No. 21-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,

Plaintiff-Appellee,

v.

JANET 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.

On Appeal from the United States District Court
for the Southern District of Ohio

REPLY BRIEF FOR APPELLANTS

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SUMMARY OF ARGUMENT

Ohio's brief makes clear that its case rests on a textually implausible interpretation of the Offset Provision—that is, the notion that the statute proscribes all state tax cuts. As our opening brief explained, that broad interpretation of the provision is inconsistent with its text, the decisions of other courts, and the Treasury Department's implementing regulations. The Offset Provision leaves States free to reduce taxes; it simply provides that a State may not *use Fiscal Recovery Funds* to pay for a reduction in net tax revenue. Ohio's basic misconception of the Offset Provision undermines its arguments on both jurisdiction and the merits, as explained below.

ARGUMENT

I. OHIO FAILED TO ESTABLISH AN ARTICLE III CONTROVERSY OVER THE OFFSET PROVISION

A. The Offset Provision's Plain Text Forecloses The Broad Interpretation That Ohio Alleged

Ohio's brief confirms that its suit challenges a straw man: a broad interpretation of the Offset Provision that is contrary to the statute's plain terms, that other courts have rejected, and that the Treasury Department has repeatedly disavowed. The premise of the complaint is that the Offset Provision "effectively prohibits reductions in taxes." Complaint ¶ 6, RE1, PageID #2. Ohio's brief likewise declares that the Offset Provision "at least arguably proscribes" tax cuts recently enacted by its legislature. Br. 42-43.

That broad interpretation of the Offset Provision is contrary to its plain text, as courts have explained in addressing analogous claims by Arizona and Missouri. First, the Offset Provision is not implicated unless a State enacts tax cuts that reduce its "*net* tax revenue." 42 U.S.C. § 802(c)(2)(A) (emphasis added). It is therefore is not implicated if reductions in some taxes are balanced by increases in others. Second, even if a State reduces its net tax revenue, the Offset Provision is not implicated unless the State uses its Fiscal Recovery Funds to "offset"—that is, pay for—that "reduction," *id.*; indeed, the statute makes explicit that the Offset Provision is a "restriction on use of" the Fiscal Recovery Funds, *id.* § 802(c)(2) (heading). Thus, by its plain terms, the Offset Provision "'does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue.'" *Missouri v. Yellen*, 2021 WL 1889867, at *4 (E.D. Mo. May 11, 2021), *appeal pending*, No. 21-2118 (8th Cir.); *see also Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021) (explaining that "[n]owhere does Arizona claim to have directly or indirectly used [Fiscal Recovery Funds] to supplement a reduction in its net income"), *appeal pending*, No. 21-16227 (9th Cir.).

In light of the Offset Provision's plain terms, the Treasury Department has repeatedly disavowed the broad interpretation that Ohio and various other States challenged. Soon after the American Rescue Plan Act was enacted, the Treasury Secretary emphasized that "[n]othing in the Act prevents States from enacting a broad variety of tax cuts." Letter from Janet Yellen, Sec'y of the Treas., to Mark Brnovich, Att'y Gen.

of Ariz. (Mar. 23, 2021), https://go.usa.gov/xMeW8. "That is," the Secretary explained, "the Act does not 'deny States the ability to cut taxes in any manner whatsoever'"; it "simply provides that funding received under the Act may not be used to offset a reduction in net tax revenue resulting from certain changes in state law." *Id.* The Secretary elaborated that "[i]f States lower certain taxes but do not use funds under the Act to offset those cuts—for example, by replacing the lost revenue through other means—the limitation in the Act is not implicated." *Id.* Likewise, when the Treasury Department issued an interim final rule that implemented the Fiscal Recovery Fund, it emphasized that the Offset Provision is not implicated if a State cuts taxes but offsets any resulting reduction in revenue with revenue derived from macroeconomic growth, revenue derived from increases in other taxes, or spending cuts in areas where the State is not spending Fiscal Recovery Funds. *See Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786, 26,809-810 (May 17, 2021).

