No. 16-3093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio (No. 15-cv-321-ALM-NMK)

BRIEF OF THE STATE OF KANSAS AND 15 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC* FILED BY THE STATE OF OHIO, *ET AL.*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The States of Kansas, Arizona, Indiana, Louisiana, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming file this brief as *amici curiae* in support of the petition for rehearing *en banc* filed by Appellants, the State of Ohio, *et al*.[1] At the heart of this case is the scope of the federal government's authority to tax the States and the vitality of the clear statement rule, which this Court and the Supreme Court have repeatedly recognized and applied to protect the balance between federal and state governments. The *amici* States have a substantial interest in protecting that balance by ensuring that any decision by the federal government to tax the States directly is made by Congress, expressed unequivocally in the plain language it adopts, and does not undermine the States' well-established intergovernmental tax immunity.

ARGUMENT

En banc review of the Panel's opinion, which allows the U.S. Department of Health and Human Services ("HHS") to extend the transitional reinsurance tax in the Affordable Care Act ("ACA") to the States, is necessary because the Panel's decision conflicts with Sixth Circuit and Supreme Court precedent. In departing from that precedent the Panel commits an error of exceptional public importance,

[1] The States file this *amicus* brief under Fed. R. App. P. 29(a)(2) and (b).

upending the federal-state balance by substantially eroding traditional protections for States against direct federal taxation.

It is one thing for the federal government to tax private entities and individuals. It is quite another for it to tax the States, forcing them to foot the bill for the federal government's policy choices. Kansas alone has paid—under protest—more than $9 million under the transitional reinsurance tax. Some of that money will go to private health insurance companies, and some will simply pad the federal treasury's "general fund." *See* 42 U.S.C. §§ 18061(b)(1), (b)(3)(B)(iii)-(iv), (b)(4).

If Congress chooses to take the extraordinary step of taxing the States directly, both this Court and the Supreme Court have said that it must make its intent do so unmistakably clear. Yet the Panel failed to identify any plain language in the ACA that applies the tax to the States. Instead, it relied on inferences from other statutes to posit that Congress "must have" intended for the tax to apply to the States. *Ohio v. United States*, 849 F.3d 313, 319 (6th Cir. 2017).

The Panel also distorted this Court's intergovernmental tax immunity holding in *Michigan v. United States*, 40 F.3d 817 (6th Cir. 1994), misconstruing it to hold that all non-discriminatory federal taxes may be imposed on States. Worse, the Panel's broad reading of *Michigan* requires implicitly overruling *New York v.*

United States, 326 U.S. 572 (1946), which rejected the very nondiscrimination test the Panel applied here.

The panel opinion rejects Circuit and Supreme Court precedent at the expense of state sovereignty. *En banc* review should be granted, and the panel opinion vacated.

I. The Panel Opinion Conflicts with Sixth Circuit and Supreme Court Precedent Requiring Congress to State Explicitly Its Intent to Tax the States Directly.

State immunity from direct federal taxation "is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other." *United States v. California*, 297 U.S. 175, 184 (1936), *overruled in part on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). It is well established that if Congress intends to alter this "usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted); *accord Bond v. United States*, 134 S. Ct. 2077, 2089 (2014).

In *New York*, Justice Rutledge explained it this way: "[B]efore a federal tax can be applied to activities carried on directly by the States, the intention of Congress to tax them should be stated expressly and not drawn merely from

general wording of the statute applicable ordinarily to private sources of revenue." 326 U.S. at 585 (Rutledge, J., concurring). And in *Michigan*, this Court expressly adopted the clear statement rule in Justice Rutledge's concurring opinion, which the Supreme Court has more recently applied in many other contexts. *See Michigan*, 40 F.3d at 823-24. The clear statement rule is rooted in the principle that giving "the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Court has] relied to protect states' interests." *Gregory*, 501 U.S. at 464 (internal quotation marks omitted).

Unable to point to any actual clear statement that Congress intended to tax the States, the Panel allowed HHS to extend the transitional reinsurance tax to the States anyway by departing from, and attempting (but failing) to distinguish, this binding clear-statement precedent.

A. The Panel turned the clear statement rule on its head.

The Panel first erred by turning the clear statement rule on its head, suggesting that Congress should "explicitly . . . exempt state and local governments" from the transitional reinsurance tax if it did not want to require them to pay the tax, *Ohio*, 849 F.3d at 320. *Cf. Sossamon v. Texas*, 563 U.S. 277, 289 (2011) ("The question here is not whether Congress has given clear direction

that it intends to *exclude* a damages remedy" against the States, "but whether Congress has given clear direction that it intends to *include* a damages remedy.").

