IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

STATE OF WEST VIRGINIA, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE TREASURY, *et al.*, Defendants.	Case No. 7:21-cv-00465-LSC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Congress generously appropriated nearly $200 billion in new funding for state governments in the American Rescue Plan Act to respond to the economic effects of the COVID-19 pandemic. 42 U.S.C. § 802. But one of the explicit conditions on that money is that States cannot use the federal funds to offset a net-tax-revenue reduction resulting from changes in state law. *Id.* § 802(c)(2)(A). Congress did not provide Rescue Plan funds for States to replace purposeful decreases in net tax revenue; it provided the money to help States economically recover from the pandemic in ways they otherwise could not. So if a State could use Rescue Plan funds to replace its own planned state expenditures and then use the money it had originally budgeted to offset a reduction in net tax revenue—an undisputedly "indirect" offset—it would create a loophole big enough to undo the very purpose of the Rescue Plan. That's why States are free to cut all the taxes they want, as long as they do not use the federal aid to "offset" any decreased revenue. *Id.* And if the States do not like that condition, they are free to decline the funds, which three of the Plaintiff States have done so far. *See* Joint Stipulation of Facts, ECF No. 74.

Plaintiffs' response is long on rhetoric but short on law. *See generally* Pls.' Reply in Support of Mot. for Permanent Inj. & Declaratory J., ("FJ Reply"), ECF No. 77. They do not mention, much less address, the two decisions rejecting nearly all of their arguments en route to dismissing virtually identical claims for lack of standing. *See Arizona v. Yellen*, 2021 WL 3089103, at *6 (D. Ariz. July 22, 2021), *appeal filed*, No. 21-16227 (9th Cir. July 26, 2021); *Missouri v. Yellen*, 2021 WL 1889867, at *5 (E.D. Mo. May 11, 2021), *appeal filed*, No. 21-2118 (8th Cir. May 18, 2021). Nor do they meaningfully address the requirements for pre-enforcement standing, which demand that a plaintiff

"allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of [enforcement] thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). In fact, Plaintiffs cannot seem to decide why the offset provision is unconstitutional, alternating between their atextual argument that the offset provision "penalizes States for tax cuts—and tax cuts alone," FJ Reply 4, and the opposite contention that the provision regulates state *expenditures*, *id.* 1–2. Nowhere do they grapple with the actual text of the statute, which prohibits only using Rescue Plan funds as a direct or indirect "offset" for a reduction in net tax revenue. As one district court put it in a decision unaddressed by Plaintiffs, "State tax cuts are not proscribed by the ARPA," and States are "free to propose and pass tax cuts as [they] see[] fit." *Missouri*, 2021 WL 1889867, at *5. Indeed, Plaintiffs' only declarant professes a speculative fear of "prompting a recoupment action by the Department of Treasury" that is nowhere in sight. Decl. of Greg Albritton ("Albritton Decl.") ¶ 8, ECF No. 75-2.

Plaintiffs also claim that the Rescue Plan "represents an unprecedented intrusion by the federal government into the States' sovereign taxing authority." FJ Reply 1. But they nowhere address the Supreme Court's holding that "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790 (1983). Plaintiffs were (and are) free to decline Rescue Plan funds if they dislike the offset provision. Nothing happens if States do so, a result that all Justices deemed acceptable in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) ["*NFIB*"]. And "state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer." *Id.* at 578.

Plaintiffs also misconstrue the few cases they discuss. For example, Plaintiffs mention the *Pennhurst* unambiguity requirement, but gloss over the fact that funding conditions may be "largely indeterminate," so long as Congress gives "clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with" the condition. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). Properly following this precedent, the Eleventh Circuit has held that Congress must only "make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." *Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004) (citation omitted). As one district court recently explained, "nobody questions the [offset provision] exists as a condition to [States] accepting the [Rescue Plan] funds," and "[i]n that regard, Congress fulfilled its duty under" the Spending Clause. *Arizona*, 2021 WL 3089103, at *3. That the offset provision provides far more information than the Spending Clause requires—explaining the nature and scope of the funding condition—only underscores the impropriety of invalidating it.

