

Case No. 03-4486

---

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

**JEROME R. MIKULSKI; ELZETTA C. MIKULSKI,  
On Behalf of Themselves and All Others Similarly Situated,**

Plaintiffs-Appellants,

vs.

**CENTERIOR ENERGY CORP.; FIRST ENERGY CORP.;  
CLEVELAND ELECTRIC ILLUMINATING COMPANY;  
THE TOLEDO EDISON COMPANY,**

Defendants-Appellees.

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**CASE NO. 1:02CV 2440**

---

---

**SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS-APPELLANTS  
ON REHEARING *EN BANC***

---

---

**ERIC H. ZAGRANS** (0013108)  
1401 Eye Street, N.W.  
Washington, D.C. 20005-2225  
202.857.4400 (telephone)  
202.261.0046 (facsimile)  
[eric@zagrans.com](mailto:eric@zagrans.com) (e-mail)

Lead Counsel for Appellants  
(List of counsel continued on back)

— and —

Robert D. Gary (0019610)  
Thomas R. Theado (0013937)  
GARY, NAEGELE & THEADO  
446 Broadway  
Lorain, Ohio 44052-1797  
(440) 244-4809 (telephone)  
(440) 244-3462 (facsimile)  
[rgary@gntlaw.com](mailto:rgary@gntlaw.com) (e-mail)  
[TomTheado@aol.com](mailto:TomTheado@aol.com) (e-mail)

— and —

Dennis P. Barron (0030568)  
P.O. Box 8190  
Cincinnati, Ohio 45208  
(513) 871-2369 (telephone)  
[DennisPBarron@aol.com](mailto:DennisPBarron@aol.com) (e-mail)

— and —

Eben O. McNair IV (0026049)  
Daniel S. White (0047400)  
SCHWARZWALD & MCNAIR  
616 Penton Media Building  
1300 East Ninth Street  
Cleveland, Ohio 44114-1503  
(216) 566-1600 (telephone)  
(216) 566-1814 (facsimile)  
[emcnair@smcnlaw.com](mailto:emcnair@smcnlaw.com) (e-mail)  
[dwhite@smcnlaw.com](mailto:dwhite@smcnlaw.com) (e-mail)

Co-Counsel for Appellants

Mitchell G. Blair (0010892)  
Tracy Scott Johnson (0064579)  
Colleen Moran O'Neil (0066576)  
CALFEE HALTER & GRISWOLD LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114  
216.622.8200 (telephone)  
216.241.0816 (facsimile)

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

[Paragraph Headings Go Here]

CONCLUSION ..... 25

CERTIFICATE OF COMPLIANCE ..... 27

CERTIFICATE OF SERVICE ..... 27

## TABLE OF AUTHORITIES

<i>Alford Chevrolet-Geo v. Jones</i> , 91 S.W.3d 396 (Tex. App. 2002) .....	25
<i>Amsouth Bank v. Dale</i> , 386 F.3d 763 (6 <sup>th</sup> Cir. 2004) .....	15
<i>Bancroft v. Indemnity Insurance Company of North America</i> , 203 F. Supp. 49 (W.D. La. 1962) .....	23
<i>Beneficial National Bank v. Anderson</i> , 539 U.S. 1 (2003) .....	14, 15
<i>Brennan v. Southwest Airlines</i> , 134 F.3d 1405 (9 <sup>th</sup> Cir. 1998) .....	8
<i>Brown v. U.S.</i> , 105 F.3d 621 (Fed. Cir. 1997) .....	18
<i>Buchanan v. Dowdy</i> , 772 F. Supp. 986 (S.D. Tex. 1991) .....	20-21
<i>Centex Corp. v. U.S.</i> , 55 Fed. Cl. 381 (2003), <i>aff'd</i> 395 F.3d 1283 (Fed. Cir. 2005) .....	18
<i>Churchill v. Star Enterprises</i> , 3 F. Supp.2d 622 (E.D. Pa. 1998) .....	8
<i>Clemens v. USV Pharmaceutical</i> , 838 F.2d 1389 (5 <sup>th</sup> Cir. 1988) .....	20
<i>Cyprus Amax Coal Co. v. United States</i> , 205 F.3d 1369 (Fed. Cir. 2000) .....	18
<i>Denney v. Jenkins &amp; Gilchrist</i> , 230 F.R.D. 317 (S.D.N.Y. 2005) .....	25
<i>Eastman v. Marine Mechanical Corp.</i> , 438 F.3d 544 (6 <sup>th</sup> Cir. 2006).....	1
<i>Edward H. Clark v. Commissioner</i> , 40 B.T.A. 333 (1939) .....	21
<i>Empire HealthChoice Assurance, Inc. v. McVeigh</i> , ___ U.S. ___, 126 S. Ct. 2121, 165 L. Ed.2d 131 (6-15-2006) .....	1, 2, 4
<i>First Heights Bank, FSB v. U.S.</i> , 422 F.3d 1311 (Fed. Cir. 2005) .....	18
<i>First Nationwide Bank v. U.S.</i> , 431 F.3d 1342 (Fed. Cir. 2005) .....	18
<i>Glude v. Sterenbuch</i> , 133 F.3d 914 (4 <sup>th</sup> Cir. 1998) .....	20

<i>Grable &amp; Sons Metal Products, Inc. v. Darue Engineering &amp; Mfg.</i> , 545 U.S. 308, 125 S. Ct. 2363 (2005) .....	1, 2, 4
<i>Hatter v. U.S.</i> , 953 F.2d 626 (Fed. Cir. 1992) .....	18
<i>Holloway v. Odom Antennas, Inc.</i> , 1997 U.S. App. LEXIS 19981 (8 <sup>th</sup> Cir. 1997) .....	21
<i>Husvar v. Rapoport</i> , 337 F.3d 603 (6 <sup>th</sup> Cir. 2003) .....	11, 12
<i>In re Air Transp. Excise Tax Litig.</i> , 37 F. Supp.2d 1133 (D. Minn. 1999) .....	7, 14
<i>In re Chateaugay</i> , 94 F.3d 772 (2 <sup>nd</sup> Cir. 1996) .....	20
<i>In re Forman Enterprises, Inc.</i> , 281 B.R. 600 (Bank. W.D. Pa. 2002) .....	24
<i>In re Gribben</i> , 158 B.R. 920 (S.D.N.Y. 1993) .....	19
<i>In re Madden</i> , 388 F. Supp. 47 (D. Id. 1975) .....	19
<i>In re Pacific Far East Lines, Inc.</i> , 889 F.2d 242 (9 <sup>th</sup> Cir. 1989) .....	19
<i>In re Pittsburgh Railways</i> , 253 F.2d 654 (3 <sup>rd</sup> Cir. 1958) .....	19
<i>In re R&amp;W Enterprises</i> , 181 B.R. 624 (Bankr. N.D. Fla. 1994) .....	19
<i>In re Stewart Thomas, Inc.</i> , 1979 U.S. Dist. LEXIS 14509 (W.D. Va. 1979) .....	19
<i>Kelly v. Hunton &amp; Williams</i> , 1999 U.S. Dist. LEXIS 14605 (E.D.N.Y. 1999) .....	8
<i>Lisec v. United Airlines</i> , 10 Cal. App.4 <sup>th</sup> 1500 (1992) .....	8
<i>Local Okla. Bank, N.A. v. U.S.</i> , 2006 U.S. App. LEXIS 16281 (Fed. Cir. 6-29-2006) .....	18
<i>Longstreth v. Copple and MCI Telecommunications Corp.</i> , 101 F. Supp.2d 776 (N.D. Iowa 2000) .....	8
<i>Marks v. Newcourt Credit Group, Inc.</i> , 342 F.3d 444 (6 <sup>th</sup> Cir. 2003) .....	11, 12
<i>Mikulski v. Centerior Energy Corp.</i> , 435 F.3d 666 (6 <sup>th</sup> Cir. 2006) .....	6, 9, 10, 16, 17, 22

