**No. 20-1707**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**SHARON BAUER, *et al*.,**

**Appellants,**

**v.**

**MARC ELRICH, *et al*.,**

**Appellees.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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# BRIEF OF APPELLANTS SHARON BAUER AND RICHARD JURGENA

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## JURISDICTIONAL STATEMENT

The District Court determined it had original jurisdiction pursuant to 28 U.S.C. § 1331. Memorandum Opinion at 6 (JA 294).[1] This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291. The appeal is timely because the District Court entered its final judgment on June 25, 2020 (JA 301), and a timely notice of appeal was filed the same day. Notice of Appeal (JA 303).

## STATEMENT OF THE ISSUES

1. Whether the District Court had subject matter jurisdiction over this case in which a state claim relies on the violation of a federal statute.

2. Whether Maryland common law provides Maryland taxpayers a private right of action to enjoin an illegal act by Maryland government officials

[1] At the District Court, Plaintiffs-Appellants (hereinafter "Taxpayers") did not seek remand. However, after a closer reading of *Burrell v Bayer Corporation*, 918 F.3d 372 (4th Cir. 2019) and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), it does not appear the court had jurisdiction. Because questions of subject matter jurisdiction may be raised at any point, including on appeal, the Taxpayers now argue the District Court should have remanded the case, instead of dismissing it. *See Brickwood Contractors*, Inc. v. *Datanet Engineering Inc*., 369 F.3d 385, 390 (4th Cir. 2004); *see also Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986) ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it."). In addition, as the party who removed this case to federal court, it is Defendants-Appellees' burden to establish jurisdiction. *Mulcahey v. Columbia Organic Chemicals Company*, 29 F.3d 148, 151 (4th Cir. 1994).

regardless of whether any private right of action exists in the underlying federal law making the act illegal.

## STATEMENT OF THE CASE

The issues before this Court concern what cases federal courts may hear, whether state causes of action may rely on violations of federal law, and whether county officials acted illegally.

8 U.S.C. § 1621 has four subparts, of which subsections (a) and (d) are relevant here. Memorandum Opinion at 3 (JA 291). Subsection (a) generally prohibits unlawfully present aliens from being eligible for "any State or local public benefit." *Id.* (citing 8 U.S.C. § 1621(a) and *Mayor and City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 498 (D. Md. 2019) ("Section 1621 provides that immigrants who lack lawful status are not eligible for any State or local public benefit") (internal quotations omitted)). "Subsection (d) sets out a generalized exception to subpart (a)." Memorandum Opinion at 4 (JA 292). It states:

> 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.

*Id.* (citing 8 U.S.C. § 1621(d) and *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015), *aff'd*, 136 S. Ct. 906 (2016) ("Unlawfully present aliens are generally

not eligible to receive. . . state and local public benefits unless the state otherwise provides")). In short, Section 1621 prohibits unlawfully present aliens from receiving state and local public benefits unless the state legislature affirmatively authorizes it.

Even though the Maryland legislature had not affirmatively authorized it, Montgomery County, Maryland, nonetheless, started providing cash payments to unlawfully present aliens. As part of its response to the COVID-19 pandemic, the Montgomery County Council appropriated $10 million for an Emergency Assistance Relief Payment ("EARP") program. Memorandum Opinion at 1 (JA 289). EARP provides cash payments to individuals or families, including unlawfully present aliens (*Id.* at 4 (JA 292)), who (1) live in Montgomery County, (2) are not eligible for federal COVID-19 stimulus checks or state benefits, (3) are not eligible to receive unemployment benefits, and (4) have an income equal to or below 50% of the federal poverty level. *Id* at 1 (JA 292). The County Department of Health and Human Services ("DHHS"), which administers the program, distributes payments of $500 to eligible single adults, $1,000 to eligible families with a child, and an additional $150 to families for each additional child, up to $1,450 total. *Id.* at 1-2 (JA 289-290).

