No. 20-1707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHARON BAUER, *et al.*,

Appellants,

v.

MARC ELRICH, *et al.*,

Appellees.

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

REPLY BRIEF OF APPELLANTS SHARON BAUER AND RICHARD JURGENA

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INTRODUCTION

Plaintiffs-Appellants (hereinafter "Taxpayers") seek to prevent their county government from expending local taxpayer money illegally. To do so, the Taxpayers brought a long-established and well-recognized state cause of action against their county officials. Under Maryland law, to prevail on such a claim, the Taxpayers are required to show: 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. No party disputes that the Taxpayers' claim satisfies elements one, two, or four. The legal issues before this court all stem from the third element: whether the actions of Defendants-Appellees County Executive Marc Elrich and DHHS Director Raymond Crowel (collectively "Montgomery County") are illegal.

The Taxpayers assert Montgomery County is acting illegally by providing cash payments to unlawfully present aliens. There is no dispute that federal law, specifically 8 U.S.C. § 1621, prohibits cash payments to unlawfully present aliens unless a state law affirmatively authorizes such payments. Nonetheless, a lot of ink has been spilled about how Section 1621 should be applied. The Taxpayers and the United States assert the plain language of the statute is unambiguous. The statute says what it means and should be applied as such. Unhappy with that

result, Montgomery County and Amici argue the 10th Amendment prohibits a plain language application of the law and asks this Court to rewrite the statute.

However, before the Court may address the merits of the claim, two preliminary matters must be resolved. First, the Taxpayers raise a jurisdictional concern. Under U.S. Supreme Court precedent, only a limited number of state claims fall within federal courts' jurisdiction. Here, the Taxpayers brought a run-of-the-mill, state, taxpayer action alleging that their local government is illegally expending local, taxpayer money. Such causes of action are routine in Maryland and at least 35 other states. In those 36 states, taxpayer actions are not only well recognized but also rooted in history, dating back – in many instances – to the founding of each state. A ruling by this Court that federal courts have jurisdiction to hear such claims would threaten the delicate balance between federal and state courts.

Second, Montgomery County and the United States assert that local taxpayers do not have a private right of action to challenge the illegal expenditure of local, taxpayer money if the underlying law that makes the expenditure illegal is federal. Although it does not specifically say so, the United States makes a preemption argument, asserting that Section 1621 preempts Maryland's long-established taxpayer cause of action. Montgomery County, on the other hand, seems to argue a claim the Taxpayers do not bring. The Taxpayers do not bring

this action pursuant to Section 1621. Nor do they bring this action under any other federal law. They bring a well-established and long-recognized state claim seeking to prevent Montgomery County from illegally spending taxpayer money. There is nothing in Section 1621 nor Supreme Court precedent that prohibits such an action.

To date, the Court has before it six briefs addressing the merits. Because not much has been left unsaid on that topic, the Taxpayers' primary focus in this brief is responding to Montgomery County's arguments that the District Court had jurisdiction and Montgomery County's and the United States' assertions that the Taxpayers did not bring a valid cause of action.

ARGUMENT

I. The District Court Did Not Have Subject Matter Jurisdiction.

The Taxpayers raise the issue of subject matter jurisdiction, not because they lost at the District Court, but because "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." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986) (citations and internal quotations omitted). Even if all parties were in agreement that jurisdiction was proper, this Court would still have an obligation to review it.

The Supreme Court's holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), supports a conclusion that the District Court

lacked subject matter jurisdiction to hear this case. The *Merrell Dow* Court "conclude[d] that a complaint alleging a violation of a federal statue 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, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" 478 U.S at 817 (quoting 28 U.S.C. § 1331). Regardless of how Montgomery County or the United States attempts to frame this case, the Taxpayers brought a long-established state claim. Under Maryland law, to prevail, the Taxpayers must show: 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 v. Mayor of Baltimore*, 205 A.3d 928, 937-939 (Md. 2019). The Taxpayers allege providing cash payments to unlawfully present aliens without a state law affirmatively authorizing such payments is illegal under 8 U.S.C. § 1621. In other words, the violation of Section 1621 is nothing more than an element of the Taxpayers' state cause of action. Under *Merrell Dow*, federal jurisdiction does not exist.[1]

Montgomery County disagrees. It asserts *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), somehow alters the *Merrell Dow* analysis. *See* Brief for Appellees at 18-19. It does not. The

[1] All parties agree that Section 1621 does not create a private, federal cause of action.