<i>Newhouse v. McCormick &amp; Co.</i> , 157 F.3d 582 (8 <sup>th</sup> Cir. 1998) .....	7
<i>N.Y. State Conference of Blue Cross &amp; Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995) .....	16
<i>P.J.'s Concrete Pumping Service, Inc. v. NexTel West Corp.</i> , 803 N.E.2d 1020 (Ill. App. 2004) .....	25
<i>Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.</i> , 399 F.3d 692 (6 <sup>th</sup> Cir. 2005) .....	11, 12
<i>Pritchard v. Floyd</i> , 867 So.2d 83 (La. App. 2004) .....	24
<i>Ramos v. Davis &amp; Gecks</i> , 224 F.3d 30 (1 <sup>st</sup> Cir. 2000) .....	7
<i>Rapid Settlements v. Safeco</i> , 2005 Conn. Super. LEXIS 31 (Conn. Super. 2005) .....	24
<i>Ravetti v. U.S.</i> , 37 F.3d 1393 (9 <sup>th</sup> Cir. 1994), <i>cert. denied</i> , 514 U.S. 1005 (1995) .....	20, 23
<i>Redfeld v. Insurance Company of North America</i> , 940 F.2d 542 (9 <sup>th</sup> Cir. 1991) .....	8
<i>Remington v. U.S.</i> , 210 F.3d 281 (5 <sup>th</sup> Cir. 2000) .....	20
<i>Rev. Rul. 57-47</i> , 1957-1 C.B. 23 .....	21, 24
<i>Roddy v. Grand Trunk Western Railroad, Inc.</i> , 395 F.3d 318 (6 <sup>th</sup> Cir. 2005) .....	15
<i>Sang-Hoon Kim v. Monmouth College</i> , 726 A.2 <sup>nd</sup> 1017 (N.J. Super. Ct. 1998) .....	8
<i>State of Washington v. Grimes</i> , 2002 Wash. App. LEXIS 3407 (Wash. App. 2002) .....	24
<i>Thiokol Corp. v. Roberts</i> , 76 F.3d 751 (6 <sup>th</sup> Cir. 1996) .....	16
<i>Tungseth v. Mutual of Omaha Ins. Co.</i> , 43 F.3d 406 (8 <sup>th</sup> Cir. 1994) .....	7, 8
<i>United States v. Williams</i> , 514 U.S. 527 (1995) .....	13

<i>U.S. v. Papandon</i> , 331 F.3d 52 (2 <sup>nd</sup> Cir. 2003) .....	20
<i>U.S. v. West Productions, Ltd.</i> , 168 F. Supp.2d 84 (S.D.N.Y. 2001) .....	24
<i>Wisecup v. Gulf Development</i> (Mont. Cty. 1989), 56 Ohio App.3d 162 .....	20
<i>Wright v. General Motors Corp</i> , 262 F.3d 610 (6 <sup>th</sup> Cir. 2001) .....	11, 12

INTERNAL REVENUE CODE

Section 152(e)(2) .....	24
Section 263A .....	3
Section 312(n)(1) .....	2, 3, 5, 6, 10, 16
Section 416 .....	11
Section 502(a)(1)(B) .....	11
Section 897(I)(4) .....	16
Section 1031 .....	24
Section 3720A .....	20
Section 5891(b)(2)(A) .....	24
Section 6042(c) .....	16
Section 6110(j)(1)(B) .....	16
Section 6335 .....	2
Section 6402(d) .....	20
Section 6671 .....	20
Section 6672(d) .....	20, 24
Section 7422.....	5, 6, 8, 9, 12-20, 25

Section 7426(a)(1) .....	16
Section 7431(a)(2) .....	16
Section 7432 .....	16
Section 7433(a) .....	16
Section 7433(e) .....	16
Section 7434 .....	14, 16, 17, 19, 20

OTHER FEDERAL STATUTES

National Bank Act .....	14
Tax Reform Act of 1986 .....	3

OTHER AUTHORITIES

“Report to Congress: IRS Tax Compliance Activities,” July 15, 2003 (Tables 2-3), IRS DATA BOOK, 2003-2004 .....	22
Todres, <i>Torts, Tax Reporting, and Preemption: Is There Tort Liabililty for Incorrect Information Reports?</i> 28 IOWA J. CORP. LAW 259 (2003) .....	21

ARGUMENT

**I. THE SUPREME COURT INTENDS FEDERAL JURISDICTION UNDER *GRABLE* TO BE A “SLIM CATEGORY” NARROWLY APPLIED, AS IT MADE CLEAR IN ITS RECENT DECISION IN *EMPIRE HEALTHCHOICE V. MCVEIGH*.**

**PURSUANT TO THE HOLDING AND REASONING OF *MCVEIGH*, THIS CASE DOES NOT QUALIFY FOR FEDERAL JURISDICTION UNDER *GRABLE*’S SUBSTANTIAL FEDERAL QUESTION ANALYSIS.**

Despite Centerior’s wishful thinking, this case does not fit within “the special and small category”<sup>1</sup> of federal jurisdiction created by the Supreme Court’s decision last year in *Grable & Sons Metal Products v. Darue Engineering*.<sup>2</sup> The fallacy of Centerior’s novel and flawed jurisdictional argument is best confirmed, not by a pedantic, point-by-point and diagram-by-diagram refutation, but by the fact it ignores and cannot be reconciled with the Supreme Court’s recent pronouncement on the meaning and application of *Grable* in *Empire HealthChoice v. McVeigh*.<sup>3</sup>

In *McVeigh*, the Government argued as *amicus curiae* that the federal courts could exercise valid federal question jurisdiction over Empire HealthChoice’s state law reimbursement claim under *Grable* because “federal law is a necessary element of

---

<sup>1</sup> *Empire HealthChoice Assurance, Inc. v. McVeigh*, \_\_ U.S. \_\_, 126 S. Ct. 2121, 165 L. Ed.2d 131, 149 (6-15-2006).