Seeing their taxes being spent in violation of federal law, Sharon Bauer and Richard Jurgena ("Taxpayers"), Montgomery County taxpayers, sought to enjoin

County Executive Marc Elrich and DHHS Director Raymond Crowel (collectively "Montgomery County") from implementing EARP. *Id.* at 2 (JA 290). The Taxpayers filed their lawsuit in the Circuit Court of Montgomery County under Maryland common law, which allows 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." *See generally* Complaint (JA 9); *see also Floyd v. Mayor of Baltimore*, 205 A.3d 928, 937 (Md. 2019) (citation omitted). The Taxpayers specifically sought to enjoin Montgomery County from using taxpayer funds for cash payments to unlawfully present aliens in violation of 8 U.S.C. § 1621. *See generally* Complaint (JA 9).

Montgomery County subsequently removed the case to federal court. Notice of Removal (JA 15). The parties cross-moved for summary judgment, and, on June 25, 2009, the District Court granted Montgomery County's motion and denied the Taxpayers' motion. Final Order (JA 303). In doing so, the Court concluded that "U.S.C. § 1621 confers no private right of action" and, therefore, the Taxpayers "may not maintain their suit pursuant to the statute." Memorandum Opinion at 11 (JA 299).

After filing their notice of appeal, the Taxpayers sought an injunction prohibiting Montgomery County from expending all EARP funds pending appeal.

On July 2, 2020, the District Court granted the Taxpayers' request. Memorandum (JA 304).

## SUMMARY OF THE ARGUMENT

The District Court incorrectly concluded that it had subject matter jurisdiction over this lawsuit. Precedent makes clear that a substantial federal question does not exist in a state law action relying on the violation of a federal law that does not provide a private right of action. Because that is precisely the type of case the Taxpayers brought, the District Court should have remanded the case instead of dismissing it.

In the alternative, if the District Court had subject matter jurisdiction, the court incorrectly dismissed the Taxpayers' claim. State causes of action may rely on violations of federal law, even when the federal law does not provide a private right of action. That is precisely the type of claim the Taxpayers brought. They sought under Maryland common law to enjoin Montgomery County from expending taxpayer funds in violation of federal law. The Taxpayers' cause of action relies on a federal statute; it was not brought under it. The District Court's dismissal therefore should be reversed.

The Taxpayers anticipate Montgomery County will ask the Court to affirm the District Court's ruling on any ground, including on the merits. The Taxpayers therefore also address Montgomery County's illegal act. 8 U.S.C. § 1621 is

straightforward. It generally makes unlawfully present aliens ineligible for state or local benefits unless a state legislature affirmatively authorizes their eligibility. Here, there is no dispute that Montgomery County is providing such benefits to unlawfully present aliens and that no affirmative statute authorizing such benefits has been enacted. If the Court were to reach the merits of this case, the District Court's order should be reversed.

## ARGUMENT

### I. Standard of Review.

*De novo* review is the appropriate standard for all issues currently before the Court. *Burrell*, 918 F.3d at 380 ("We review the district court's jurisdictional holding de novo.") (citation omitted); *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (internal quotation marks omitted) ("We review a district court's decision to grant summary judgment de novo, applying the same legal standards as the district court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.") (citation omitted).

### II. The District Court Did Not Have Subject Matter Jurisdiction.

"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*, 918 F.3d at 380 (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*, 478 U.S. at 808). 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 Products v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005)). The question here is whether the Taxpayers' case falls within the "slim category" of cases. Upon closer reading, it does not.

Although it appears the Taxpayers' claim may satisfy the first two prongs, relying on *Burrell*, it is clear that this case does not raise a substantial question of

federal law nor can it be heard without disturbing the proper federal-state judicial balance. As this Court noted in *Burrell*, any discussion of jurisdiction related to state law claims must start with the Supreme Court's ruling in *Merrell Dow*.

In *Merrell Dow*, the Supreme Court resolved "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States,' 28 U. S. C. § 1331." 478 U.S. at 805. In that case, the plaintiffs brought several claims in state court asserting "common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence." *Id.* As an element of their causes of action, the plaintiffs alleged that the violation of federal law – specifically the Federal Food, Drug, and Cosmetic Act ("FDCA")[2] – "constitutes a rebuttable presumption of negligence" and "directly and proximately caused the injuries suffered." *Id.* at 806.

Although the plaintiffs' claims contained a federal issue – namely whether the defendants violated the FDCA – the Supreme Court concluded there was no subject matter jurisdiction. *Id.* at 809 ("[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation,

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[2] The FDCA does not create a private right of action. *Id.*

does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U. S. C. § 1331." *Id.* at 817. In addition, as discussed by this Court in *Burrell*, "An alleged 'powerful federal interest' in uniform interpretation of the FDCA, a federal statute, did not change the Court's calculus; a need for uniformity is properly addressed through preemption, not by opening the doors to federal jurisdiction." 918 F.3d at 384-385.