The bottom line is that Congress has full "authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *NFIB*, 567 U.S. at 580. So out of "[d]ue respect for the decisions of a coordinate branch of Government," *United States v. Morrison*, 529 U.S. 598, 607 (2000), the Court should reject Plaintiffs' facial, pre-enforcement attack. They have all the recourse they need in either declining the funds, seeking a better bargain in the halls of Congress, or working cooperatively with the Treasury Department.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING.

Contrary to Plaintiffs' assertion that "[n]othing has changed that would affect the Court's analysis or conclusion" since its preliminary-injunction ruling, FJ Reply 5, something fundamental has changed: Plaintiffs' burden of proof to establish standing increases "with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At final judgment, that means actual evidence. *Id.* As Defendants have explained and two other district courts have recognized in virtually identical cases, Plaintiffs fail to establish subject matter jurisdiction for their premature pre-enforcement challenge. *See* Defs.' Combined Mot. to Dismiss & Opp'n to Pls.' Mot. For Permanent Inj. & Declaratory J., ("Defs.' Mot.") 8–15, ECF No. 76; *Arizona*, 2021 WL 3089103, at *6; *Missouri*, 2021 WL 1889867, at *5.

And contrary to Plaintiffs' assertion that "Defendants do not dispute the relevant facts," FJ Reply 5, Defendants dispute the most critical fact: whether the offset provision prohibits tax cuts. It plainly does not. *Missouri*, 2021 WL 1889867, at *4 ("State tax cuts are not proscribed by the ARPA," and States are "free to propose and pass tax cuts as [they] see[] fit."). Plaintiffs offer no valid reason why this Court should depart from the statute's text, the Rule's implementation of that text, or the principle that courts should *avoid* (rather than *create*) constitutional issues, all to enjoin an interpretation of the offset provision that Defendants have not adopted. *Nielsen v. Preap*, 139 S. Ct. 954 (2019). Importantly, the Court cannot blindly accept Plaintiffs' legal argument about the offset provision's meaning. *See In re U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 54 (D.C. Cir. 2019) ("Where,

as here, defendants challenge standing at the pleading stage without disputing the facts alleged in the complaint . . . we do not assume the truth of legal conclusions or accept inferences that are unsupported by the facts alleged in the complaint."); *Utah v. Babbitt*, 137 F.3d 1193, 1207 n.20 (10th Cir. 1998) (collecting cases); *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (noting that, in determining standing, a court is "not bound by conclusory allegations, unwarranted inferences, or legal conclusions"). That's why two other district courts both properly interpreted the plain text of the Act and dismissed for lack of standing despite Missouri's and Arizona's similarly atextual arguments. *See Missouri*, 2021 WL 1889867, at *4; *Arizona*, 2021 WL 3089103, at *5. Properly construed, the offset provision implicates only States' use of Rescue Plan funds to "offset a reduction in the net tax revenue . . . resulting from a change in law"; it does not prohibit the proposal or adoption of any tax change. 42 U.S.C. § 802(c)(2)(A); *see West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863, at *7 (N.D. Ala. July 14, 2021) (recognizing that Plaintiffs "must first . . . use ARPA funds to offset [a] reduction" before recoupment could occur).

Plaintiffs therefore fail to establish each element required for pre-enforcement standing under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 161–67 (2014). First, Plaintiffs fail to allege or establish "an intention to engage in a course of conduct . . . proscribed by a statute." *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). The only such conduct would be using Rescue Plan funds to offset a reduction in net tax revenue, and no State has so much as hinted at doing so.

Second, that course of conduct—using new federal funds contrary to a condition the recipient States voluntarily accepted—is not "arguably affected with a constitutional interest." *Id.* Plaintiffs' purported interest in

setting state tax policy is a red herring because that sovereign interest is not at issue. *Missouri*, 2021 WL 1889867, at *4. The only course of conduct implicated by the offset provision is using federal funds to pay for reduction in net tax revenue. *Id.* Only Congress, not the States, has a sovereign interest in whether federal funds are used for that purpose—a proposition that Plaintiffs do not bother to rebut. *See* Defs.' Mot. 10.