B. The Panel's far-flung statutory interpretation conflicts with the Supreme Court's "simple" and "stringent" test.

Purporting to apply the clear statement rule, the Panel concluded that Ohio "asks too much of the ACA." *Ohio*, 849 F.3d at 321. Not so, it is the Panel that asks too *little* of Congress. Relying on *Kimel v. Florida Board of Regents*, 528 U.S. 62, 76 (2000), the Panel correctly states that Congress is not required to "make its clear statement in a single section or in statutory provisions enacted at the same time." *Ohio*, 849 F.3d at 321 (internal quotation marks omitted). But *Kimel* offers no support for the Panel's attempt to somehow imply a clear statement from extraneous statutory provisions. If anything, *Kimel* shows where the Panel went wrong.

In *Kimel*, the Court held that the Age Discrimination in Employment Act ("ADEA") contained a clear statement of Congress's intent to abrogate the States' sovereign immunity to suits for damages. And it found the clear statement by applying a "simple but stringent test," closely following the chain of provisions Congress linked together. 528 U.S. at 73. The ADEA stated that "its provisions 'shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216, [etc.]'" *Id.* "Section 216(b), in turn, . . . authorize[d] employees to maintain actions for backpay 'against any employer

(including a public agency).'" *Id.* And the ADEA defined "public agency" in § 203(x) as including "'the government of a State or political subdivision thereof,' and 'any agency of . . . a State, or a political subdivision of a State.'" *Id.* at 74.

The States here urged the Panel to take a straightforward approach, much like the Supreme Court's approach in *Kimel*. Following a chain of definitional provisions from both the ACA and the Employee Retirement Income Security Act ("ERISA"), the plain language Congress adopted applies the transitional reinsurance tax only to certain "persons," which does not include States.

The ACA requires "group health plans" to pay the transitional reinsurance tax. 42 U.S.C. § 18061(b)(1)(A). "Group health plans" are "employee welfare benefit plan[s]" as defined in ERISA. *See* 42 U.S.C. §§ 18111, 300gg-91(a)(1). ERISA defines "an employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer." 29 U.S.C. § 1002(1). The "term 'employer' means any person" acting as an employer. *Id.* § 1002(5). In turn, ERISA defines "person" very specifically to "mean[] an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." *Id.* § 1002(9).

Because "person" does not include the sovereign States, the tax does not extend to the States. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

Even the federal government, when asked in a different case to explain whether *it* was an "employer" under ERISA argued that "employer" clearly does not include sovereigns, and the court agreed. *See Call Henry, Inc. v. United States*, No. 14-989 C, 2016 WL 640648 (Fed. Cl. Feb. 17, 2016); Defendant's Opening Supplemental Brief at 9, *Call Henry, Inc.*, 2016 WL 640648 (Att. A to States' Panel *Amicus* Br.). After the *amici* States pointed this out, the federal government withdrew its argument in the *Call Henry* case. But the government's inconsistent positions show that the text at least is ambiguous, and ambiguity is fatal to HHS's claim that the transitional reinsurance tax applies to the States.

Compare the States' simple and stringent approach to the Panel's search for interpretive clues, inferred from provisions Congress did not reference, which the Panel then used to adjust the plain definition of "person" based on what the statutes allegedly "contemplate[]" and what "Congress must have . . . intended." *Ohio*, 849 F.3d at 319-20. This approach not only belies the Panel's conclusion that Congress clearly intended to apply the tax to the States, it highlights the Panel's departure from precedent. *See, e.g.*, *Kimel*, 528 U.S. at 73-74.

En banc review should be granted to restore this Court's correct holding in *Michigan* and to return Sixth Circuit precedent into line with the Supreme Court's articulation and application of the clear statement rule. *See Gregory*, 501 U.S. at 460-61, 467. Even if the Panel's statutory interpretation were plausible (and it is

not), where a statute is susceptible of multiple plausible interpretations, the interpretation that preserves the traditional balance between the States and the federal government prevails. *See Sossamon*, 563 U.S. at 287; *Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014).

C. The Panel tried but failed to distinguish *Michigan v. United States*, which cannot be squared with the Panel's watered-down version of the clear statement rule.

Finally, the Panel's attempt to distinguish *Michigan* falls flat. In *Michigan*, the question was whether a tax on the income of "every corporation" included a state education trust set up by the Michigan legislature as a quasi corporation. Applying the clear statement rule, this Court said "no." 40 F.3d at 823-24. Here, the question is whether a tax that applies to a benefit plan established by a "person" applies to States when the definition of "person" does not include the States. As in *Michigan*, the answer should be "no." The Panel's decision to the contrary conflicts with *Michigan* and should be vacated.

II. The Panel Opinion Conflicts with Supreme Court Precedent Because the Supreme Court Has Rejected the Very Nondiscrimination Test for Intergovernmental Tax Immunity the Panel Applied Here.

Even if Congress had clearly expressed an intent to impose the transitional reinsurance tax on the States, the tax would violate the States' intergovernmental tax immunity. *See New York*, 326 U.S. 572. In rejecting Ohio's tax immunity claim, the Panel concluded that intergovernmental tax immunity "now protects

only against *discriminatory* taxes levied directly on the states." *Ohio*, 849 F.3d at 323 (internal quotation marks omitted).

That holding squarely conflicts with the Supreme Court's decision in *New York v. United States*, 326 U.S. 572 (1946). There, the Supreme Court held that the State of New York was not immune from direct taxation of its sales of mineral water, but the Court split 2-4-2 on the proper test for state tax immunity. 326 U.S. at 579-81, 583 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.* at 591 (Douglas, J., dissenting, joined by Black, J.).

Justice Frankfurter would have held that intergovernmental tax immunity only protects the States from discriminatory taxes, but that view drew support from only one other Justice. *Id.* at 582-84 (opinion of Frankfurter, J.); *see also id.* at 584-85 (Rutledge, J., concurring).

A majority of six Justices in fact rejected the nondiscrimination test Justice Frankfurter proposed—the very nondiscrimination test the Panel adopted here. A plurality opinion written by Chief Justice Stone and joined by three other Justices concluded "that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 586-87 (Stone, C.J., concurring). In a dissenting opinion,

Justice Douglas, joined by Justice Black, agreed with the plurality that State tax immunity extends beyond discriminatory taxes. He explained that if "any federal tax on any state activity were sustained unless it discriminated against the State, then a constitutional rule would be fashioned which would undermine the sovereignty of the States as it has been understood throughout our history." *Id.* at 592 (Douglas, J., dissenting).

The panel opinion contradicts *New York*. Apparently, the Panel believed that this Court's decision in *Michigan* and an out-of-circuit case, *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), somehow overruled *New York* and adopted a bright line rule that all non-discriminatory taxes are valid. Not so.

In *Michigan*, the Court explained that "Congress is free to impose a non-discriminatory tax *on the investment income at issue here* if it wants to." 40 F.3d at 823 (emphasis added). It did not stand for the much broader proposition that Congress may impose *any* non-discriminatory tax on the States. And in *Travis*, the Seventh Circuit's observation that over time "intergovernmental immunity turned into a rule of nondiscrimination" referred to *indirect* taxation. 163 F.3d at 1002. Regardless, *Travis* was not even a tax case, so any discussion of intergovernmental tax immunity was at best *dicta*.

Applying the *New York* plurality opinion, the transitional reinsurance tax violates the States' tax immunity. First, the States are unaware of any federal tax

remotely similar to the transitional reinsurance tax that traditionally has been imposed on state health plans, so application of intergovernmental tax immunity would not "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning." *New York*, 326 U.S. at 588 (Stone, C.J., concurring). Second, the transitional reinsurance tax unconstitutionally infringes state sovereignty by "forcing state governments to absorb the financial burden of implementing a federal regulatory program," thus allowing members of Congress to "take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz v. United States*, 521 U.S. 898, 930 (1997); *accord New York v. United States*, 505 U.S. 144, 168 (1992).

Allowing the federal government to commandeer state treasuries in this manner is no less an affront to state sovereignty than allowing the federal government to commandeer state legislative processes or state executive officials.

CONCLUSION

A panel of this Court cannot reject Sixth Circuit or Supreme Court precedent. The Panel's attempt to do so is precisely the type of error that warrants *en banc* review. Ohio's petition for such review should be granted.

Dated: April 5, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *amicus* brief is in 14-point Times New Roman proportional font and contains 2,573 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by using the word-counting function of Microsoft Word 2007. It therefore complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(b)(4) and 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2017, this *amicus* brief was electronically filed using the Court's CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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