In light of *Merrell Dow* and subsequent decisions applying it,[3] the *Burrell* Court concluded that the plaintiffs' state negligence per se and fraud claims relying on violations of federal laws did not involve a substantial question of federal law. *Id.* at 385-386. The plaintiffs' claims did not concern the federal government's operations or challenge the constitutionality or legality of a federal law. The claims merely required "fact-intensive inquiries into [the defendants'] compliance with certain [federal] requirements." *Id.* at 385. The same is true here.

The Taxpayers' sole claim alleges that Montgomery County is providing cash payments in violation of federal law. It is indisputable that Montgomery County is providing cash payments to unlawfully present aliens. Memorandum Opinion at 4 (JA 292). It is also indisputable that those payments are local benefits

[3] This Court in *Mulcahey*, stated, "[U]nder *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question." 29 F.3d at 152.

as defined by 8 U.S.C. § 1621. *Id.* In addition, all parties agree the Maryland legislature has not affirmatively authorized the EARP program or providing cash payments to unlawfully present aliens. *Id.* at 5 (JA 293) ("[T]he Maryland General Assembly was not directly involved in the enaction of the EARP" program). In other words, based on the Taxpayers' Complaint alone, this case is nothing more than a routine application of facts to the law. *Burrell*, 918 F.3d at 381. There are no statutory construction or interpretation issues for the District Court to resolve. The lawsuit simply does not bear any of the hallmarks of substantiality. *Id.* at 385.

Because it could not seriously dispute the plain application of facts to the law, Montgomery County made two arguments as to why the Taxpayers' lawsuit should be dismissed. First, "under the home-rule provisions of the Maryland Constitution, [the county council] has the authority to enact locally applicable laws that have the force of state law." Memorandum Opinion at 5 (JA 293). Second, "[a]ny holding that § 1621(d) prohibits the use of EARP funds for the benefit of unlawfully present aliens, they say, would violate principles of federalism derived from the federal Constitution, including a State's right to structure its government in a manner of its choosing as well as the Tenth Amendment's anti-commandeering doctrine." *Id.* Neither defense creates a substantial question of federal law.

With respect to the first assertion, whether a Maryland county council has authority to enact state laws is a question of Maryland law, not federal law. There is no significant federal interest in answering that question, nor is it a serious federal issue that justifies federal jurisdiction. With respect to the second argument, *Burrell* could not be clearer: "The substantiality inquiry applies only to those federal issues that are necessarily raised by a complaint" and do not include affirmative defenses. *918* F.3d at 386. Montgomery County, not the Taxpayers, raised the issue of constitutionality. Accordingly, Montgomery County's argument that Section 1621 violates the 10th Amendment cannot provide the basis for a federal court to hear the Taxpayers' claim. *Id.* In short, the Taxpayers' state taxpayer claim does not concern any pure federal issue of law. *Id.* at 385.

Although Montgomery County's failure to satisfy the substantiality prong itself requires a remand, it also cannot satisfy the fourth prong: that removal would be consistent with "congressionally approved balance of federal and state judicial responsibilities." *Id.* (internal citation and quotation omitted). As the *Burrell* Court explained, many state law claims incorporate allegations of violations of federal law. *Id.* at 387. Removing all of those cases to federal court "would risk enormous disruption to the division of judicial labor." *Id.* This is especially true when the cases are fact based. *Id.*

The Taxpayers have brought a garden variety common law, taxpayer claim. Such claims exist not only in Maryland but also in at least 35 other states. *See* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1277 (2012) ("This Article's survey of state taxpayer standing doctrines observed that . . . thirty-six states . . . clearly permit state taxpayer lawsuits."). The particular dispute at issue here is a dispute between local taxpayers and their local government over the expenditure of local taxpayer funds in their community. If the District Court had jurisdiction here, federal courts in those 36 cases could see a "tremendous number of cases shunted from state to federal court." *Burrell*, 918 F.3d 372.