Third, there is no "credible threat of [enforcement]" by the agency responsible for enforcing the offset provision. *Id.* It is far too soon to tell whether Plaintiffs may face recoupment proceedings for any misused funds. For that to happen, as this Court recognized, Plaintiffs would have to certify they will comply with the offset provision (several have not), receive Rescue Plan funds, make a change in state law that reduces net tax revenue, and then use Rescue Plan funds to offset that reduction in revenue. *West Virginia*, 2021 WL 2952863, at *7. Treasury then would have to decide that recoupment is appropriate under the Rule. *See* Coronavirus State & Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786, 26,807 (May 17, 2021); Defs.' Mot. 11–12. Plaintiffs have neither pled nor proved that those steps have occurred or will imminently occur—especially any net-tax-revenue reduction, any impermissible offset, or any decision to seek recoupment. Defs.' Mot. 11–12.

And Plaintiffs cannot leapfrog this critical step in the pre-enforcement-standing analysis by relying on Treasury's mere promulgation of the Rule and the agency's defense of the offset provision in litigation. FJ Reply 8. In *Driehaus*, for example, the Supreme Court found a credible threat of enforcement only due to "past enforcement" of the challenged statute, a probable-cause finding that the plaintiff had already violated the statute, the possibility that "any person"—not just the enforcing agency—could file a complaint, and the frequency of enforcement proceedings. 573 U.S. at 164–67. None of

that is true here. So Plaintiffs have not presented plausible allegations (let alone evidence) that there is any credible threat of enforcement. Two other courts have correctly agreed. *See Missouri*, 2021 WL 1889867, at *4; *Arizona*, 2021 WL 3089103, at *5. And this Court has similarly noted how remote any potential recoupment is. *West Virginia*, 2021 WL 2952863, at *7. The conclusion that Plaintiffs lack pre-enforcement standing logically follows.[1]

Finally, Plaintiffs' arguments that they have already suffered harm are wrong. *See* FJ Reply 6–7. "[T]he violation of a legal right alone does not satisfy the concrete injury requirement." *Nicklaw v. CitiMortgage, Inc.*, 855 F.3d 1265, 1268 (11th Cir. 2017). So even if Plaintiffs were correct that the offset provision intangibly intrudes "into their sovereign authority to set tax policy," FJ Reply 6, more is required for standing. *See Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923) (explaining that a State's "naked contention that Congress has usurped the reserved powers of the several [S]tates by the mere enactment of the statute" was insufficient to establish an Article III case or controversy); Defs.' Opp'n to Pls.' Mot. for Prelim. Inj., ("PI Opp'n") 12–13, ECF No. 54. State legislators and officials "act in the shadow" of many federal laws and regulations that may or may not incentivize them to act in certain ways, depending in large part on those individuals' interpretations of federal laws or regulations. FJ Reply at 7. That cannot mean they are harmed in the Article III sense when such laws are simply enacted. *See Spokeo, Inc. v, Robins*, 136 S. Ct. 1540, 1549 (2016).[2]

[1] For the same reasons, this case is not ripe for review. *See* Defs.' Mot. 12 n.3; PI Opp'n at 13–15; *Missouri*, 2021 WL 1889867, at *4–5.

[2] Plaintiffs seem to have (rightly) abandoned their "coercion" or "commandeering" and compliance-cost standing arguments.

Importantly, though, Plaintiffs have suffered no injury to their "sovereign authority to set tax policy." FJ Reply 6. Again, "State tax cuts are not proscribed by the ARPA," and States are "free to propose and pass tax cuts as [they] see[] fit." *Missouri*, 2021 WL 1889867, at *4. Two district courts have properly rejected this exact argument and dismissed for lack of standing—decisions that Plaintiffs conspicuously ignore. *Compare id.*, *and Arizona*, 2021 WL 3089103, at *3–4, *with* FJ Reply 5–9. More to the point, though, Congress fulfilled its duty by "mak[ing] the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious."[3] *Benning*, 391 F.3d at 1307 (quoting *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002)); *Arizona*, 2021 WL 3089103, at *3–4; *see* Section II.A., *infra*. So Alabama and the other States that accepted Congress's deal should simply have declined the Rescue Plan funds if they were concerned about "act[ing] in the shadow of the" offset provision. FJ Reply 7.