Supreme Court in *Grable* expressly stated, "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." 545 U.S. at 318. The Court then went on to note the "absence of any federal cause of action affected" both the substantiality and federal-state judicial balance factors of the federal jurisdiction test.[2] *Grable*, 504 U.S. 308.

A. The Taxpayers' claim does not contain a substantial federal question.

Montgomery County's assertion that Section 1621 cannot mean what it says because of 10th Amendment concerns is an affirmative defense. It is not part of the Taxpayers' Complaint and therefore cannot confer federal jurisdiction. *See Burrell*, 918 F.3d at 381-382; *see also Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 181 (2014) (citations and internal quotations omitted) ("[T]he

[2] There is no dispute that this Court must determine whether this case falls within a "slim category" of cases "in which state law supplies the cause of action but federal courts have jurisdiction. *Burrell v. Bayer Corporation*, 918 F.3d 372, 380 (4th Cir. 2019). To do so, the Court must determine whether: 1) the federal question has been necessarily raised; 2) the federal question is actually disputed by the parties; 3) the federal question is substantial; and 4) the federal system is able to hear the issue without disturbing the proper federal-state judicial balance. *Id*. at 381.

well-pleaded complaint rule demands that [courts] confine [their] inquiry to the plaintiff's statement of his own claim.").

Montgomery County asserts a substantial federal question exists because the meaning of Section 1621 is in dispute. Brief of Appellees at 17. Montgomery County's position misses the mark. There is no real dispute as to what Section 1621 means. Montgomery County attempts to define its objection as a statutory interpretation issue to avoid remand; however, the dispute is whether Section 1621 violates the 10th Amendment. *See* Brief of Appellees at 17, fn. 5 ("The substantiality of the issue is heightened by the constitutional implications of Plaintiffs' claim. Although Plaintiffs did not raise the Tenth Amendment in their complaint, the Tenth Amendment . . . informs the proper interpretation of Section 1621, which is an essential element of Plaintiffs' claim."); *see also* Appellees' Response to Brief for United States at 17 ("[A]pplying § 1621 to invalidate the EARP Program would violate the constitutional principles of federalism reflected in the Tenth Amendment . . . by dictating how States may structure and exercise governmental power (at least on Plaintiffs' reading of the statute)."). Montgomery County's assertion that Section 1621 cannot mean what it says because of 10th Amendment concerns is an affirmative defense. It should be treated as one and does not confer federal jurisdiction. *Burrell*, 918 F.3d at 381-382.

Montgomery County also asserts the Supreme Court's ruling in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), supports federal jurisdiction. However, the complaint in *City of Chicago* "raised a number of . . . issues in the form of various federal constitutional challenges to" city ordinances and "the manner in which" the city "conducted its proceedings." *City of Chicago*, 522 U.S. at 164. Although the "the federal constitutional claims were raised by way of a cause of action created by state law," the Court concluded federal jurisdiction existed because the plaintiff "rais[ed] several claims that arise under federal law." *Id*.[3]

Here, the Taxpayers' claim looks nothing like those brought in *City of Chicago*. There are no constitutional challenges. Nor do the claims arise under federal law.[4] The Taxpayers' only claim is that Montgomery County is illegally expending taxpayer funds.[5] *City of Chicago*, if anything, supports the Taxpayers' position that the District Court did not have jurisdiction to hear the case.

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[3] Specifically, the *City of Chicago* plaintiff alleged violations of the Due Process, Equal Protection, and Taking clauses of the U.S. Constitution.

[4] The plaintiff in *City of Chicago* could have also brought its case in federal court under 42 U.S.C. § 1983.