Because Montgomery County cannot satisfy the third and fourth prongs of the Section 1331 analysis, the case "was not properly removed" and the District Court "was without jurisdiction to rule on its merits and instead was required to remand the action to state court." *Id.* at 379.

## III. The Taxpayers Brought a Valid State Law Claim.

The District Court concluded the Taxpayers did not bring a valid cause of action because 8 U.S.C. § 1621 does not provide a private right of action. Memorandum Opinion at 11 (JA 299) ("Having concluded that 8 U.S.C. § 1621 confers no private right of action, Plaintiffs may not maintain their suit pursuant to

the statute."). In explaining that conclusion, the court stated, "[A] State cannot manufacture a judicial right of action to enforce a federal statute where, as here, Congress has not affirmatively intended for a State to be able to do so nor clearly crafted one on its own volition." *Id.* The court is mistaken. State law may create causes of action that rely on violations of federal law, even if the federal law does not provide a private right of action.

The Taxpayers brought a Maryland common law cause of action available to all Maryland taxpayers. As the Maryland Court of Special Appeals explained:

> The taxpayer standing doctrine permits a taxpayer to invoke the aid of a court of equity to restrain the action of a public official, which is illegal or ultra vires and may injuriously affect the taxpayer's rights and property. The taxpayers, in essence, are asserting the rights of their government against local administrators. Thus, the Court of Appeals has likened the taxpayer suit to a derivative shareholder suit, the shareholders of a government being the taxpayers.

*Bennett v. Montgomery County*, 2019 Md. App. LEXIS 760, *35 (Md. Ct. Spec. App. Sept. 3, 2019) (internal citations, quotations, and alterations omitted). The court also reemphasized that the Maryland taxpayer doctrine is more than just a standing doctrine. It provides the cause of action. *Id.* at *31 (The taxpayer standing doctrine "provide[s] both the cause of action (or claim) and the right of the individual to assert the claim in the judicial forum.").

To prevail on such a claim, taxpayers 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). Here, there is no dispute that the Taxpayers are Montgomery County taxpayers, that they brought this lawsuit on behalf of all Montgomery County taxpayers, and that the challenged action – the distribution of EARP funds to unlawfully present aliens – resulted in a pecuniary loss. *See* Declarations of Sharon Bauer and Richard Jurgena (JA 286-288). The sole issue is the third element: whether such action is illegal.

It is the illegal nature of the public official's act that is the focus of this element of the claim, not the source of the underlying provision of law that makes the public official's act illegal. It is irrelevant to the claim whether the source is a county ordinance, a state statute, the Maryland Constitution, a federal statute, or the U.S. Constitution. *See e.g.*, *Murray v. Comptroller of Treasury*, 216 A.2d 897 (Md. 1966); *see also Horace Mann League v. Board of Public Wo*rks, 220 A.2d 51 (Md. 1966).

In addition, a Maryland taxpayer claim does not require that the underlying law, which makes the public official's act illegal, provide a private right of action. In *State Center v. Lexington Charles Limited Partnership*, the Maryland Court of Appeals "engage[d] [] in a general discussion of the principles and case law on taxpayer standing doctrine in Maryland." 92 A.3d 400, 453 (Md. 2014). As part

of that discussion, the court specifically raised the question, "[I]s a private right of action required for taxpayer suits?" *Id.* Its answer is an emphatic no. As the Court of Appeals explained:

> In the present case, Appellees do not rely on the provisions of the Procurement Code to confer standing. Rather, they assert standing as taxpayers . . . and they seek relief granted traditionally to taxpayers: declaratory relief that the governmental action is illegal and *ultra vires* and that the action thus taken should be voided; and injunctive relief to preclude further illegal and *ultra vires* governmental actions that will cause pecuniary harm to their taxes. ***Because taxpayer suits in this State do not require also a separate private right of action, such an inquiry is irrelevant in our analysis.***

*Id.* at 456 (emphasis added).

8 U.S.C. § 1621 does not contain a private right of action, express or implied. Memorandum Opinion at 9-10 (JA 297-298). But the Taxpayers did not bring their claim pursuant to the statute. *Id.* Nor did they file their suit in federal court. *Id.* They brought a Maryland common law claim in a Maryland court seeking to enjoin Montgomery County's illegal expenditure of county taxpayer funds. *Id.* They sought to enforce Maryland common law prohibiting such expenditures. The fact that the violation of law relies on a federal statute, instead of a state statute, is irrelevant to whether a valid cause of action exists under Maryland common law. The District Court was mistaken.

Importantly, this Court has previously held that state law may create causes of action that rely on underlying violations of federal law, even if those federal

laws do not provide private right of actions. *See Mulcahey*, 29 F.3d at 153; *Clark v. Velsicol Chemical Corporation*, 944 F.2d 196 (4th Cir. 1991); *Dixon v. Coburg Dairy*, 369 F.3d 811 (4th Cir. 2004).

In *Mulcahey*, the plaintiffs brought a state law negligence *per se* claim alleging that the defendants were guilty of negligence *per se* because they violated applicable disposal and safety standards and notice provisions established by several Federal laws. 29 F.3d at 150. The relied-upon environmental laws either did not provide a private right of action or did not allow the type of remedy the plaintiffs sought. *Id.* at 152-153. Although this Court held it did not have subject matter jurisdiction to hear the case, it did not dismiss it for failure to state a claim. *Id.* at 152. Rather, it reversed with instructions to remand the case to state court. *Id.* at 153.

Similarly, in *Clark*, the plaintiffs brought a claim under a North Carolina law in which "a violation of any statute enacted for the safety and protection of the public constitutes negligence *per se*." 944 F.2d at 198. The plaintiffs sued in federal court because, they asserted, their case concerned "whether chlordane is a hazardous material to which the regulations in Title 49 of the CFR apply." *Id.* at 197. However, Titles 29 and 49, the statutes from which the regulations derived, did not create a private right of action. This Court again held because it did not have subject matter jurisdiction to hear the case, it affirmed the lower court's

dismissal without prejudice in order for the plaintiff to refile in state court. *Id.* at 199.

This Court sitting *en banc* ruled similarly in *Dixon*. In that case, the plaintiff brought three causes of action alleging the defendant violated a South Carolina law, which made it "unlawful for a person to discharge a citizen from employment or occupation because of political opinions or the exercise of political rights and privileges guaranteed by the Constitution and laws of the United States." *Dixon*, 369 F.3d at 814-815. In other words, the South Carolina law relied on the violation of federal law. The Court once again remanded the case for lack of jurisdiction. *Id.* at 819. It did not dismiss it for failure to bring a claim. *Id.*

Instead of following *Mulcahey, Clark*, and *Dixon*, the District Court relied on a line of cases concerning claims brought under federal statutes. *See* Memorandum Opinion at 10-11 (JA 298-299). In *Comcast Corporation v. National Association of African American-Owned Media*, the Supreme Court resolved whether a plaintiff in a 42 U.S.C. § 1983 lawsuit must plead and prove that an injury would not have occurred "but for" the unlawful conduct. 140 S. Ct. 1009, 1013 (2020). *Maine Community Health Options v. United States* concerned a suit against the federal government for damages pursuant to 28 U.S.C. § 1491. 140 S. Ct. 1308, 1318 (2020). In *Moor v. County of Alameda*, the plaintiffs brought their suit pursuant to 42 U.S.C. §§ 1983 and 1988. 411 U.S. 693, 694

(1973). *In re Miller* concerned whether a federal statute provided a private right of action in federal court. 124 Fed. Appx. 152, 153 (4th Cir. 2005). In *Berry v. Muskogee*, the Tenth Circuit resolved whether a 42 U.S.C. § 1983 claim survives the death of the injured party. 900 F.2d 1489 (10th Cir. 1990). None of these cases answered the question as to whether a state cause of action may rely on a violation of federal law.

Time and again this Court has recognized the validity of state law claims relying on a violation of federal law, even if the underlying federal law does not provide a private right of action. Maryland common law plainly allows taxpayers to sue government officials to enjoin them from illegally expending taxpayer funds. If the Court determines the District Court had jurisdiction, the Court should reverse the District Court's ruling and remand it to the District Court for further proceedings on the merits.

