must provide all state benefits, a second category of aliens for whom States must not provide any state benefits, and a third category of aliens for whom Congress authorizes States to determine eligibility for state benefits. *Id.* §§ 1621-22.

797 F.3d at 580. Section 1621 squarely falls within Congress's Article I authority over immigration. Whether certain aliens are eligible for State or local benefits has not been reserved for the States.

ii. Section 1621 is not an impermissible regulation.

The second question a court must ask is "whether the means of regulation employed, like those found violative of the Tenth Amendment in *New York* [*v. United States*], nevertheless impermissibly infringe on state sovereignty." *Johnson*, 114 F.3d at 480.[10] In *New York*, the

[10] It should be noted that both *Johnson* and *New York* concern federal statutes enacted pursuant to the federal government's power under the Commerce Clause. *See* 144 F.3d at 487. Here, Congress enacted Section 1621 under its authority to regulate immigration, which is an area that only the federal government has occupied. Therefore, it is not entirely clear whether *Johnson*'s two prong test even applies in this case. The inquiry may very well end with the fact immigration is an exclusive power of the federal government.

Supreme Court was called upon to determine whether Congress could compel States to dispose of waste in specific ways. 505 U.S. 144 (1992). The Court concluded, "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id*. at 188. Congress cannot "direct the States to provide for the disposal of the radioactive waste generated within their borders." *Id*. Similarly, in *Printz v. United States*, the Supreme Court held, "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 521 U.S. 898, 935 (1997).

Applying this basic principle, the Supreme Court reviewed a challenge to 28 U.S.C. § 3702, which stated, in its entirety:

> It shall be unlawful for –
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

Murphy v. NCAA, __ U.S. __, 138 S. Ct. 1461 (2018). In *Murphy*, the Court concluded, "That provision unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals." *Id*. at 1478.

Unlike the statutes in *New York*, *Printz*, and *Murphy*, Section 1621 was enacted under Congress' exclusive authority to regulate immigration. It was not passed pursuant to the

Commerce Clause. In addition, Section 1621(a) does not mandate any action by the States. Section 1621(a) is a regulation of aliens, not a regulation of the States. It plainly States, "an alien who is not [within a certain category of aliens] is not eligible for any State or local public benefit." 8 U.S.C. § 1621(a). The statute does no more than inform certain aliens that they are not eligible for certain types of benefits. Such a regulation does not – and cannot – violate the 10th Amendment. *New York*, 505 U.S. at 166 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals.").

Section 1621(d) likewise does not require anything of States. It simply creates a process by which a State may – if it so chooses – provide specific benefits to unlawfully present aliens. It does not prevent State legislators from voting a particular way or from voting at all. Nor does it require them to enact or administer any federal program. In fact, the default in Section 1621 is for a State to do nothing. Only if a State wants to provide State or local benefits does Section 1621(d) apply to the State.

Since the States by way of the Constitution gave Congress the exclusive authority to regulate the "conditions under which aliens remain in the United States" (*De Canas*, 424 U.S. at 355), States may only exercise such power if Congress shares that authority with the States. Section 1621 does just that. It provides State legislatures the limited authority to provide additional benefits to unlawfully present aliens. Such choice is not commandeering. It is cooperative federalism. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 289 (1981) (Cooperative federalism "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.") (citation omitted). Because Section 1621 regulates aliens directly

and allows States to provide additional benefits in limited circumstances if they choose to do so, Section 1621 does not violate the 10th Amendment.[11]

4. Plaintiffs will suffer pecuniary loss.

It is indisputable Defendants are expending at least $10 million in support of EARP. It is also undisputed that at least a portion of the $10 million is being used to provide cash payments to unlawfully present aliens. In addition, the $10 million derives from the general fund, which is comprised exclusively of taxpayer revenue. Substantial taxpayer funds will be lost if EARP continues. Plaintiffs therefore will suffer a pecuniary loss if Defendants are not permanently enjoined. *Floyd*, 463 Md. at 258-260; *George v. Baltimore City*, 463 Md. 263, 282 (2019) (finding the expenditure of $2.3 million of taxpayer funds in a fiscal year to be a pecuniary loss).

V. Conclusion.

For all the reasons stated above, Plaintiffs request the Court grant their motion for summary judgment and permanently enjoin Defendants from expending taxpayer funds in violation of federal law.

[11] To the extent Defendants argue Section 1621 could be read to commandeer States to implement a federal immigration program, such reading should be rejected. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (where one reading "raise[s] … constitutional problems, the other reading should prevail").

Dated: May 26, 2020

Respectfully Submitted,

/s/ Michael Bekesha
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U.S. DISTRICT COURT
DISTRICT OF MARYLAND

SHARON BAUER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case Number: 20-cv-01212-PJM
v.	)	
	)	
MARC ELRICH, *et al.*,	)	
	)	
Defendants.	)	
	)	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment and the entire record herein, it is hereby ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED.

SO ORDERED.

Dated:

_____
The Hon. Peter J. Messitte