[5] Although the Taxpayers did not specifically cite to the Maryland Constitution in its Complaint, if any Constitutional violation occurred here, it was under the state constitution. *See* Md. Decl. of Rights, art. 2 ("The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof . . . are, and shall be the Supreme Law of the State; and the Judges of this

B. Exercising federal jurisdiction would shift the balance of federal and state judicial responsibilities.

With respect to the federal-state judicial balance factor, Montgomery County's reliance on *Grable* fares no better. In *Grable*, the plaintiff's claim turned on whether the IRS complied with federal law when it notified the plaintiff of its seizure. *Id*. at 311, 314-315. The Supreme Court concluded federal jurisdiction was proper over the state cause of action because:

> [t]he Government has a strong interest in the prompt and certain collection of delinquent taxes, and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like [the defendant] to satisfy themselves that the Service has touched the bases necessary for good title. The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters.

Id. at 315 (citation and internal quotations omitted).

Here, none of the same concerns apply. The taxpayers' claim does not relate to any affirmative obligation of the federal government, like collecting taxes. Nor does it concern any action – or even inaction – of the federal government. Taxpayers allege Montgomery County is illegally providing cash payments to unlawfully present aliens. If the Taxpayers were to prevail, no limitation or

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State, and all the People of this State, are, and shall be bound thereby."). By providing cash payments to unlawfully present aliens in violation of Section 1621, Montgomery County has violated the Maryland Constitution.

requirement would be imposed on the federal government. In fact, a ruling in this case would have little, if any, bearing on the federal government or any of its operations.[6] For this reason alone, federal jurisdiction does not exist.

Conferring federal jurisdiction over this case also would threaten "Congress's intended division of labor between state and federal courts." *Id*. at 319. As the Taxpayers demonstrated in their opening brief, their claim in akin to that in *Merrell Dow*. Appellants' Brief at 8-10. Whereas *Merrell Dow* concerned a garden variety state tort lawsuit (*Grable*, 545 U.S. at 318-319), this case concerns a garden variety taxpayer action. *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."). Not only do Maryland and at least 35 other states authorize taxpayer actions, but such actions are well-recognized and long-established. *See* Alabama: *Zeigler v. Baker,* 344 So. 2d 761, 763-764 (Ala. 1977) (citing a long line of Alabama Supreme Court cases dating back to at least 1939 recognizing a taxpayer's right to challenge the expenditure of public funds); Alaska: *De Armond v. Alaska State Development Corporation*, 376

[6] Importantly, the United States does not identify any concerns related to the impact a ruling would have on the federal government or its operations.

P.2d 717 (Alaska 1962); Arizona: *Ethington v. Wright*, 66 Ariz. 382, 386-387 (Ariz. 1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds."); Arkansas: *Russell v. Tate*, 52 Ark. 541 (Ark. 1890); California: *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1249-1250 (Cal. 2017) ("Prior to the 1909 adoption of [the taxpayer standing statute], we held that, as a general matter, taxpayers had such an interest in the proper application of public funds that they could maintain an action to enjoin the illegal expenditure of public funds." (citation and internal quotation omitted)); Colorado: *Packard v. Board of County Commissioners*, 2 Colo. 338 (Colo. 1874); Connecticut: *W. Farms Mall, LLC v. Town of W. Hartford*, 279 Conn. 1, 12-13 (Conn. 2006) ("Connecticut has always recognized the jurisdiction of its courts to entertain suits instituted by taxpayers to enjoin the officers of a town from performing illegal acts."); Delaware: *Fetters v. Wilmington*, 31 Del. Ch. 338 (Del. 1950); Florida: *Paul v. Blake*, 376 So. 2d 256 (Fla. 1979); Georgia: *Keen v. Mayor & Council of Waycross*, 101 Ga. 588 (Ga. 1897); Illinois: *Fergus v. Russel*, 270 Ill. 304, 314 (Ill. 1915) ("We have repeatedly held that taxpayers may resort to a court of equity to prevent the misapplication of public funds, and that this right is based upon the taxpayers' equitable ownership of such funds."); Iowa: *Heath v. Albrook*, 123 Iowa 559 (Iowa 1904); Kentucky: *Price v. Commonwealth*, 945 S.W.2d 429, 431-432 (Ky. App. 1996) ("From the more recent case [in 1988] to cases from the