Ohio thus imagined the broad interpretation that it posited, and Ohio cannot manufacture an Article III controversy by challenging that interpretation. Moreover, even if Ohio were correct that the Offset Provision is "*arguably*" amenable to an interpretation that raises serious constitutional issues (Br. 50), a court would be obligated to reject that interpretation so long as a constitutionally unproblematic interpretation were also available, which is plainly the case here. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction

of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). A court could not properly adopt a merely "arguable" reading of an Act of Congress and then enjoin the enforcement of the statute on the theory that the interpretation raises serious constitutional issues.

B. Ohio Failed To Produce Evidence That It Has Taken Any Action Contravening The Offset Provision, As Correctly Construed

Ohio moved for entry of final judgment in its favor, and Ohio thus bore the burden of producing evidence to establish an Article III controversy over the constitutionality of the Offset provision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Yet Ohio failed to produce evidence that it has taken or imminently plans to take action that would contravene the Offset Provision, as correctly construed.

After accepting Fiscal Recovery Funds, Ohio enacted significant tax cuts. Ohio Br. 42. But like Arizona, which similarly cut taxes while challenging the Offset Provision, Ohio does "not even claim the tax cut [would] result in a reduction in [its] net income." *Arizona*, 2021 WL 3089103, at *5. And even if Ohio had projected that its tax cuts would lead to a reduction in its net tax revenue, Ohio did not produce any evidence showing that it has "directly or indirectly used [Fiscal Recovery Funds] to supplement a reduction in its net income," *id.*—which is all that the Offset Provision precludes States from doing with their federal grants. On the contrary, our opening brief explained (Br. 8)—and Ohio conspicuously does not dispute—that its public records indicated that the recent tax cuts may be offset by increases in state tax revenue derived

from macroeconomic growth. As explained above, the Offset Provision is not implicated if a State offsets a reduction in net tax revenue with revenue increases from macroeconomic growth or spending cuts in areas where the State is not using Fiscal Recovery Funds. Ohio thus failed to produce evidence establishing "a realistic danger of sustaining a direct injury as a result of the [Offset Provision's] enforcement." *Arizona*, 2021 WL 3089103, at *5.

Ohio's recent enactment of significant tax cuts also undermines its allegation that the Offset Provision "cast[] a cloud of uncertainty over [its] policymakers' ability to oversee the State's budgetary matters." *Arizona*, 2021 WL 3089103, at *2. Like Arizona, Ohio produced "no evidence that the lawmakers' decision was at all influenced by the" Offset Provision. *Id.* at *4. Ohio cannot fill that evidentiary void by speculating (Br. 48) that its General Assembly might have assumed from the district court's order *denying* a preliminary injunction that the Offset Provision would never be enforced. *See Ohio v. Yellen* (*Ohio I*), 2021 WL 1903908, at *15 (S.D. Ohio May 12, 2021) (explaining that the court "cannot" provide "the clarity that Ohio seeks"). And because Ohio has failed to demonstrate any concrete harm from the supposed ambiguity of the Offset

Provision, it cannot premise standing on the abstract proposition that it has been "denied" the clarity "to which it is legally entitled" (Br. 40); as the *Arizona* court explained, that is a purely "conjectural and hypothetical" injury. 2021 WL 3089103, at *4.[1]

The district court correctly did not accept Ohio's other theories of injury. First, Ohio's vague reference (Br. 46) to Section 802's reporting requirements does not establish an Article III controversy because, even if there were no Offset Provision, the State would be obligated to keep track of its expenditures and ensure that the federal funds are used for permissible purposes. *See* 42 U.S.C. § 802(d)(2) (requiring a State that accepts Fiscal Recovery Funds to submit to the Treasury Department "periodic reports providing a detailed accounting" of "the uses of funds by such State"). Second, it is long established that federal courts "are without jurisdiction … to adjudicate … abstract questions" of "sovereignty." *Massachusetts v. Mellon*, 262 U.S. 447, 484-485 (1923); *see Texas v. United States*, 523 U.S. 296, 297, 301-302 (1998) (finding no Article III jurisdiction where Texas's claim to "suffer[] the immediate hardship of a 'threat to federalism'"