<sup>2</sup> 545 U.S. 308 (2005). *Grable*, and this Court’s faithful and consistent understanding and application of *Grable* in *Eastman v. Marine Mechanical Corp.*, 438 F.3d 544 (6<sup>th</sup> Cir. 2006), were both discussed in detail in Mikulski’s Supplemental Brief on Rehearing *En Banc* filed on May 26, 2006.

<sup>3</sup> See note 1 *supra*.

[Empire’s] claim,”<sup>4</sup> just as Centerior argues in this case that an interpretation of federal law – Section 312(n)(1) of the Internal Revenue Code (“IRC”) – is essential to the resolution of Mikulski’s state law claims for relief.

The Supreme Court sharply distinguished *McVeigh* from *Grable* – “[t]his case is poles apart from *Grable*”<sup>5</sup> – and dramatically limited the scope and application of *Grable*’s holding and rationale. In contrast to *Grable*, which centered on whether the actions of a federal agency (the IRS) had violated a federal statute (IRC § 6335), and presented a nearly “pure issue of law” the resolution of which would be both dispositive of that case and controlling in numerous other tax sale cases, Empire’s reimbursement claim arose from the actions of private litigants in a state court forum rather than from the acts of any federal agency, service or department, and were “fact-bound and situation-specific.”<sup>6</sup>

Mikulski’s claims in this case are identical in all relevant respects to Empire’s claim in *McVeigh*. They arise from the actions of private parties (*i.e.*, whether a corporation violated federal law), and do not involve the activities of any federal agency or department. The Government simply has no interest or stake in this litigation. Mikulski’s claims are, like Empire’s, fact-bound and situation specific. Unlike in *Grable*, the resolution of this case will not govern or control numerous

---

<sup>4</sup> *McVeigh, supra*, 165 L. Ed.2d at 143.

<sup>5</sup> *Id.* at 150.

<sup>6</sup> *Id.*

future cases because the federal tax code provision at issue no longer applies to corporate “earnings and profits” calculations for years after 1986.<sup>7</sup>

The Supreme Court likewise did not think “a proper ‘federal-state balance’ would place such a nonstatutory issue [*i.e.*, Empire’s attorneys’ fees it spent to obtain the tort recovery in state court] under the complete governance of federal law, to be declared in a federal forum.”<sup>8</sup> Similarly, the Ohio common law issues of fraudulent misrepresentation, the duties a corporation owes to its shareholders, and whether state law damage remedies are available to redress such fraud and breaches of duties, should not be “under the complete governance of federal law, to be declared in a federal forum.”

Just as in *McVeigh*, where “[t]he state court in which the [tort] suit was lodged is competent to apply federal law . . . and would seem best positioned to determine” the state law issues arising out of the state tort action,<sup>9</sup> the state courts from which Mikulski’s claims were removed are competent to interpret and apply the effective date provisions of Section 312(n)(1), and are best positioned to adjudicate the Ohio common law issues of fraud and breach of contract.

Although the Court recognized that the United States had a legitimate interest in

---

<sup>7</sup> Section 263A of the Internal Revenue Code, enacted as part of the Tax Reform Act of 1986. *See* discussion that Section 312(n)(1) determination will have little value as precedent in Appellants’ Supplemental Brief on Rehearing *En Banc* at 12 n.35.

<sup>8</sup> *McVeigh*, *supra*, 165 L. Ed.2d at 150.

<sup>9</sup> *Id.*

*McVeigh* in protecting the federal workforce, it concluded that those interests did not warrant turning a straightforward state law contract claim into a costly “federal case.”<sup>10</sup>

The Court in *McVeigh* summed up its holding and the proper interpretation and application of *Grable* as follows:

*Grable* emphasized that it takes more than a federal element “to open the ‘arising under’ door.” This case cannot be squeezed into the *slim category* *Grable* exemplifies.<sup>11</sup>

Extrapolating from *Grable* and *McVeigh* to this litigation, it similarly takes more than a private party’s violation of one provision of the Internal Revenue Code (which a state judge is fully competent to construe and apply) to confer jurisdiction over Mikulski’s state law claims upon the federal courts. If *McVeigh* cannot be squeezed into *Grable*’s “slim category” of jurisdiction, this case surely cannot as well.

The proper interpretation of *Grable* set forth in the majority opinion in *McVeigh*, and the scope of its application to *McVeigh* and other cases, apparently garnered unanimous approval by the entire Court since the dissenting opinion neither takes issue with the majority on this point nor even mentions *Grable*.<sup>12</sup>

Therefore, the Court should affirm the panel majority’s determination, following *Grable* as properly understood, that no federal question jurisdiction exists

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (emphasis supplied) (citation omitted).

<sup>12</sup> *Id.* at 151-58 (Breyer, J., dissenting).

over Mikulski's state law claims for relief.

**II. SECTION 7422 OF THE INTERNAL REVENUE CODE DOES NOT PREEMPT MIKULSKI'S STATE LAW CLAIMS.**

The panel decision unanimously held that IRC § 7422 did not preempt Mikulski's state law claims for fraudulent misrepresentation and breach of contract. The panel conducted a thorough preemption analysis that took into account a number of considerations, including (i) the express language of Section 7422; (ii) the district court's reliance on the airline passenger excise tax cases; (iii) whether the nature of a claim is determined by the underlying damages; and (iv) whether Section 7422 provides an exclusive remedy. The panel unanimously concluded that not one of these considerations supported preemption. The Court rehearing this appeal *en banc* should adopt the panel's preemption analysis and affirm its conclusion that Mikulski's state law claims are not preempted.

**A. Mikulski's State Law Claims Do Not Fall Within the Express Language of Section 7422.**

Mikulski brought suit in state court for tortious conduct, not for a federal tax refund. Mikulski's state law claims allege that Centerior performed fraudulent tax accounting calculations in violation of IRC § 312(n)(1). After improperly inflating earnings and profits, Centerior then over-reported taxable dividends and induced its shareholders to overpay their respective state and federal income taxes. In the text of IRC § 7422, there is no mention of improper tax calculations or income reporting. The panel correctly held that:

The plaintiffs' state law claims do not fall within the express language of 26 U.S.C. § 7422, which would prevent recovery for failure to file a claim against the United States with the Internal Revenue Service. . . . Section 7422 does not apply to these complaints by its plain language; the plaintiffs do not complain of erroneous or illegal tax assessments or collections by the defendants.<sup>13</sup>

Concurring with the majority's finding of no federal preemption, Judge Daughtrey noted:

The majority correctly points out that the plaintiffs' claims turn on Centerior's failure to comply with § 312(n)(1) of the Code and do not fall within the language of the refund provision of § 7422. It is also evident that the plaintiffs are not suing to recover a tax or sum improperly collected; they are suing for tortious conduct, the damages for which may be measured by the amount of their overpayment of taxes.<sup>14</sup>

Centerior presents no argument or authority on rehearing *en banc* to justify or support deviating from the panel's holding in this regard.

**B. Preemption Cannot Be Based on the Airline Passenger Excise Tax Cases Since Centerior Collected No Taxes.**

After four years of extensive briefing in this litigation, the only cases cited by Centerior in support of its misguided concept of preemption are the handful of airline passenger excise tax cases. No other reported cases hold that Section 7422 preempts state law claims. As the panel found:

The magistrate judge and the district court rely heavily upon airline passenger excise tax cases to preempt the

---

<sup>13</sup> *Mikulski v. Centerior Energy Corp.*, 435 F.3d 666, 672 (6<sup>th</sup> Cir. 2006).

<sup>14</sup> *Id.* at 676-77.

plaintiffs' state law claims through 26 U.S.C. § 7422. This reliance is misplaced.<sup>15</sup>

Citing the *FedEx* case discussed at length in Mikulski's panel Brief and Reply Brief, the panel concluded that the airline passenger excise tax cases are inapplicable to this litigation because Centerior did not collect taxes from Mikulski and its other shareholders:

In the airline cases, the preemption decisions were based on the court's finding that the defendant airline was acting as a collection agent of excise taxes for the Internal Revenue Service. No such finding has been made about the defendants in this case. Other courts, including district courts, recognize that the airline excise tax cases have limited applicability beyond their unique set of circumstances. *See In re Air Transp. Excise Tax Litig.*, 37 F. Supp.2d 1133, 1137 (D. Minn. 1999) (distinguishing airline cases; refusing to preempt plaintiffs' claims for improper collection of excise taxes on air freight of Federal Express because elements of "true" tax refund claim not present).<sup>16</sup>

The airline passenger excise tax cases are further limited to their unique facts and circumstances by a line of cases holding defendant-employers liable to wrongfully discharged employees for improper tax withholdings (including, federal and state income and FICA taxes) on awards of damages.<sup>17</sup> These employer withholding cases

---

<sup>15</sup> *Id.* at 672 (citations omitted).

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g., Ramos v. Davis & Geck*, 224 F.3d 30 (1<sup>st</sup> Cir. 2000); *Newhouse v. McCormick & Co.*, 157 F.3d 582 (8<sup>th</sup> Cir. 1998); *Tungseth v. Mutual of Omaha Ins. Co.*, 43 F.3d 406 (8<sup>th</sup> Cir. 1994); *Redfield v. Insurance Company of North America*, 940 F.2d 542 (9<sup>th</sup> Cir. 1991); *Longstreth v. Cople and MCI Telecommunications Corp.*, 101 F. Supp.2d 776 (N.D. Iowa

indicate that the employer's status as a tax collection (withholding) agent, so crucial to finding preemption in the airline tax cases, does not require federal preemption of state law claims given different facts and circumstances. The courts in these cases addressed whether the employers had correctly determined under the relevant tax laws that awards of damages were subject to tax withholding. Liability in the employer withholding cases was premised on the employer's incorrect determination that the award represented "wage income" subject to tax withholding, without thereupon finding that the claim was for a tax refund, thus preempted by Section 7422.<sup>18</sup>

Having collected no taxes, Centerior in this case is not entitled to protection from private suits under Section 7422. In her concurrence, Judge Daughtrey explained the intended purpose of Section 7422 and why Centerior does not fall within its protective scope:

Section 7422 protects private entities that act as federal collection agents from returning an improperly collected tax out of their own coffers. However, defendant Centerior, unlike the defendant in *Brennan v. Southwest Airlines* [citation omitted], on which the magistrate and district court judge relied, did not collect the alleged overpayment.

Therefore, the defendant here does not face the prospect of having to refund monies it paid to the IRS without any recourse, as was the case with *Southwest Airlines*, which had remitted the sums it collected to the IRS. Centerior merely reported payouts to shareholders that were the basis

---

2000); *Kelly v. Hunton & Williams*, 1999 U.S. Dist. LEXIS 14605 (E.D.N.Y. 1999); *Churchill v. Star Enterprises*, 3 F. Supp.2d 622 (E.D. Pa. 1998); *Lisec v. United Airlines*, 10 Cal. App.4<sup>th</sup> 1500 (1992); *Sang-Hoon Kim v. Monmouth College*, 726 A.2<sup>nd</sup> 1017 (N.J. Super. Ct. 1998).

<sup>18</sup> See illustrative discussion of *Tungseth* in Appellants' panel Brief at 23-24.

for taxes paid directly to the IRS by those shareholders.<sup>19</sup>

**C. The Nature or Measure of Mikulski's Damages Does Not Convert These State Tort Claims Into Federal Tax Refund Claims.**

The magistrate judge and the district court preempted Mikulski's state law claims under Section 7422 by mischaracterizing them as federal tax refund claims. Centerior persists in maintaining that Mikulski has lodged a federal income tax refund claim against it rather than filing the refund claim with the IRS: "Appellants seek a tax refund."<sup>20</sup> "Appellants want a refund."<sup>21</sup> Behind this mischaracterization lurks the flawed reasoning that views the nature of a claim as determined by the nature of the underlying damages. The panel unanimously rejected such flawed reasoning:

The district court erred in adopting the report and recommendation's conclusion that, because the plaintiffs' damages are calculated in terms of overpaid income taxes, the plaintiffs' state law claims constitute federal income tax refund claims.

\* \* \*

Not all claims that seek damages against the United States for overpayment of taxes are claims for the recovery of tax refunds, even though damages are measured in taxes. This court has often stated that the nature of a plaintiff's state law claims is not determined by the nature of his underlying damages.<sup>22</sup>

---

<sup>19</sup> *Mikulski, supra*, 435 F.3d at 677 (Daughtrey, J., concurring in part and dissenting in part).

<sup>20</sup> Supplemental Brief of Appellees at 44.

<sup>21</sup> *Id.* at 45.

<sup>22</sup> *Mikulski, supra*, 435 F.3d at 672.

In her concurrence, Judge Daughtrey joined the panel majority's conclusion that the nature of the underlying damages does not determine the nature of a plaintiff's claim: "It is also evident that the plaintiffs are not suing to recover a tax or sum improperly collected; they are suing for tortious conduct, the damages for which may be measured by the amount of their overpayment of taxes."<sup>23</sup>

The unanimous panel correctly understood the true nature of Mikulski's claims as being different from tax refund claims:

The plaintiffs' complaints center on the alleged inflation of the defendants' earnings and profits in violation of the Internal Revenue Code's § 312(n)(1), the over-reporting of taxable dividends to the plaintiffs and other taxpaying shareholders, and, as a result, the inducement of the plaintiffs and other shareholders to overpay their respective federal and state income taxes.<sup>24</sup>

In cases where a federal preemption defense has been raised, this Court has consistently held that the nature of a claim is not determined by the underlying damages.<sup>25</sup> Most recently, in *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*,<sup>26</sup> the plaintiff asserted state-law breach of contract and negligent

---

<sup>23</sup> *Id.* at 676-77.

<sup>24</sup> *Id.* at 672.

<sup>25</sup> See *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 453 (6<sup>th</sup> Cir. 2003); *Husvar v. Rapoport*, 337 F.3d 603, 609 (6<sup>th</sup> Cir. 2003); *Wright v. General Motors Corp.*, 262 F.3d 610, 615 (6<sup>th</sup> Cir. 2001).

<sup>26</sup> 399 F.3d 692, 702-03 (6<sup>th</sup> Cir. 2005).

misrepresentation claims for faulty tax calculations against a non-fiduciary provider of bookkeeping services. Such calculations were required by IRC § 416 to prevent the qualified plan from becoming “top-heavy.” This Court held the claims were not preempted by ERISA despite the fact that the alleged damages included a substantial corrective contribution to the plan, along with a fine paid to the Internal Revenue Service and other costs incurred to bring the plan back into compliance with Section 416:

Upon review of the pleadings, we conclude that [plaintiff’s] damage request is not seeking recovery of denied plan benefits or contributions, but rather compensatory damages proximately caused by the breach of contract. The inclusion of the top-heavy contribution is simply to reference “specific, ascertainable damages” suffered as a result of the breach, which is not the equivalent of an ERISA claim under Section 502 (a)(1)(B) to recover plan benefits.<sup>27</sup>

Mikulski’s claims are strikingly similar to those asserted by the plaintiff in *Penny* – in both cases, the plaintiffs complain of faulty tax calculations by defendants resulting in damages to the plaintiffs’ pecuniary interests. In *Penny*, this Court refused to preempt the plaintiff’s claims under ERISA even though the damages were measured, in part, by a corrective contribution to a qualified plan.

There is no principled basis or justification for the Court to depart from its analysis in *Penny*, *Marks*, *Husvar* and *Wright* to preempt Mikulski’s state law claims for fraudulent tax calculations and improper inflation of earnings and profits.

---

<sup>27</sup> *Id.* at 703.

Mikulski's claims are not federal tax refund claims simply because the alleged damages are measured, in part, by federal income tax overpayments. Accordingly, Section 7422 is inapplicable to Mikulski's claims.

Mikulski has also alleged damages measured by overpaid state income taxes. It is difficult to conceive how such a claim can be mischaracterized as a federal tax refund claim based on the nature of the underlying damages – *i.e.*, overpaid *state* taxes. The district court ignored this distinct claim, which may represent as much as 30% of the damages sustained by Mikulski and the other shareholders. Understandably, Centerior has also chosen to ignore Mikulski's state income tax overpayments. In multiple briefings filed during the course of this litigation Centerior has yet to provide any authority or rationale to substantiate the preemption under Section 7422 of claims seeking to recover state income tax overpayments from a private party.

**D. Section 7422 Does Not Provide an Exclusive Remedy.**

Centerior erroneously contends that Section 7422 provides the exclusive remedy to recover tax overpayments.<sup>28</sup> Centerior bases its contention on a strained and incorrect reading of the text of Section 7422 and its misinterpretation of the airline passenger excise tax cases.

Where a taxpayer sought to recover a tax payment from the government, and

---

<sup>28</sup> Supplemental Brief of Defendants-Appellees at 45-46.

where the same strained reading of Section 7422 would have denied a remedy to the taxpayer, the United States Supreme Court refused to adopt the strained reading urged by the government in *United States v. Williams*.<sup>29</sup> The Supreme Court permitted the plaintiff to recover her taxes from the government despite the fact that she had paid taxes assessed against another taxpayer, her ex-husband. Mikulski and the plaintiff in *Williams* were caught a similar situation. Each had no realistic alternative but to pay a tax she did not owe. To remove a federal tax lien on her property, the plaintiff in *Williams* had to pay a tax actually owed by her ex-husband. Mikulski had no reason to suspect Centerior's report of taxable dividends was fraudulent, and could not independently verify the accuracy of the dividend reporting. Mikulski merely paid the taxes Centerior advised him to pay. This Court should follow *Williams* and restore the state law remedy denied to Mikulski by the district court's incorrect conclusion that Section 7422 provides an exclusive remedy.

As discussed above, the panel unanimously agreed that the magistrate and the district court put misplaced reliance on the airline passenger excise tax cases. Given the *FedEx* and employer-withholding cases, the airline passenger excise tax cases have questionable (and perhaps no) applicability beyond their unique set of facts and circumstances. This Court should not conclude from the airline passenger excise tax cases that Section 7422 provides an exclusive remedy to a shareholder, like Mikulski, who has alleged fraudulent tax accounting and tax misreporting.

---

<sup>29</sup> 514 U.S. 527, 529 (1995). *Williams* is discussed in greater detail in Appellants' panel

In assessing whether Section 7422 provides an exclusive remedy, the panel expressly took into account (i) the doctrine of complete preemption; (ii) the provision of exclusive and non-exclusive private rights of action in the IRC; (iii) the legislative history of Section 7422; (iv) congressional intent; (v) the enactment of Section 7434 in 1996; and (vi) decisions from the Federal Circuit.

1. **The doctrine of complete preemption does not apply here.**

The district court ruled that Mikulski's state law claims were completely preempted by the IRC, citing *Beneficial National Bank v. Anderson*<sup>30</sup> as purported support for the complete preemption of Mikulskis' claims. In *Beneficial National Bank*, the Supreme Court found complete preemption under the National Bank Act because Congress intended the federal cause of action to be the exclusive remedy.<sup>31</sup> In ruling that Mikulski's state law claims were completely preempted, the district court necessarily concluded that Section 7422 provides the exclusive remedy to a damaged taxpayer. The district court thus extended the doctrine of complete preemption into a class of cases and area of the law not yet recognized by the Supreme Court.

The panel took note of the district court's unprecedented expansion of the complete preemption doctrine:

---

Reply Brief at 22-23.

<sup>30</sup> 539 U.S. 1 (2003).

<sup>31</sup> *Id.* at 7-8, 9 n.5. *Accord AmSouth Bank v. Dale*, 386 F.3d 763, 776-77 (6<sup>th</sup> Cir. 2004) and *Roddy v. Grand Trunk Western Railroad, Inc.*, 395 F.3d 318, 322-24 (6<sup>th</sup> Cir. 2005).

The [Supreme] Court has not yet recognized complete preemption for damage claims caused by allegedly inaccurate tax reporting by corporations to their taxpaying shareholders, especially when the claim involves both federal and state income taxes. This court ruled likewise when it found that ERISA did not preempt a state tax refund claim.

Courts must take care to avoid creating complete preemption beyond the three areas of law recognized by the Supreme Court.

\* \* \*

The United States District Court for the Northern District of Ohio seems to be the first court in the country to find complete preemption in the Internal Revenue Code. If the district court were correct, it would federalize most state law claims that remotely address tax issues, such as suing one's accountant or tax preparer.

There is no reason for this court to conclude that Congress intended to create an exclusive federal remedy under the Internal Revenue Code for miscalculation of earnings and profits and misreporting of taxable dividends.<sup>32</sup>

This Court should reject the conclusion that Section 7422 completely preempts Mikulski's state law claims to prevent the expansion of the complete preemption doctrine into an area of law not intended by Congress or recognized by the Supreme Court.

- 2. The panel also took congressional intent, legislative history, and Congress' provision of exclusive and non-exclusive causes of action into account.**

---

<sup>32</sup> *Mikulski*, *supra*, 435 F.3d at 673-74, citing *Thiokol Corp. v. Roberts*, 76 F.3d 751 (6<sup>th</sup> Cir. 1996), and *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

In reaching its conclusion that Section 7422 did not preempt Mikulskis' claims, the panel also considered congressional intent, legislative history, and the provision of both exclusive and non-exclusive causes of action in the IRC:

Congress has expressly provided non-exclusive federal private causes of action for violation of several sections of the Internal Revenue Code, including Sections 7426(a)(1), 7431(a)(2), 7432, and 7434. Four specific provisions of the Code indicate that Congress intended the private federal remedy to be exclusive: Sections 6110(j)(1)(B), 897(I)(4), 7433(a), and 7433(e). No such provisions for exclusive federal causes of action are set forth in Sections 312(n)(1) or 6042(c). The language and legislative history of Section 7422 also indicate that Congress did not intend for the tax refund procedure to be the exclusive federal remedy for fraudulent dividend reporting causing shareholders to overpay their income taxes. The intended purpose of Section 7422 was to protect government collection officers from being sued by taxpayers and to provide taxpayers with a means to obtain relief from improper collections by tax collectors.<sup>33</sup>

**3. Section 7434, enacted in 1996 after Mikulski's claims arose, does not apply to this case nor affects the relevant analysis.**

The panel also correctly concluded that the 1996 enactment of IRC § 7434 neither applies to this case nor alters the correct analysis that Mikulski's state law claims are not federally preempted:

In July 1996, Congress enacted 26 U.S.C. § 7434, which expressly creates a private right of action in favor of any taxpayer who is injured because another person or entity has willfully filed a fraudulent information return asserting that payments have been made to a taxpayer. All events

---

<sup>33</sup> *Mikulski, supra*, 435 F.3d at 674 (citations and footnote omitted).

giving rise to plaintiffs' cases preceded the enactment of Section 7434. Its enactment by Congress, however, is indicative of the fact that the legislative branch never intended for Section 7422 to create an implied private right of action, much less to provide the exclusive remedy for fraudulent filing claims.<sup>34</sup>

The panel decision is absolutely correct – to hold that Section 7422 provides an exclusive remedy would contradict congressional intent by creating an exclusive federal remedy where Congress had intentionally refrained from doing so.

**4. Decisions by the Court of Appeals for the Federal Circuit fully support Mikulski's construction of Section 7422.**

The Federal Circuit has held that claimants may recover taxes from the government without first having to file administrative refund claims with the Internal Revenue Service or otherwise comply with Section 7422.<sup>35</sup> In *Cyprus Amax Coal*, the Federal Circuit expressly permitted a recovery of taxes from the government via two alternative avenues – a tax refund action or a cause of action based on violation of the Export Clause of the Constitution. In *Brown*, the Federal Circuit recognized the taxpayer's claims only as claims for fraudulent assessment and taking, not as tax refund claims. In *Hatter*, the Federal Circuit permitted an action brought by a group of federal judges to recover social security taxes to proceed as a suit seeking damages for violation of the Compensation Clause of the Constitution.

---

<sup>34</sup> *Id.* at 674 n.3.

<sup>35</sup> See, e.g., *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1376 (Fed. Cir. 2000); *Brown v. U.S.*, 105 F.3d 621, 623 (Fed. Cir. 1997). See also *Hatter v. U.S.*, 953 F.2d 626, 629 (Fed. Cir. 1992).

**E. Numerous Additional Authorities, Not Cited by the Panel, Also Support Its Conclusion that Section 7422 Does Not Preempt Mikulski's Claims.**

The Federal Circuit has permitted plaintiffs to bring breach of contract actions against the government to recover damages measured by federal corporate income tax payments.<sup>36</sup> In these cases, the federal government entered into contracts with buyers of failed savings and loans that promised the buyers certain tax deductions. Congress later passed targeted tax legislation eliminating the deductions. Since they were statutorily unable to benefit from the tax deductions, the buyers incurred additional corporate tax liabilities and paid more federal taxes. The Federal Circuit has consistently permitted the recovery of these additional tax payments as damages for the government's breach of contract.

There is also an established line of cases holding that a trustee in bankruptcy is not required to comply with Section 7422(a) before bringing suit in bankruptcy court for return of excess amounts paid to satisfy tax claims of the United States.<sup>37</sup>

---

<sup>36</sup> See, e.g., *Centex Corp. v. U.S.*, 55 Fed. Cl. 381 (2003), *aff'd* 395 F.3d 1283, 1311-13 (Fed. Cir. 2005); *First Heights Bank, FSB v. U.S.*, 422 F.3d 1311 (Fed. Cir. 2005); *First Nationwide Bank v. U.S.*, 431 F.3d 1342 (Fed. Cir. 2005); *Local Okla. Bank, N.A. v. U.S.*, 2006 U.S. App. LEXIS 16281 (Fed. Cir. 6-29-2006).

<sup>37</sup> See, e.g., *In re R&W Enterprises*, 181 B.R. 624, 642-43 (Bankr. N.D. Fla. 1994); *In re Gribben*, 158 B.R. 920, 922-24 (S.D.N.Y. 1993); *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 245 n.4 (9<sup>th</sup> Cir. 1989); *In re Stewart Thomas, Inc.*, 1979 U.S. Dist. LEXIS 14509 at \*16-25 (W.D. Va. 1979); *In re Madden*, 388 F. Supp. 47, 50-53 (D. Id. 1975); *In re Pittsburgh Railways*, 253 F.2d 654, 657 (3<sup>rd</sup> Cir. 1958).