last century, Kentucky has consistently recognized taxpayer standing to challenge the constitutionality of city, county and state taxes and expenditures."); Louisiana: *Handy v. New Orleans*, 39 La. Ann. 107 (La. 1887); Maine: *Allen v. Inhabitants of Jay*, 60 Me. 124 (Me. 1872); Massachusetts: *Butler v. Selectmen of Wakefield,* 269 Mass. 585 (Mass. 1930); Minnesota: *Oehler v. City of St. Paul*, 174 Minn. 410, 417-18 (Minn. 1928) ("[I] t is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys."); Mississippi: *Mississippi Road Supply Company v. Hester*, 188 So. 281 (Miss. 1939); Missouri: *Lebeau v. Commissioners of Franklin County*, 422 S.W.3d 284, 288-289 (Mo. 2014) ("This Court has repeatedly held that taxpayers do, in fact, have a legally protectable interest in the proper use and expenditure of tax dollars."); Montana: *Chumasero v. Potts*, 2 Mont. 242 (Mont. 1875); Nebraska: *Follmer v. Board of County Commissioners*, 6 Neb. 204 (Neb. 1877); New Jersey: *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (N.J. 1879); New York: *Adriance v. Mayor of New York*, 1 Barb. 19 (N.Y. Sup. Ct. 1847); North Carolina: *Goldston v. State*, 361 N.C. 26, 30-31 (N.C. 2006) ("We recognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials."); North Dakota: *Engstad v. Dinnie*, 8 N.D. 1 (N.D. 1898); Oklahoma: *Kellogg v. School District Number 10*, 13 Okla. 285 (Okla. 1903); Oregon: *McKinney v. Watson*, 145 P. 266,

267 (Ore. 1915) (citing cases as far back as 1882 for the precedent that "a taxpayer whose enforced contribution to the public funds will be increased has a right to resist by litigation in his own name the enforcement of an unconstitutional statute, or the misapplication of public money."); Pennsylvania: *Sharpless v. Mayor & Citizens of Philadelphia*, 21 Pa. 147 (Pa. 1853); South Dakota: *State ex rel. Adkins v. Lien*, 9 S.D. 297 (S.D. 1896); Tennessee: *Lynn v. Polk*, 76 Tenn. 121 (Tenn. 1881); Texas: *Terrell v. Middleton*, 187 S.W. 367 (Tex. Civ. App. 1916); Utah: *Brummitt v. Ogden Water-Works Company*, 33 Utah 285, 296 (Utah 1908) ("The weight of authority is clearly to the effect that a taxpayer may obtain relief against the waste of public funds through the unauthorized or *ultra vires* acts of the municipality."); Washington: *Tacoma v. O'Brien,* 534 P.2d 114 (Wash. 1975); West Virginia: *State ex rel. Matheny v. County Court*, 47 W. Va. 672 (W. Va. 1900); Wisconsin: *Land, Log & Lumber Company v. McIntyre*, 100 Wis. 245 (Wis. 1898). Contrary to Montgomery County's unsubstantiated claim, conferring jurisdiction could lead to a flood of run-of-the-mill state law claims in federal court. The final factor favors remanding this case to state court.

II. The Taxpayers Brought a Valid State Law Claim.

Both Montgomery County and the United States assert the Taxpayers lack a private right of action. However, each has its own reasons for its assertion. Both are misguided.

A. The Taxpayers' claim is not preempted.

For whatever reason, the United States does not label its argument as preemption. Yet, it makes a preemption argument. It asserts that Congress did not intend to authorize the Taxpayers' claim (Brief of United States at 14), that the Taxpayers' claim would interfere with the scheme that Congress created (*id.* at 15), and that the Taxpayer's claim would conflict with the careful framework Congress adopted. *Id.* at 17. It also relies on preemption cases such as *Arizona v. United States*, 567 U.S. 387 (2012). Brief of the United States at 16-17.