[1] The cases that Ohio cites for the proposition that "[a] party is always injured when it is denied something to which it is legally entitled" (Br. 40) are inapposite; both addressed particular forms of cognizable injury not present here. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (inability to obtain information required by statute); *Ohio v. Raimondo*, 848 F. App'x 187, 188 (6th Cir. 2021) (same); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (deprivation of procedural due process). And the Supreme Court "has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

was an "abstraction").[2] And third, because Ohio has not plausibly alleged any concrete harm from the Offset Provision, it cannot establish standing by recasting its claim in terms of the unconstitutional conditions doctrine (Br. 48); it is just as necessary for a plaintiff to show that it is concretely injured by the imposition of an allegedly unconstitutional condition as by any other type of constitutional violation. *See, e.g.*, *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 279 (6th Cir. 2021) (emphasizing, in recognizing the plaintiff's standing, that he "'ha[d] introduced evidence that he would like to be on the Ohio Elections Commission'" but that "his membership in the Libertarian Party prevent[ed] him from being considered"); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir. 1999) ("'[e]ven in'" cases asserting a chilling effect on constitutionally protected expression, "'a court must still consider whether'" the plaintiff "'has sufficient injury-in-fact to satisfy the Art[icle] III case-or-controversy requirement'").

The dismissal of this action will not, of course, prevent Ohio from challenging an application of the Offset Provision if a concrete dispute ever arises. Disputes over funding conditions are routinely resolved in the context of concrete controversies, ra-

[2] The in-chambers opinion in *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan*, 501 U.S. 1301 (1991), on which Ohio relies (Br. 44), shows—by contrast—what sort of alleged harm to sovereignty rises to the requisite level of concreteness. There, a State sought a stay of judgments declaring a provision of its tax law to be preempted, enjoining enforcement of the provision, and directing the issuance of "refunds to the challenging taxpayers." 501 U.S. at 1301-1302.

ther than as an abstract matter. That was the posture of the case on which Ohio principally relies, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). There, the Supreme Court reversed an order that required a school district to pay the expert fees of parents who prevailed in an action under the Individuals with Disabilities Education Act (IDEA), holding that the IDEA's fee-shifting provision was not properly interpreted to encompass expert fees. *See id.* at 294-295. The Supreme Court has likewise resolved other disputes over the meaning of funding conditions in the context of enforcement actions. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 658 (1985) (explaining that "the dispute is whether the Secretary correctly demanded repayment based on a determination that Kentucky violated requirements that Title I funds be used to supplement, and not to supplant, state and local expenditures for education"); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985) (dispute arose from the Secretary's final decision ordering repayment of specified federal education funds).

By contrast, the pre-enforcement challenges to the Offset Provision brought by Ohio and various other States rest "upon contingent future events that may not occur." *Missouri*, 2021 WL 1889867, at *5. The adjudication of such challenges is "'too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Id.* Ohio cites no authority for the type of pre-enforcement challenge that it asserted here.[3]

[3] To the extent that other district courts found an Article III controversy in addressing analogous claims, those rulings were incorrect and should not be followed here. *See West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863, at *6-7 (N.D. Ala. July 14, 2021); *Kentucky v. Yellen*, 2021 WL 4394249, at *2-3 (E.D. Ky. Sept. 24, 2021).

II. THE OFFSET PROVISION FALLS EASILY WITHIN CONGRESS'S SPENDING POWER

Assuming this Court reaches the merits, it should hold that the Offset Provision falls easily within Congress's authority to determine the purposes for which federal grants may be used. Ohio makes no serious attempt to show that the Offset Provision—as correctly construed—presents a constitutional issue.

A. The Offset Provision Is Simply A Restriction On The Use Of Federal Funds, Which Presents No Constitutional Issue

The Offset Provision merely prohibits the *use of federal funds* to "offset"—that is, pay for—a reduction in a state's net tax revenue. 42 U.S.C. § 802(c)(2)(A). Congress unquestionably has the authority to specify the permissible and impermissible uses of federal grants. The Supreme Court has repeatedly "upheld Congress's 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.'" *National Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 580 (2012) (plurality opinion); *see, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206-208 (1987); *Gruver v. Louisiana Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir.), *cert. denied*, 141 S. Ct. 901 (2020). "The power to keep a watchful eye on expenditures … is bound up with congressional authority to spend in the first place[.]" *Sabri v. United States*, 541 U.S. 600, 608 (2004).