After all, the Supreme Court has specifically held—in yet another decision unaddressed by Plaintiffs—that "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell*, 461 U.S. at 790. Plaintiffs may not now assert standing—based on the declaration of one legislator from one State—by complaining about the "delayed the passage of beneficial legislation" due to a speculative fear of "prompting a recoupment action by the Department of Treasury." Albritton Decl. ¶ 8. That is a textbook self-inflicted injury, and Plaintiffs

[3] Plaintiffs rely heavily on the *Ohio* court's incorrect analysis. FJ Reply 6–7. But they nowhere address Defendants' point, recognized by the *Arizona* court, that the *Ohio* court's conclusion was unsupported by any case law and contravened numerous Spending Clause precedents—including *Mayweathers*, which the Eleventh Circuita adopted in *Benning*. *See* Defs.' Mot. 14 n.5; *Arizona*, 2021 WL 3089103, at *4 n.2; Section II.A., *infra*.

"cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

The same goes for the States that have not yet accepted Congress's terms. Plaintiffs liken funding conditions to a contract, FJ Reply 10, but no court would entertain a lawsuit by a similarly situated offeree based solely on an offer to contract. *Cf. Blossom v. R.R. Co.*, 70 U.S. 196, 205 (1865) ("Unaccepted offers to enter into a contract bind neither party, and can give rise to no cause of action . . . ."). Their recourse is to decline the Rescue Plan funds, seek a better bargain in Congress, or work cooperatively with the Treasury Department. *See* Section II.A., *infra*.

At bottom, it is Plaintiffs' standing theories—not Defendants' arguments—that turn on the offset provision's "substantive validity." FJ Reply 9. To establish standing, they insist that their sovereignty has been intruded because the offset provision is uncertain, so they are harmed "even if no recoupment action ever happens." *Id.* at 7. That is incorrect both as a matter of standing law and as a matter of fact about the offset provision's plain text and enforcement. Plaintiffs cannot have standing based on imaginary uncertainty with no concrete effects and an imagined possibility of enforcement. This Court should dismiss for lack of jurisdiction and await Plaintiffs' challenge if a recoupment action ever occurs. *See* Defs.' Mot. 14–15.

II. PLAINTIFFS FAIL TO STATE A CLAIM.

A. The offset provision is not unconstitutionally ambiguous.

Plaintiffs fail to engage with Defendants' legion of cases about Spending Clause unambiguity, including binding case law that funding conditions may be "largely indeterminate," so long as Congress gives "clear notice to

the States that they, by accepting funds under the Act, would indeed be obligated to comply with" the condition. *Pennhurst*, 451 U.S. at 24–25. The offset provision meets that standard, which should end the Court's inquiry. *See Arizona*, 2021 WL 3089103, at *3–4.

Here, "a state official who is engaged in the process of deciding whether the State should accept [Rescue Plan] funds and the obligations that go with those funds" would "clearly understand that one of the obligations of the Act is the obligation" not to use Rescue Plan funds to offset a net-tax-revenue reduction resulting from changes in state law. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); Defs.' Mot. 15. Plaintiffs seem to imply that *Arlington Central* requires something more. FJ Reply 2, 10. That is wrong. As in *Pennhurst*, the Court in *Arlington Central* performed a statutory analysis, determining that expert-fee payments were not a statutory funding condition because the statute's text was insufficiently broad to place States on notice that they might need to pay expert fees. 548 U.S. at 297–99. Nothing in *Arlington Central* changed the proper *Pennhurst* analysis that courts have continued to apply, including one court deciding the exact issue here. *Arizona*, 2021 WL 3089103, at *3 ("[N]obody questions the [offset provision] exists as a condition to [States] accepting the funds," and "[i]n that regard, Congress fulfilled its duty under *Pen[n]hurst* and *Arlington Central*."). It remains the case that Congress must only give "clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with" the condition. *Pennhurst*, 451 U.S. at 24–25.