Because it sought to disguise its preemption argument as something else, the United States failed to begin its analysis like all preemption cases must: with the "starting presumption" that Congress did not intend to supplant state law. *College Loan Corporation v. SLM Corporation*, 396 F.3d 588, 597 (4th Cir. 2005) (citing *Coyne Delany Company v. Selman*, 98 F.3d 1457, 1467 (4th Cir. 1996); *NY State Conference of Blue Cross Blue Shield Plans v. Travelers*, 514 U.S. 645, 654-55(1995); *S. Blasting Servs., Inc. v. Wilkes County, N. C.,* 288 F.3d 584, 589-590 (4th Cir. 2002). Importantly, this Court has also repeatedly held, "the presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists." *Id.* (citing *Abbot v. American Cyanamid Company*, 844 F.2d 1108, 1112 (4th Cir. 1988); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 251 (1984)).

"Federal preemption of state law under the Supremacy Clause – including state causes of action – is fundamentally a question of congressional intent." *Cox v. Duke Energy, Inc.*, 876 F.3d 625, 635 (4th Cir. 2017) (citation and internal quotation omitted). Based on long-established Supreme Court precedent,

> there are three ways by which Congress manifests that intent: (1) when Congress explicitly defines the extent to which its enactment preempts state law (express preemption); when state law regulates conduct in a field that Congress intended the Federal Government to occupy exclusively (field preemption); and (3) when state law actually conflicts with federal law (conflict preemption).

Id. Under all three circumstances, "invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). Instead, "a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* (citations omitted). It is not enough "for any party or court to rest on a supposition (or wish) that 'it must be in there somewhere.'" *Id.*

It is indisputable that Section 1621 does not expressly preempt Maryland state courts from authorizing taxpayer claims. Nor does the United States even hint at such an argument. The Taxpayers therefore will address conflict and field preemption.

i. No conflict preemption exists.

Conflict preemption occurs "where 'compliance with both federal and state regulations is a physical impossibility'" or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (citations omitted).

It does not appear nor does the United States assert that recognizing Plaintiff's claim is a "physical impossibility." Therefore, this Court applies a two-step process in determining whether conflict preemption exists. *Virginia Uranium Inc. v. Warren*, 848 F.3d 590, 599 (4th Cir. 2017). First, it must determine "Congress's 'significant objective[s]' in passing the federal law." *Id.* (citations omitted). Second, it assesses "whether the state law stands as an obstacle to the accomplishment of a significant federal regulatory objective." *Id.* (citations and internal quotations omitted). In conducting this process, the Court must not "seek[] out conflicts between state and federal regulation where none clearly exists." *College Loan Corp.*, 396 F.3d at 598 (citations and internal quotations omitted). Rather, "preemption is ordinarily not to be implied absent an *actual* conflict." *Id.* (emphasis added) (citation omitted).

The United States relies on two cases. *See* Brief of United States at 17. The first is *Arizona v. United States*, 567 U.S. 387 (2012). *Arizona* involved several

state laws concerning immigration. In support of its argument, the United States cites to the Supreme Court's opinion relating to a new Arizona law that "add[ed] a state-law penalty for conduct proscribed by federal law." *Arizona*, 567 U.S. at 400. The Court therefore found the law to be preempted because "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Id*. at 402. Unlike the federal statute there, Section 1621 does not create federal offenses for violating its terms. It also does not contain an enforcement mechanism.[7]

Similarly, the United States also challenged an Arizona law "enact[ing] a state criminal prohibition where no federal counterpart exist[ed]." *Arizona*, 567 U.S. at 403. Specifically, the state created "a state misdemeanor for an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in Arizona." *Id*. at 403 (citation and internal quotation omitted). Although Congress had not created a federal offense for such aliens to seek work, it did establish a crime for an employer to hire them. *Id*. at 404. The Court therefore concluded that because the Arizona law sought "to achieve one of the same goals as federal law – the

[7] The United States also does not identify any statutorily defined enforcement mechanism. It merely suggests the federal government may be able to enforce Section 1621 through lawsuits or more informal action. Brief of United States at 16.

deterrence of unlawful employment –" the state "law would interfere with the careful balance struck by Congress." *Id*. at 406.