The district court did not accept Ohio's "coercion" argument (Br. 32-38), which is foreclosed by the Supreme Court's reasoning in *NFIB*. There, a majority of the Justices held that Congress could not make a State's *preexisting* Medicaid funding contingent on the State's agreement to extend coverage to all low-income adults—an expansion that the majority regarded as an entirely new program. *See* 567 U.S. at 580-585 (plurality opinion); *id.* at 681-689 (joint dissent). But a different majority of Justices upheld the same requirement as a condition on the *new* federal funds offered by the Affordable Care Act (ACA), which totaled $100 billion per year. *See id.* at 576, 585-586 (Roberts, C.J., joined by Breyer, J., and Kagan, J.) (emphasizing that "[n]othing in our opinion precludes Congress from offering funds under the [ACA] to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use"); *id.* at 646 (Ginsburg, J., joined by Sotomayor, J., agreeing with this aspect of the plurality opinion). Even the dissenting Justices agreed that "Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion," although they disagreed with the majority about whether that funding condition was severable. *Id.* at 687-688 (joint dissent).

The Supreme Court's reasoning in *NFIB* thus forecloses the contention that Congress's restrictions on the uses of federal funds can be deemed impermissibly "coercive" merely because a federal grant is so generous that a State cannot resist the temptation to accept it. Moreover, common sense refutes the notion that Congress loses its power to determine how grants will be used if the grants exceeds a certain (unspecified)

size. For example, if Congress offered Ohio $5.4 billion to build bridges and roads, the State could not seek to invalidate that condition and use the grant for other purposes simply because "[t]hat is a tremendous amount of money." Ohio Br. 5.

Here, Congress offered States billions of dollars of new federal grants and identified the permissible and impermissible uses of these funds. Ohio does not dispute that it must comply with list of permissible uses of funds set out in Section 802(c)(1) or with Section 802(c)(2)'s provision that States may not use the funds "for deposit into any pension fund." For the same reason, Ohio cannot disregard the Offset Provision in Section 802(c)(2), which simply prevents the State from using its Fiscal Recovery Funds to pay for revenue that is lost as the result of tax cuts.[4]

B. Congress Permissibly Specified That A State Cannot Circumvent The Offset Provision Through Indirect Means

Ohio does not claim that it has the right to deposit its $5.4 billion federal grant into its general treasury to offset a (hypothetical) $5.4 billion revenue hole created by state tax cuts. That would be using the federal grant to offset the tax cut "directly."

Congress quite reasonably specified that a State cannot achieve the same result "indirectly." The Offset Provision would be meaningless if Ohio could reduce its own expenditures by $5.4 billion to offset the (hypothetical) tax cut described above, and use

[4] A district court recently accepted a coercion-based challenge to the Offset Provision; however, that court overlooked the part of *NFIB* that upheld Congress's restrictions on the uses of the ACA's massive new grants, as well as the common-sense problems with the coercion argument. *See Kentucky*, 2021 WL 4394249, at *3-6.

its $5.4 billion federal grant to pay for those expenditures instead. Congress prevented that sort of circumvention by specifying that Fiscal Recovery Funds cannot be used "directly or indirectly" to offset a reduction in a State's net tax revenue.[5]

A funding restriction of this kind is unremarkable. Our opening brief explained (Br. 13) that, by preventing States from using Fiscal Recovery Funds simply to displace sources of non-federal revenue ordinarily used to pay for state expenditures (and using that savings to offset a reduction in net tax revenue), the Offset Provision is similar to the maintenance-of-effort requirements that are a longstanding feature of Spending Clause legislation. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 659 (explaining that Title I of the Elementary and Secondary Education Act "from the outset prohibited the use of federal grants merely to replace state and local expenditures"); *Mayhew v. Burwell*, 772 F.3d 80 (1st Cir. 2014) (upholding a Medicaid maintenance-of-effort requirement); *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249, 252 (4th Cir. 2013) (describing the maintenance-of-effort requirement in the Individuals with Disabilities