The Eleventh Circuit unsurprisingly follows that binding precedent. As that court held in the context of a funding condition in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Congress must only "make the existence of the condition itself—in exchange for the receipt of

federal funds—explicitly obvious." *Benning*, 391 F.3d at 1307 (quoting *Mayweathers*, 314 F.3d at 1067). Plaintiffs attempt to escape this binding precedent by arguing that, in *Benning*, States "were agreeing to the familiar strict scrutiny standard" that forms the basis of the funding condition in RLUIPA. FJ Reply 11. True, the Eleventh Circuit parenthetically recognized that strict scrutiny was "not new to Georgia or any state." *Benning*, 391 F.3d at 1306. But that was not why the court sustained the condition. As the Eleventh Circuit explained in no uncertain terms: "[t]he federal law in *Pennhurst* was unclear as to whether the states incurred any obligations *at all* by accepting federal funds," but "RLUIPA is clear that states *incur an obligation* when they accept federal funds, even if the method for compliance is left to the states. *Pennhurst* does not require more." *Id.* at 1307 (emphasis added).

That's why one court recently rejected this exact argument. Although "the strict scrutiny standard is well-known," courts have recognized that "the standard is unruly, perhaps unpredictable, and has resulted in different determinations in different courts." *Arizona*, 2021 WL 3089103, at *4 (quoting *Mayweathers*, 314 F.3d at 1067). "Despite the standard's (and therefore the condition's) unpredictable nature," courts around the country "found that Congress had satisfied its duty to the States by making the existence of a condition known." *Id.* (quoting *Mayweathers*, 314 F.3d at 1067); *see Benning*, 391 F.3d at 1307; *Charles v. Verhagen*, 348 F.3d 601, 607–08 (7th Cir. 2003); *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005). "Here, Congress has done at least as much as it did in RLUIPA. It made the existence of the condition upon which [States] could accept funds explicitly obvious." *Arizona*, 2021 WL 3089103, at *4 (quoting *Mayweathers*, 314 F.3d at 1067). As the *Arizona* court further recognized, the *Ohio* court's contrary conclusion (relied upon by Plaintiffs, FJ Reply 11–12) was unsupported by any case law. *Id.* at

*4 n.2. It also contravened numerous Spending Clause precedents—including *Mayweathers*, which the Eleventh Circuit adopted in *Benning*. *See id.*; *Benning*, 391 F.3d at 1307.

Plaintiffs bypass most of Defendants' cited authorities and ask for a new requirement that Congress specify funding conditions with the precision of a homeownership contract. FJ Reply 2. But that is not the law. As Plaintiffs themselves admit, "the Supreme Court has been 'careful not to imply that all contract-law rules apply to Spending Clause legislation.'" FJ Reply 10 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)). And that makes sense because "it is simply impossible" for Congress to "delineate every instance in which a State may or may not comply with" a funding condition. *Charles*, 348 F.3d at 608; *Mayweathers*, 314 F.3d at 1067. As Defendants explained, numerous Spending Clause cases—in the Supreme Court, the Eleventh Circuit, and other Circuits—all confirm that States make an "informed choice" when Congress simply makes clear that acceptance of federal money obligates the States to comply with a condition. Defs.' Mot. 16–17 (collecting unrebutted cases and quoting *Pennhurst*, 451 U.S. at 25). That Plaintiffs may be "unsure of every factual instance of possible noncompliance does not amount to a violation of Congress' duty." *Arizona*, 2021 WL 3089103, at *4 (quoting *Mayweathers*, 314 F.3d at 1067).