Section 1621 does not create any mechanism to enforce the prohibition that states not provide certain benefits to unlawfully present aliens unless a state law affirmatively authorizes such payments. The law also does not create a criminal offense for unlawfully present aliens who receive such benefits from states. Adjudicating the Taxpayers' claim would not interfere with any balance Congress struck because Congress was absolutely silent on enforcing Section 1621.

The United States also relies on *Salk v. Regents of University of California*. Brief of United States at 17. *Salk* is an unpublished opinion of the California Court of Appeal. 2008 Cal. App. Unpub. LEXIS 10292, 2008 WL 5274536 (Cal. Ct. App. Dec. 19, 2008). Pursuant to Rule 8.1115(a) of the California Rules of Court, unpublished opinions are not to be cited or relied upon. Putting aside the United States' disregard for California rules, *Salk* does not support the United States' position. In *Salk*, the plaintiffs sought to prevent the University of California from operating research facilities in violation of the federal Animal Welfare Act. *Id*. at **2-3. Unlike Section 1621, the AWA provided the Secretary of Agriculture with "numerous administrative remedies" to enforce the statute. *Id*. at **17-18. The plaintiffs' action, therefore, could "frustrate the objectives of the AWA by interfering with the authority of the Department and its inspectors." *Id*. at *19.

As noted above, Section 1621 does not create any administrative remedies for the federal government to enforce the statute. The Taxpayers' claim does not conflict or interfere with any statutory authority of the federal government to ensure compliance with the law. This Court should not seek a conflict. *College Loan Corporation*, 396 F.3d at 598.

ii. No field preemption exists.

To the extent the United States makes a field preemption argument (Brief of United States at 15-16), it is without merit. Field preemption occurs when Congress "regulat[es] so pervasively that there is no room left for the states to supplement federal law." *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997) (citation omitted).

The Taxpayers do not dispute that Congress "set[] out a comprehensive set of eligibility requirements governing aliens' access to both federal and state benefits." *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014). Congress however did not create a comprehensive set of enforcement mechanisms. In fact, it did not create any enforcement mechanism for Section 1621. No field exists to preempt the Taxpayers' cause of action.

B. Maryland law creates the Taxpayers' cause of action.

Montgomery County does not make a preemption argument. Instead, it asserts that Maryland law does not authorize taxpayer actions when state or local

officials spend taxpayer money in violation of federal law and that Section 1621 controls the Taxpayers' claim. Neither argument is supported by law.

First, Montgomery County fails to cite to a single case either in Maryland or anywhere in the country where a court has rejected a taxpayer claim based on the fact that taxpayer money was being spent in violation of federal law. Nor could it. Neither the Taxpayers nor the United States has found such a case.[8] Maryland law does not focus on the source of the underlying provision of law that makes the public official's act illegal. It is the illegal nature of the public official's act that is the focus of this element of the claim. 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.

The Taxpayers however have identified two cases in which federal law provided the source that makes a public official's act illegal. *See Murray v. Comptroller of Treasury*, 216 A.2d 897 (Md. 1966) and *Horace Mann League v. Board of Public Wo*rks, 220 A.2d 51 (Md. 1966). Contrary to Montgomery County's assertion (Brief of Appellees at 25), it is irrelevant that those claims concerned Constitutional violations instead of statutory violations. It is also irrelevant that the U.S. Supreme Court subsequently recognized a private right of

[8] As noted above, California rules prohibit *Salk* from being cited or relied upon.

action with respect to the Establishment Clause. In those two cases, Maryland taxpayers through a Maryland taxpayer action sought to prevent the expenditure of taxpayer funds in violation of the First Amendment, and the Maryland Supreme Court did not dismiss the cases for failure to state a cause of action.[9]

Second, Montgomery County argues federal law controls the Taxpayers' claim. *See* Brief of Appellees at 27-33.[10] The Taxpayers have already demonstrated that Montgomery County's argument relies on a line of cases concerning claims brought under federal statutes, not claims brought under state law. Brief of Appellants at 15-18. The Taxpayers also demonstrated that they do not bring this action pursuant to Section 1621. Nor do they bring this action under any other federal law. They bring a well-established and long-recognized state claim seeking to prevent Montgomery County from illegally spending taxpayer money. *Id*. at 12-15.