[5] Although the validity of the Treasury Department's implementing regulations is not before the Court, *see infra* pp. 16-17, Ohio is wrong to cast one provision of the regulations as "giv[ing] the Secretary standardless discretion to decide whether a State is using [Fiscal Recovery Funds] to 'indirectly' offset revenue lost through tax cuts" (Br. 53). The provision on which Ohio focuses says only that if a State initially cuts spending (outside an area in which it is spending Fiscal Recovery Funds) to offset a reduction in its tax revenue, but later uses Fiscal Recovery Funds to "replace[]" the reduced expenditure of state funds, that would constitute an indirect usage of Fiscal Recovery Funds to offset a reduction in tax revenue—just as if the State had used Fiscal Recovery Funds to replace the reduced state expenditures in the first place. 86 Fed. Reg. at 26,810. In other words, the provision addresses only the timing, not the substance, of the indirect-offset inquiry.

Education Act, which generally requires the Secretary to reduce a State's grant by the same amount by which the State has failed to maintain its expenditures for special education for children with disabilities). In short, the Offset Provision's restriction on the use of Fiscal Recovery Funds to "indirectly" offset revenue losses from tax cuts is just as straightforwardly permissible as its restriction on the use of funds to "directly" offset such losses.

C. The Offset Provision Gives States Clear Notice Of The Basic Contours Of The Funding Condition, As RLUIPA Precedents Confirm

In *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005), this Court rejected Ohio's argument that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)—which bars any "program or activity that receives Federal financial assistance" from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the imposition of the burden "is the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000cc-1(a), (b)(1)—provides insufficient notice of the conditions on federal grants. Accordingly, Ohio now concedes (Br. 55) that, although RLUIPA provides "a flexible standard, it nonetheless provides the States with meaningful notice regarding what they may and may not do."

The Offset Provision likewise gives States "meaningful notice regarding what they may and may not do," whatever "flexib[ility]" there may be in its application (Ohio Br. 55). The district court ruled otherwise because it believed that the Offset Provision

could be read to prohibit "essentially *any* reduction in the rate of any one or more state taxes." *Ohio v. Yellen* (*Ohio II*), 2021 WL 2712220, at *15 (S.D. Ohio July 1, 2021). Ohio's brief echoes that concern. *See, e.g.*, Br. 50 (insisting that the Offset Provision is "so vague" that it "arguably proscribes nearly every tax reduction"). But as we have already explained, that interpretation is contrary to the Offset Provision's text, it has been rejected by other courts, and it has been disavowed by the Treasury Department. And even if Ohio were correct that the statute is "arguably" susceptible to such a construction, and that it would raise serious constitutional concerns, the canon of constitutional avoidance would prohibit a court from adopting that interpretation. *See supra* pp. 3-4.

There is no serious argument that the Offset Provision affords States meaningfully less notice of the condition on their use of federal funds than did the RLUIPA provision upheld in *Cutter*. The provision that Fiscal Recovery Funds may not be used to "indirectly offset" a reduction in net tax revenue is straightforward, as discussed above. It provides at least as much notice of the basic contours of the spending condition as does RLUIPA's prohibition against "impos[ing] a substantial burden on … religious exercise" unless doing so "is the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000cc-1(a), (b)(1)—a rule with numerous elements, each of which routinely gives rise to litigation.

The other phrase that Ohio regards as insufficiently clear (Br. 20)—"reduction in the net tax revenue of such State … resulting from a change in law … during the