Were it otherwise, numerous longstanding statutes would be called into question. That includes RLUIPA, which the Eleventh Circuit upheld in *Benning* despite repeated acknowledgments that the funding condition in that statute is "unpredictable." *Benning*, 391 F.3d at 1307; *Mayweathers*, 314 F.3d at 1067. Other funding regimes, like Medicaid and education statutes, would also be potentially unconstitutional, even though courts have deferred to regulations implementing such statutes for decades. *See, e.g.*, *Irving*

Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891–92 (1984) (Education of the Handicapped Act); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019) (Medicaid); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 778 (D.C. Cir. 2012) (IDEA); *United States v. Miami Univ.*, 294 F.3d 797, 811-15 (6th Cir. 2002) (Family Educational Rights and Privacy Act). The Court should reject Plaintiffs' invitation to adopt a Spending Clause requirement that would not only contravene binding Supreme Court and Eleventh Circuit precedent, but render constitutionally suspect a myriad of federal statutes.

This is especially true because the offset provision goes far beyond what *Pennhurst* and *Benning* require: the Rescue Plan not only makes plain the existence of a condition, but it specifies the nature and scope of the condition as well. Defs.' Mot. 19–20. The provision straightforwardly explains that States may not use Rescue Plan funds "to either directly or indirectly offset a reduction in the net tax revenue" resulting from changes in state law. *Id.* at 4; 42 U.S.C. § 802(c)(2)(A). And Congress routinely uses the phrase "directly or indirectly" in that way to emphasize the breadth of a statutory dictate. *See, e.g.*, *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 444 (D.C. Cir. 2012) ("Congress phrased the relevant provision broadly—employing words and phrases like 'any' and 'directly or indirectly.'"). Put simply, "Congress permissibly conditioned the receipt of federal money in such a way that each State is made aware of the condition and is simultaneously given the freedom to tailor compliance according to its particular . . . circumstances." *Benning*, 391 F.3d at 1307 (quoting *Charles*, 348 F.3d at 608).

As Defendants explained, States are not without recourse if they dislike the offset provision or have ambiguity concerns: they may decline the Rescue Plan funds, seek a better bargain in the halls of Congress, or work cooperatively with the Treasury Department. *See Bennett v. Ky. Dep't of*

Educ., 470 U.S. 656, 669 (1985) (describing a conditional grant program "an ongoing, cooperative program" in which "grant recipients ha[ve] an opportunity to seek clarification of the program requirements"); *Charles*, 348 F.3d at 608 (explaining that States who dislike the ambiguity of an imposed condition "certainly could have refused federal funding"). So the Court should show "[d]ue respect for the decisions of a coordinate branch of Government," *Morrison*, 529 U.S. at 607, and reject Plaintiffs' facial attack on the Rescue Plan.

B. The Rescue Plan is not coercive or commandeering.

In attempting to show coercion and commandeering, Plaintiffs again misconstrue the Rescue Plan and governing law. *See* FJ Reply 13–15, 16–17. As Defendants explained, Congress has full "authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *NFIB*, 567 U.S. at 580; Defs.' Mot. 27. It is undisputed that the offset provision does not "threat[en] to terminate other significant independent grants" and therefore it is not "properly viewed as a means of pressuring the States to accept policy changes." *NFIB*, 567 U.S. at 580. So a coercion analysis is inapplicable here. Defs.' Mot. 27 (collecting cases unaddressed by Plaintiffs). The statutory text itself proves the point: titled "[f]urther restriction on the *use of funds*," the offset provision only applies to a State's "*use [of] the funds* provided under this section." 42 U.S.C. § 802(c)(2) (emphases added).

That a State using Rescue Plan funds as an "indirect[]" offset may implicate the use of *state* funds does not change the analysis. *Contra* FJ Reply 13–14. The state funds Plaintiffs reference would be otherwise unavailable *but for the federal aid*. *See id.* at 1–2, 13. And Congress acts well within its

constitutional authority when it "condition[s] the receipt of funds on the States' complying with restrictions on the use of [federal] funds," whether that use is direct or indirect. *NFIB*, 567 U.S. at 580. Indeed, maintenance-of-effort requirements—a longstanding feature of Spending Clause legislation that ensure federal grants supplement, not supplant, state spending—also implicate a State's spending power. PI Opp'n 19–21. Yet such requirements are undeniably allowable to ensure that Congress's appropriations are used for their intended purpose. *See, e.g., Bennett*, 470 U.S. at 659 (Title I of the Elementary and Secondary Education Act "prohibited the use of federal grants merely to replace state and local expenditures").

In any event, even if the coercion analysis did apply, Plaintiffs would still lose under *NFIB*. As Defendants explained, the key aspect of the Medicaid expansion that *NFIB* found to be coercive was that Congress "penalize[d] States that choose *not to participate* in that new program by taking away their *existing* Medicaid funding." *NFIB*, 567 U.S. at 585 (emphases added). Here, in stark contrast, there are no monetary consequences if a State chooses to decline the Rescue Plan funds. Defs.' Mot. 28. Plaintiffs bizarrely claim that there *are* monetary consequences from declining Rescue Plan funds because they would not receive the money. FJ Reply 14. But that's exactly the point of a noncoercive offer: States are free to evaluate the offer and decide whether the federal aid is worth the attendant conditions. *NFIB*, 567 U.S. at 576–78. In such cases, States "defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own." *Id.* at 579 (quoting *Massachusetts*, 262 U.S. at 482). If Plaintiffs' theory were accepted, every funding condition would be unconstitutionally coercive simply because a recipient would *never* receive the offered funds if they declined the offer.

Plaintiffs also briefly repeat their futile argument that the Rescue Plan is coercive "based on the size of the funds offered." FJ Reply 14–15. But, again, the amount of funding at issue in *NFIB* was only relevant to the *preexisting* funding that would be withdrawn if States declined the Medicaid expansion. Defs.' Mot. 28. And *all* Justices in *NFIB* agreed that, despite the amount of funding at issue, "Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion." *NFIB*, 567 U.S. at 687–88 (joint dissent); *id*. at 576, 585 (plurality) (same); *id.* at 624–46 (Ginsburg, J., concurring in part) (finding no coercion). That's what Congress has done here, as one district court recently recognized. *Arizona*, 2021 WL 3089103, at *5 (The Rescue Plan "will not revoke any federal funding [States] enjoyed prior to accepting. The downside to declining the ARPA funds is just that—[States] would not have received ARPA funds."). So it is certainly true that "'[y]our money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500." FJ Reply 15 (quoting *NFIB*, 567 U.S. at 582 n.12). That's because "[y]our life" is a preexisting entitlement that you would lose by refusing the alternative. But it's not coercive for someone to offer you $500 on the condition that you'll lose "[y]our life" if you spend it on certain prohibited items. One may or may not think that's a good deal—depending on their desire for the money or the items—but everyone is free to simply turn and walk away.

Unable to escape *NFIB*, Plaintiffs complain that "[b]y refusing exorbitant funds offered to every State, any one State would put itself at an immense competitive disadvantage if it refused the funds." FJ Reply 14. But there is a reason Plaintiffs cite nothing in support of this novel Spending Clause theory: it finds no basis in text, history, or case law. Worse yet, if accepted, this theory would invalidate countless past and future funding

conditions on the mere possibility that some States may accept permissible funding conditions that others may not. This would flip the Spending Clause on its head, allowing Congress only to provide federal grants that are so worthless, or have conditions so onerous, that all States would turn them down. *Contra NFIB*, 567 U.S. at 577 ("Congress may use its spending power to create incentives for States to act in accordance with federal policies."). That is not, and cannot be, the law.

In a last-ditch effort, Plaintiffs again seek refuge in the Tenth Amendment by arguing that the offset provision "intru[des] on State sovereignty in an area the Constitution reserves for the States: tax policy." FJ Reply 1; *id.* 15 ("The sovereign right to control state taxing and spending policies is more important than money."). That is incorrect for several reasons.

First, as Defendants explained, the offset provision does not restrict state "tax policy" at all. Plaintiffs are free to do what they want with their own money or tax scheme, including cutting taxes, providing rebates, increasing spending, or cutting expenditures. Defs.' Mot. 29; *Missouri*, 2021 WL 1889867, at *4 (explaining that "State tax cuts are not proscribed by the ARPA," and States are "free to propose and pass tax cuts as [they] see[] fit"). The States must simply refrain from using the federal money to "directly or indirectly offset a reduction in net tax revenue" resulting from state tax-law changes. 42 U.S.C. § 802(c)(2)(A); Defs.' Mot. 27.

Second, Congress routinely prohibits States from passing certain tax laws without violating the Tenth Amendment. *See, e.g.*, 4 U.S.C. § 114(a) (providing that States may not "impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State"); Pub. L. No. 105-277, 112 Stat. 2681, 2719 § 1101 (1998) ("Internet Tax Freedom

Act," providing that no "State or political subdivision thereof shall impose . . . taxes on Internet access" or "multiple or discriminatory taxes on electronic commerce" (made permanent by Pub. L. No. 114-125, 130 Stat. 281 § 992 (2016))); *see also, e.g.*, *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 155 (1986); *Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 318 (1992) ("Congress is [] free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."), *overruled on other grounds by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478–79 (2018).

Third, Plaintiffs again ignore binding case law holding that the coercion and commandeering inquiries are the same in the Spending Clause context. *See NFIB*, 567 U.S. at 578–79; *New York v. United States*, 505 U.S. 144, 177 (1992) (explaining that the inquiry under both the Spending Clause and the Tenth Amendment is whether the challenged "provision is inconsistent with the federal structure of our Government established by the Constitution"). That's because "Congress can use [its Spending Clause] power to implement federal policy it could not impose directly under its enumerated powers." Defs.' Mot. 29 (collecting unrebutted cases). And "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell*, 461 U.S. at 790; *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 283 (6th Cir. 2009) (Sutton, J., concurring) ("[T]he Tenth Amendment, the Eleventh Amendment and the Constitution's other structural limitations on congressional authority do not limit properly enacted spending-clause legislation.").

A conclusory reference to "political accountability" does not help Plaintiffs either. FJ Reply 16–17. Supreme Court case law—left unaddressed by Plaintiffs—makes clear that where, as here, Congress's offer is not coercive, "state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer." *NFIB*, 567 U.S. at 578; *New York*, 505 U.S. at 168. So the States are free to accept or reject Congress's generous offer of Rescue Plan funds, as several Plaintiffs have done so far. *See* Joint Stipulation of Facts. Their voters know where to turn if they like, or dislike, the State's choice.

C. The offset provision relates to the Rescue Plan's purposes.

This Court should not be the first to strike down a funding condition on relatedness grounds. *See City of Los Angeles v. Barr*, 929 F.3d 1163, 1175 (9th Cir. 2019) (recognizing that the relatedness standard "is not demanding" and that "the Court has never struck down a condition on federal grants based on this relatedness prong"). Plaintiffs do not address the minimum-rationality standard articulated by the Eleventh Circuit in *Benning* or the other cases, like *South Dakota* and *New York*, finding that even attenuated conditions satisfy the Spending Clause. *Compare* Defs. Mot. 30–31 *with* FJ Reply 15–16. And while Plaintiffs emphasize that the Rescue Plan itself provides tax relief, they omit the facts that (a) the offset provision does not prohibit tax relief but only prohibits using federal funds to *offset* net-tax-revenue reductions, and (b) Congress may run a deficit whereas States cannot. *See* Albritton Decl. ¶ 2. As Defendants explained, Congress did not provide the Rescue Plan funds as a means to replace purposeful decreases in net tax revenue; it provided the money to help States economically recover from the pandemic in ways they otherwise could not. Defs.' Mot. 30. This is more

than sufficient to meet the "minimal standard of rationality" required of Spending Clause legislation. *Benning*, 391 F.3d at 1308.

CONCLUSION

For the reasons explained above, Plaintiffs' final-judgment motion should be denied and this case should be dismissed.

DATED: August 26, 2021

Respectfully submitted,

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