Montgomery County also seems to suggest it has not violated any Maryland law. Brief of Appellees at 31. That contention is mistaken. The Maryland

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[9] In addition, other courts around the country have also allowed state taxpayer actions to proceed when federal law made the public official's act illegal. *See, e.g., Kaider v, Hamos,* 975 N.E.2d 667 (Ill. App. Ct. 2012); *see also, e.g., Lone Star College System v. Immigration Reform Coalition of Texas*, 418 S.W.3d 263 (Tex. App. 2013); *Karunakarum v. Town of Herndon*, 70 Va. Cir. 208 (Va. Cir. 2006); *Trustees for Alaska v. State*, 736 P.2d 324 (Alaska 1987); *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 27 (Cal. App. 3d Dist. September 4, 2001).

[10] Tellingly, the United States does not make this argument.

Constitution makes clear that federal law is supreme, and Montgomery County is bound by it. *See* Md. Decl. of Rights, art. 2. Because the Taxpayers allege Montgomery County's actions are in violation of federal law, it is reasonable to infer they also allege Montgomery County violated the Maryland Constitution's requirement that federal law must be followed. *E. I. du Pont de Nemours & Company v. Kolon Industries,* 637 F.3d 435, 440 (4th Cir. 2011).

Finally, Montgomery County complains that allowing this case to proceed would be disruptive. Brief of Appellees at 32. This assertion only reinforces the point that the District Court did not have jurisdiction to hear this case. Maryland and 35 other states have established a state claim that allows state and local taxpayers to challenge the illegal expenditure of taxpayer funds. Such cases are not federal cases simply because the underlying source of illegal action is federal law. Nor do such state claims simply disappear because state and local governments violate federal law. If this Court were to conclude otherwise, it would abolish over one hundred years of state jurisprudence.

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.

III. Providing Cash Benefits to Unlawfully Present Aliens Violates 8 U.S.C. § 1621.

Montgomery County and Amici argue Section 1621 violates the 10th Amendment. They also argue this Court may avoid the constitutional question by ignoring the unambiguous language of the statute. The Taxpayers addressed most of the arguments in its opening brief. The United States also addressed these arguments. To avoid duplication and repetition, the Taxpayers will only respond to the issues that have not been fully addressed.

A. Section 1621 means what it says.

While Section 1621(a) generally prohibits unlawfully present aliens from being eligible for "any State or local public benefit[,]" subsection (d) creates an exception:

> 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. As the Taxpayers demonstrated in their opening brief (Brief of Appellants at 19-28) both statutory construction and legislative history support a plain reading on the exception: states may provide unlawfully present aliens with state or local benefits only if the state enacts a state law affirmatively allowing such benefits to be provided. Relying on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *City of Columbus v. Ours Garage & Wrecker Services*,

536 U.S. 424 (2002), Montgomery County and Amici assert that whenever Congress uses the term "State" it means "State and political subdivisions." This assertion is incorrect. The Supreme Court looked at the specific circumstances of each of those cases to reach its conclusions.

In *Mortier*, the Supreme Court had to determine whether a federal law authorizing a state to regulate federally registered pesticides also authorized political subdivisions of that state to do the same. 501 U.S. 597 at 606. The plaintiff asserted that a Wisconsin town could not regulate pesticides because the federal law only provided the authority to states to regulate. *Id*. The Supreme Court disagreed.

The provision at issue in *Mortier* allowed states to regulate pesticides but only if they did so in a way that was not prohibited by federal law. *Id*. The Court noted that if the provision did not include political subdivisions, political subdivisions "would still be free to regulate subject to the usual principles of preemption." *Id*. at 607. Stated another way, the Wisconsin town still could have regulated pesticides as long as the regulations complied with federal law. Reading "political subdivisions" into the provision would have made little difference. Here, unlawfully present aliens are not eligible for local benefits unless a state law is enacted. If "State law" does not include political subdivisions, Section 1621(a) would make unlawfully present aliens ineligible without exception for cash

payments from Montgomery County. Reading "political subdivisions" into Section 1621(d) would alter the eligibility of unlawfully present aliens.

The *Mortier* court also found the "legislative history [to be] complex and ambiguous. *Id*. at 612. The Court noted "matters were left with the two principal Committees responsible for the bill in disagreement over whether [the provision at-issue] preempted pesticide regulation by political subdivisions." *Id*. at 610. Here, the Conference Agreement accompanying Section 1621 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). There is nothing complex or ambiguous about Section 1621's legislative history. Two of the reasons why the Supreme Court concluded that the federal provision in *Mortier* did not preempt local regulation of pesticides are not relevant to the application of Section 1621. *Mortier* does not support Montgomery County's and Amici's contentions.

The same can be said for their reliance on *Ours Garage*. In *Ours Garage*, the Supreme Court held that federal law did "not bar a State from delegating to municipalities and other local units the State's authority to establish safety

regulations governing motor carriers of property." 536 U.S. at 428. The federal law in question concerned the "traditional state police power over safety." *Id*. at 439. The Court concluded:

> Congress' clear purpose in [the provision] is to ensure that its preemption of States' economic authority over motor carriers of property "not restrict" the preexisting and traditional state police power over safety. That power typically includes the choice to delegate the State's "safety regulatory authority" to localities. Forcing a State to refrain from doing so would effectively "restrict" that very authority. Absent a basis more reliable than statutory language insufficient to demonstrate a "clear and manifest purpose" to the contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units over safety on municipal streets and roads.

Id. at 439-440. The *Ours Garage* Court resolved the issue to avoid federal law trampling over historic state police powers.

Section 1621, on the other hand, does not concern a state's historic police powers. It was enacted as part of "a uniform federal structure for providing welfare benefits to distinct classes of aliens[,]" which falls within Congress' Article I authority over immigration. *Korab*, 797 F.3d at 581; 8 U.S.C. § 1601. In addition, nothing prevents Maryland from enacting legislation delegating to the localities the state's authority to provide local benefits for unlawfully present aliens. Maryland has not done so. Nor has Montgomery County requested such authority from the state legislature. *Ours Garage* simply does not apply to the circumstances here.

B. Section 1621 does not violate the 10th Amendment.

The Taxpayers anticipated Montgomery County's and Amici's 10th Amendment arguments and addressed them fully in their opening brief. Only one point bears reaffirming: Section 1621 only imposes one requirement on states. That requirement is in subsection (d). Subsection (a) states that "an alien who is not [qualified] is not eligible for any State or local public benefit." 8 U.S.C. § 1621(a). It does not require anything of states or command states to do anything.[11] It simply defines eligibility for specific benefits by a specific subset of aliens. Therefore subsection (a) cannot violate the 10th Amendment. If this Court were to rule subsection (d) violates the 10th Amendment, it would still be unlawful for Montgomery County to provide cash payments to unlawfully present aliens.

CONCLUSION

For the foregoing reasons and the reasons set forth in their opening brief, 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

[11] Contrary to Montgomery County's assertion, the federal law at issue in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) concerned a direct regulation of the states. The statute in question made it unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme." 28 U.S.C. § 3702.

Court has jurisdiction, reverse the District Court's decision dismissing the case, and remand the case to the District Court to resolve the merits. Finally, to the extent it addresses the merits, the Taxpayers respectfully request the Court conclude that Montgomery County is in violation of Section 1621 and enjoin it from providing cash payments to unlawfully present aliens.

Dated: February 2, 2021

Respectfully submitted,

/s/ Michael Bekesha

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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 6355 words.

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Dated: February 2, 2021

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