covered period that reduces any tax … or delays the imposition of any tax or tax increase," 42 U.S.C. § 802(c)(2)(A)—affords equally meaningful notice of the basic contours of the condition. As Ohio notes (Br. 20-21), Congress did not specify every detail of how that provision was to be applied; for example, it did not expressly state the baseline by which to determine whether a State has suffered a "reduction" in net tax revenue. But Ohio considerably overstates the degree of uncertainty. As noted above, for example, Congress's reference to "net" tax revenue answers (in the affirmative) the question whether increases in some taxes can permissibly offset reductions in others. And the remaining details of implementation are of the sort that agencies routinely resolve in carrying out their delegated authority to apply funding conditions. To hold that Congress must specify every such detail would be inconsistent with *Cutter*, which recognized that "Congress need not 'delineate every instance in which a State may or may not comply with'" a funding condition. 423 F.3d at 586. Indeed, *Cutter*—like the decisions of other circuits on the same issue—explained that under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), it is sufficient for Congress to "provide no more than 'clear notice' … that funding is conditioned upon compliance with certain standards." 423 F.3d at 586 (quoting *Pennhurst*, 451 U.S. at 25); *see also* Opening Br. 15-16 (collecting other decisions to this effect).[6]

[6] Ohio is incorrect to state (Br. 51) that the government did "not challenge" the district court's ruling with respect to the "reduction in … net tax revenue" phrase. *See*

Ohio misunderstands the relevance of the many cases (*see* Opening Br. 18-19, 19 n.5) in which courts have deferred to agency regulations specifying the details of how funding conditions are to be applied. The purpose for which our opening brief cited those cases was not, as Ohio believes (Br. 53), to suggest that "an agency's interpretation can save a condition from being held unconstitutionally ambiguous."[7] Rather, the point is that those cases reflect the understanding, already clear from *Pennhurst* and *Cutter*, that the clarity requirement for funding conditions does not mean Congress must specify every detail of how a funding condition is to be implemented. If Congress were required to specify all such details, there would be no gaps for the responsible agency to fill and thus no basis for courts to afford deference.

D. Ohio's Challenge To The Treasury Department's Regulations Is Not Before The Court And Is Also Meritless

Ohio's complaint did not challenge the Treasury Department regulations that implement Section 802. Nonetheless, the district court declared that the Treasury De-

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Opening Br. 17 (explaining that "[m]atters that the district court perceived as ambiguities—such as the baseline from which to measure whether a State experiences a reduction in its net tax revenue and whether that measurement reflects actual or projected tax revenues—do not affect a State's ability to understand, when it accepts a Fiscal Recovery Fund grant, the existence or basic nature of the funding condition" (citation omitted)).

[7] For that reason, *Texas Education Agency v. U.S. Department of Education*, 992 F.3d 350 (5th Cir. 2021), and *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), are inapposite here; those decisions address whether regulations can supply the clarity required for a condition on spending to pass constitutional muster.

partment's express authority "to issue such regulations as may be necessary or appropriate to carry out" Section 802, 42 U.S.C. § 802(f), does not encompass regulations implementing the Offset Provision. Ohio makes no serious attempt to defend that reasoning; instead, it urges that the Court "need not even reach this issue." Br. 55. Ohio is correct that there is no reason to consider the validity of regulations that were not challenged in the complaint.

If the Court were to reach the issue, however, it should have little difficulty concluding that the district court's rationale was unsound. Indeed, that rationale would virtually nullify Congress's express grant of rulemaking authority to the Treasury Department—unlike in *King v. Burwell*, 576 U.S. 473 (2015), where the Supreme Court declined to defer to the Internal Revenue Service's resolution of a particular question of statutory interpretation but left in place the Treasury Department's general power to prescribe regulations necessary to carry out the ACA's tax credits, *see* 26 U.S.C. § 36B(h). The fact that the Offset Provision affects "'billions of dollars in spending each year,'" *Ohio II*, 2021 WL 2712220, at *19, is not a basis to exclude that provision from the agency's rulemaking authority: Section 802 in its entirety implicates nearly $200 billion in grant funding for States, yet there is no doubt that Congress authorized the Secretary to issue regulations that implement Section 802. It is likewise immaterial that the Offset Provision touches on "a core State function, the power to tax." *Id.* It is common ground that Congress cannot dictate state tax policy, and the Offset Provision does not do so. The provision leaves States free to structure their tax laws as they choose even

if they accept Congress's generous offer; it simply prevents them from using Fiscal Recovery Funds to offset a reduction in their net tax revenue caused by a tax cut.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,753 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik