

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,

Plaintiff-Appellee,

v.

JANET L. YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as Acting Inspector General of the Department of the Treasury; and the U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

No. 21-3787

RESPONSE TO MOTION TO EXPEDITE

The federal government respectfully submits this response to Ohio’s motion to expedite this appeal.

BACKGROUND

This appeal concerns the American Rescue Plan Act, enacted in March 2021, which provides nearly \$200 billion in new federal grants to help States “mitigate the fiscal effects” of the Covid-19 pandemic. 42 U.S.C. § 802(a)(1). The Act gives States considerable flexibility in determining how to use these Fiscal Recovery Funds but specifies that a State “shall not use the funds ... to either directly or indirectly offset a reduction in the net tax revenue of such State” resulting from changes in state tax law during the covered period. *Id.* § 802(c)(2)(A) (the “Offset Provision”).

This case, brought only by Ohio, is one of six constitutional challenges to the Offset Provision pending in courts around the country. District courts dismissed the similar challenges brought by Missouri and Arizona for lack of jurisdiction, concluding that the States had failed to demonstrate the existence of a sufficiently concrete dispute concerning the implementation of the Offset Provision. *Arizona v. Yellen*, 2021 WL 3089103 (D. Ariz. July 22, 2021); *Missouri v. Yellen*, 2021 WL 1889867 (E.D. Mo. May 11, 2021). The States' appeals from those dismissals are pending before the Eighth Circuit (No. 21-2118) and Ninth Circuit (No. 21-16227), with the government's briefs due on September 15 and October 5, respectively. The Eighth Circuit appeal has not been expedited; Missouri did not oppose, and the court granted, a thirty-day extension for the federal government's brief. And the Ninth Circuit appeal was expedited only upon the parties' negotiation of a reasonable schedule, which afforded the federal government 46 days to file its brief. Other challenges are pending in district courts in this Circuit and the Fifth and Eleventh Circuits. See *Texas v. Yellen*, No. 21-cv-79 (N.D. Tex.) (action brought by three States); *Kentucky v. Yellen*, No. 21-cv-17 (E.D. Ky.) (two States); *West Virginia v. U.S. Department of the Treasury*, No. 21-cv-465 (N.D. Ala.) (thirteen States). Briefing on dispositive motions is complete in *Kentucky* and *West Virginia* and will extend through November 8 in *Texas*.

In this case, the district court denied Ohio's motion for a preliminary injunction, concluding that Ohio could not show a risk of irreparable harm during the pendency of the litigation. *Ohio v. Yellen*, 2021 WL 1903908 (S.D. Ohio May 12, 2021) (*Ohio I*).

After further briefing, the district court issued a permanent injunction against the enforcement of the Offset Provision as to Ohio, concluding that the provision is insufficiently clear to be a proper exercise of Congress's Spending Clause authority. *Ohio v. Yellen*, 2021 WL 2712220 (S.D. Ohio July 1, 2021) (*Ohio II*). The federal government noticed this appeal on August 27, 2021.

ARGUMENT

Ohio asks the Court to impose an extraordinarily expedited briefing schedule, which would give the federal government just eleven days from the docketing of its appeal to file its opening brief and only eleven days to file its reply brief. There is no basis for such a compressed schedule.

Ohio has not identified any imminent intention (or, indeed, any intention at all) to make use of its Fiscal Recovery Funds in a manner that would violate the Offset Provision. Although the district court relied on Ohio's recent enactment of tax cuts as a "concrete example" of Ohio's prospective harm from the Offset Provision, Ohio has not suggested that it intends to use Fiscal Recovery Funds to offset those tax cuts. Any potential loss of revenue from those tax cuts would not implicate the Offset Provision if it were offset by macroeconomic growth, increases in other taxes, or spending cuts outside an area where Ohio is spending Fiscal Recovery Funds. 42 U.S.C. § 802(c)(2)(A); see *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) (describing the Treasury Department's implementation of the statute).

Nor has Ohio identified any basis on which it would likely be able to persuade the Supreme Court to hear this case during the Term beginning in October 2021, particularly when this would be the first challenge to the Offset Provision to reach the Supreme Court and when closely related cases brought by other States remain pending before other courts of appeals. Indeed, it is not at all clear that the Supreme Court *could* hear the case during the upcoming Term without an exceptional departure from its usual practices. Under the schedule that Ohio proposes, briefing before this Court would conclude October 5. But under the Supreme Court's rules, a petition for a writ of certiorari would need to be filed no later than November in order to be granted in time for the case to be heard before the end of the Term. That leaves less than two months after the close of briefing for this Court to hear argument and issue an opinion and for the losing party to seek certiorari.

The federal government routinely agrees to reasonable expedition, as it did in the *Arizona* appeal, but it cannot consent to the schedule that Ohio has proposed. The federal government is willing, however, not to seek extensions of the ordinary deadlines for its opening and reply briefs (and Ohio is of course free to file its response brief as quickly as it wishes). Without extensions, an ordinary briefing schedule will have this appeal ready for the Court's consideration no more than two and a half months later than the schedule that Ohio proposes—still an expeditious pace, but one that would

allow the parties to brief this important case and the Court to hear and resolve it in an effective manner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this opposition complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 927 words, according to Microsoft Word.

/s/ Daniel Winik

Daniel Winik