Thus, courts recognize that compliance with the federal tax-refund statute and filing an administrative tax-refund claim with IRS are not, in every instance, prerequisites to asserting an otherwise valid claim against the government to recover damages measured by taxes. If such claims are not preempted by Section 7422 in litigation against the government, then it defies logic to maintain that Section 7422 preempts state law tort litigation between purely private parties claiming similar kinds of damages.

As pointed out above, the panel correctly regarded the enactment of Section 7434 as a clear signal that Congress did not intend Section 7422 to preempt Mikuski's claim for fraudulent tax reporting against Centerior. Although not noted by the panel, Congress also enacted Section 6672(d) at the same time it enacted Section 7434 in 1996. Notwithstanding Section 7422's bar on suits to recover "any penalty claimed to have been collected without authority," Section 6672(d) provides a private federal cause of action for contribution to recover tax penalties. However, even with respect to claims arising before the enactment of Section 6672(d), the Fourth Circuit recognized a right to contribution under Maryland law to recover tax penalties.<sup>38</sup> Similarly, the Ninth Circuit has held that a state law action for contribution may also be available to an estate seeking to recover taxes from a former spouse.<sup>39</sup> Other case

---

<sup>38</sup> *Glude v. Sterenbuch*, 133 F.3d 914 (4<sup>th</sup> Cir. 1998).

<sup>39</sup> *Ravetti v. U.S.*, 37 F.3d 1393, 1395-96 (9<sup>th</sup> Cir. 1994), *cert. denied*, 514 U.S. 1005 (1995). The *Ravetti* decision is described in greater detail in the Appellants' Reply Brief at 21-22.

decisions confirm that the provision of a remedy in the IRC does not necessarily preempt parallel state-law remedies.<sup>40</sup>

Federal and state courts have routinely held employers liable to employees for inaccurately reporting income to them on tax Forms W-2 and 1099.<sup>41</sup> These cases are especially relevant to Mikulski's claims for fraudulent tax reporting because Centerior issued Forms 1099-DIV to Mikulski and its other shareholders. A recent study examining whether federal law preempted state tort liability for inaccurate tax reporting concluded that it does not.<sup>42</sup>

Sixty-seven years ago, the predecessor to the United States Tax Court held that amounts paid by a negligent tax counsel to a client to compensate him for a loss suffered on account of erroneous advice were not taxable income to the client. The tax advice caused the client to overpay his federal income taxes.<sup>43</sup> A 1957 revenue

---

40 See, e.g., *U.S. v. Papandon*, 331 F.3d 52, 56 (2<sup>nd</sup> Cir. 2003) (“But the adoption of a federal statutory provision [Internal Revenue Code Section 4103] granting a certain remedy does not bar the use of similar state law remedies”); *In re Chateaugay*, 94 F.3d 772, 778-79 (2<sup>nd</sup> Cir. 1996) (enactment of Sections 3720A and 6402(d) permitting set-off of tax refunds against non-tax debts owed to federal agencies did not preempt the government's common law right of set-off); *Remington v. U.S.*, 210 F.3d 281, 282-84 (5<sup>th</sup> Cir. 2000) (Sections 6671 and 6672 did not preempt the government's use of Texas partnership law to impose liability on partner for payroll-related tax debt).

41 See, e.g., *Clemens v. USV Pharmaceutical*, 838 F.2d 1389 (5<sup>th</sup> Cir. 1988); *Wisecup v. Gulf Development* (Mont. Cty. 1989), 56 Ohio App.3d 162; *Buchanan v. Dowdy*, 772 F. Supp. 986 (S.D. Tex. 1991); *Holloway v. Odom Antennas, Inc.*, 1997 U.S. App. LEXIS 19981 (8<sup>th</sup> Cir. 1997).

42 Jacob L. Todres, *Torts, Tax Reporting, and Preemption: Is There Tort Liability for Incorrect Information Reports?* 28 IOWA J. CORP. LAW 259 (2003).

43 *Edward H. Clark v. Commissioner*, 40 B.T.A. 333 (1939).

ruling also found excludible from income the compensation paid by a tax consultant to a taxpayer for an error which caused the taxpayer to overpay her taxes.<sup>44</sup> In *Rev. Rul. 57-47*, the error was discovered after expiration of the limitations period for filing a tax refund claim with the IRS. Thus, the taxpayer in that case was in the same situation as Mikulski who discovered Centerior's fraudulent dividend reporting too late to file for a refund. While these authorities did not address the issue of federal preemption, they indicate that taxpayers who overpaid taxes decades ago have successfully recovered these overpayments from private defendants. The filing of a tax refund claim was not their only remedy.

Centerior suggests that Mikulski's claims amount to an attempted collateral attack on the IRS' supposed administrative determination that Centerior had accurately calculated its earnings and profits.<sup>45</sup> However, the mere fact that the IRS did not dispute Centerior's earnings and profits calculations filed on Form 5452 does *not* indicate that the IRS even examined such calculations, much less approved the computation. Thousands of Forms 5452 are filed with the IRS annually by corporations reporting non-dividend payments to shareholders. There is no basis to believe that the IRS audits or reviews more than a relatively few Forms 5452 given the

---

<sup>44</sup> *Rev. Rul. 57-47; 1957-1 C.B. 23.*

<sup>45</sup> Supplemental Brief of Defendants-Appellees at 49 n.103.

low audit rate of other tax returns and reports filed with the IRS.<sup>46</sup> Centerior has no basis to contend that the IRS examined and agreed with its earnings and profits calculations. This argument mirrors Centerior's unsupportable assertion that it acted as a collection agent for the government. As correctly determined by the panel, Centerior collected no tax from Mikulski or from any other shareholder.<sup>47</sup> Accordingly, this Court should give no credence to Centerior's wishful thinking, imagined IRS audit, and phantom approval of its earnings and profits calculations.

Centerior raises an alternative argument in favor of preemption – any determination that Centerior inflated earnings and profits must proceed through the tax refund process and involve the IRS and the U.S. government. This argument has no merit whatever. Mikulski does not seek a determination of any shareholder's correct tax liability to the government. The tax years in question, 1985-1997, are “closed.” The government will never have to refund any tax overpayments. Centerior performed the disputed earnings and profits calculations, not the government. There is no evidence that the IRS approved the calculations. Mikulski does not challenge any action by the IRS. The IRS and the federal government have no interest in this litigation. There is simply no reason or need to involve the government in this litigation.

---

<sup>46</sup> From 1996 through 2000, inclusive, the IRS reviewed between 0.19% and 0.56% of all business and other non-individual taxpayer returns. *See* “Report to Congress: IRS Tax Compliance Activities,” July 15, 2003 (Tables 2-3), IRS DATA BOOK, 2003-2004.

<sup>47</sup> *Mikulski, supra*, 435 F.3d at 672.

Where a complaint alleges purely private misconduct relating to federal tax matters, the plaintiff need not first file a tax refund claim with the IRS prior to asserting his state law claims.<sup>48</sup> As the Ninth Circuit explained, there is no reason to preempt a state law action that does not seek to establish a taxpayer's correct tax liability to the government.<sup>49</sup>

In a number of reported cases, the IRS did not detect errors on tax returns, accepted the tax returns as filed, and retained excessive tax payments. By the time the plaintiffs in those cases discovered the errors and tax overpayments, the limitations period to file for a tax refund had expired. The IRS was not found to be an indispensable party in these cases.<sup>50</sup>

In addition to the numerous cases previously cited to the Court holding that the provisions of the IRC do not preempt state law claims,<sup>51</sup> other cases similarly accord

---

<sup>48</sup> *Bancroft v. Indemnity Insurance Company of North America*, 203 F. Supp. 49, 54 (W.D. La. 1962) (“The law makes the filing of a claim for refund of taxes a condition precedent to a suit for refund. This is required, however, only where the suit involves review of an administrative determination by the IRS. It is not applicable to a suit for damages resulting from the professional negligence of a public accountant”).

<sup>49</sup> *See Ravetti, supra*, 37 F.3d at 1396 (“[t]he Supremacy Clause has no application, because the state court will not purport to determine how much . . . [the] estate must pay the IRS”).

<sup>50</sup> *See* cases cited and discussed in Appellants’ panel Brief at 45. *Rev. Rul. 57-54, supra*, also involved an error and tax overpayment detected too late to file a refund claim.

<sup>51</sup> *See* Final Brief of Plaintiffs-Appellants at 46-48 and Final Reply Brief of Plaintiffs-Appellants 27-28.

no preemptive effect to the IRC.<sup>52</sup>

Class actions have been certified, not preempted, where plaintiffs sought damages from private defendants measured in taxes, tax penalties and interest.<sup>53</sup>

Neither party in this litigation has found a single reported case where a court preempted an action against a defendant for alleged misreporting of taxable income. There is no proper basis to hold that Section 7422 preempted Mikulski's claims against Centerior for misreporting taxable income to its shareholders.

### CONCLUSION

Accordingly, for the foregoing reasons and for the reasons more fully set forth in Appellants' panel Brief, panel Reply Brief and Supplemental Brief, the Court should affirm the panel decision in all respects, reverse the judgment below, and order

---

<sup>52</sup> See, e.g., *In re Forman Enterprises, Inc.*, 281 B.R. 600, 606-08 (Bank. W.D. Pa. 2002) ("We know of no provision of the Internal Revenue Code which states that it supersedes any state law cause of action which may require a taxpayer to turn over to a third party a refund to which the taxpayer is entitled under the Internal Revenue Code"); *U.S. v. West Productions, Ltd.*, 168 F. Supp.2d 84, 91 (S.D.N.Y. 2001) (Section 6672 does not preempt New York state partnership law); *Pritchard v. Floyd*, 867 So.2d 83, 85-86 (La. App. 2004) (Section 152(e)(2) does not preempt allocation of dependency exemption among parents under state law); *State of Washington v. Grimes*, 2002 Wash. App. LEXIS 3407 at \*7-10 (Wash. App. 2002) (Section 1031 does not preempt a state law prosecution for theft); *Rapid Settlements v. Safeco*, 2005 Conn. Super. LEXIS 31 at \*5 (Conn. Super. 2005) (Section 5891(b)(2)(A) does not preempt state law governing assignment of payments under a structured settlement).

<sup>53</sup> See, e.g., *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317 (S.D.N.Y. 2005) (IRS tax penalties and interest in abusive tax shelter litigation); *P.J.'s Concrete Pumping Service, Inc., v. NexTel West Corp.*, 803 N.E.2d 1020 (Ill. App. 2004) (erroneous collection of taxes on cellular phone service); *Alford Chevrolet-Geo v. Jones*, 91 S.W.3d 396 (Tex. App. 2002) (erroneous collection of car dealer's inventory tax). These cases were certified as class action litigation irrespective of the federal tax issues involved. See also certified class actions collected in Appellants' panel Reply Brief at 3.

these consolidated cases to be remanded to the respective state courts from which they were improperly removed.

Respectfully submitted,

---

Eric H. Zagrans (Ohio Bar #0013108)  
(Lead Counsel)  
1401 Eye Street, N.W.  
Washington, D.C. 20005-2225  
(202) 857-4400 (telephone)  
(202) 261-0046 (facsimile)  
[eric@zagrans.com](mailto:eric@zagrans.com) (e-mail)

Robert D. Gary (Ohio #0019610)  
Thomas R. Theado (Ohio #0013937)  
GARY, NAEGELE & THEADO  
446 Broadway  
Lorain, Ohio 44052-1797  
(440) 244-4809 (telephone)  
(440) 244-3462 (facsimile)  
[rgary@gntlaw.com](mailto:rgary@gntlaw.com) (e-mail)  
[TomTheado@aol.com](mailto:TomTheado@aol.com) (e-mail)

Dennis P. Barron (Ohio #0030568)  
P.O. Box 8190  
Cincinnati, Ohio 45208  
(513) 871-2369 (telephone)  
[DennisPBarron@aol.com](mailto:DennisPBarron@aol.com) (e-mail)

Eben O. McNair IV (Ohio #0026049)  
Daniel S. White (Ohio #0047400)  
SCHWARZWALD & MCNAIR  
616 Penton Media Building  
1300 East Ninth Street  
Cleveland, Ohio 44114-1503  
(216) 566-1600 (telephone)  
(216) 566-1814 (facsimile)  
[emcnair@smcnlaw.com](mailto:emcnair@smcnlaw.com) (e-mail)

[dwhite@smcnlaw.com](mailto:dwhite@smcnlaw.com) (e-mail)

Attorneys for Plaintiffs-Appellants,  
Jerome R. Mikulski and Elzetta C.  
Mikulski

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)**

I hereby certify, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, that the foregoing Supplemental Reply Brief of Plaintiffs-Appellants on Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more, and contains 5,269 words.

Dated: July \_\_\_, 2006

---

Eric H. Zagrans (0013108)

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true copy of the foregoing Supplemental Reply Brief of Plaintiffs-Appellants on Rehearing *En Banc* by ordinary U.S. mail, postage prepaid, on Mitchell G. Blair, Tracy Scott Johnson and Colleen Moran O'Neil, CALFEE, HALTER & GRISWOLD, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114, Attorneys for Defendants-Appellees, Centerior Energy Corp., *et al.*, this \_\_\_ day of July, 2006.

---

Eric H. Zagrans