## IV. Providing Cash Benefits to Unlawfully Present Aliens 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). Memorandum Opinion at 4 (JA 292). Nor is there a dispute unlawfully present aliens are eligible for and are receiving those benefits. *Id.* Whether Montgomery County is violating federal law turns exclusively 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 receiving under the program. Memorandum Opinion at 4-5 (JA 292-293). Only the Montgomery County Council has spoken on the program or the payments. *Id.* Montgomery County is a political subdivision of the State of Maryland, and its County Council is not the state legislature. *See e.g.,* General Provisions Code Ann. § 4-101(i). The Montgomery County Council only has authority to enact "local laws." Md. Const. art. XI-A, § 3. Similarly, the Express Powers Act only give the council the authority to enact "local laws." Local Government Code, § 10-202. The purpose of the constitutional amendment and the enacting statutes was "to transfer the General Assembly's power to enact many types of county public local

laws to the Art. XI-A home rule counties." *Holiday Universal, Inc. v. Montgomery County*, 833 A.2d 518, 523 (Md. 2003) (citations omitted).

The transferred power is not the authority to pass State laws or general laws but local laws.[4] *Holiday Universal*, 833 A.3d at 524 ("This Court's decisions . . . make it clear that the Home Rule Amendment limits the Montgomery County Council to enacting local laws on matters covered by the Express Powers Act." (internal quotations and citations omitted)); *see also H. P. White v. Blackburn*, 812 A.2d 305, 309 (Md. 2002) ("As made clear by the language of Article XI-A, § 3, of the Constitution, however, the law-making authority of a home rule county is limited to the 'power to enact *local* laws of said … County.'"). Stated another way, if "an ordinance enacted by a charter county does not constitute a 'local law' within the meaning of Article XI-A, it is beyond the authority of a charter county and, therefore, is unconstitutional." *Montgomery County v. Broadcast Equities, Inc.*, 758 A.2d 995, 996, n.1 (Md. 2000). The General Assembly did not delegate the authority to pass State laws to the Montgomery County Council. It provided

[4] Whereas a local law "is confined in its operation to prescribed territorial limits and was equally applicable to all persons within such limits[,]" a "public general law" or State law "deals with the general public welfare, a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state." *Steimel v. Board of Election Supervisors*, 357 A.2d 386, 388 (Md. 1976).

the council with the limited authority to pass local laws, enforceable only within the county and not in conflict with State laws.[5]

Importantly, Congress expressly allows for a State – not a local or municipal government – 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' use of "State or local" in reference to the types of benefits that could be provided. Had Congress sought to allow for

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[5] In addition, laws passed by the Maryland General Assembly preempt laws of Maryland counties, including those enacted by the Montgomery County Council. *See* Md. Const. art. XI-A, § 3 ("[I]n case of any conflict between said local law and any Public General Law now or hereafter enacted the Public General Law shall control."); *see also Haub v. Montgomery County*, 727 A.2d 369, 376-377 (Md. 1999) (noting that plaintiffs' proposed remedy of rescinding Montgomery County's operating budget can only be accomplished if it is in conflict with "higher law," such as "state or federal law, or state or federal constitutions."). Clearly, if a State law may preempt a local law, the two are not equivalent.

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 Management, LLC*, 706 F.3d 245, 251 (4th Cir. 2013) (*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.[6] 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 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

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[6] *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.

251 (Courts 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 its council cannot enact "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. 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 that the Montgomery County Council's two appropriation resolutions do not satisfy Congress' stringent requirement.

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

In the District Court, Montgomery County argued 8 U.S.C. § 1621 violates the 10th Amendment. Memorandum Opinion at 5 (JA 293). However, the Taxpayers are not aware of a single federal court that has ruled that way. Nor are they aware of any federal court ruling that similar provisions of the PRWORA violate the 10th Amendment.

As this Court 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 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 the conclusion that Section 1621 is constitutionally permissible.

### 1. Section 1621 squarely falls within Congress' 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' Article I authority over immigration. Whether certain aliens are eligible for State or local benefits has not been reserved for the States.

### 2. 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.[7] In *New York*, the 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).

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[7] 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.

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.

28 U.S.C. § 3702; *Murphy v. NCAA*, 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.

## CONCLUSION

For the foregoing reasons, the Taxpayers respectfully request the Court vacate the District Court's order and instruct the court to remand the case to the state court for further proceedings. Alternatively, the Taxpayers respectfully request the Court conclude the District Court has jurisdiction and remand the case to the District Court to resolve the merits.

Dated: August 10, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 8816 words.

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