No. 22-10168

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF WEST VIRGINIA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF THE TREASURY, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

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No publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Daniel Winik
Daniel Winik

STATEMENT REGARDING ORAL ARGUMENT

The federal government respectfully requests oral argument. The district court permanently enjoined the federal government from enforcing against the 13 plaintiff States the provision of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, that prohibits a State from using the new federal funds provided by the Act to offset a reduction in the State's net tax revenue. Oral argument is warranted given the importance of the issue.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. A28. The district court entered final judgment in plaintiffs' favor on November 15, 2021. A144-145. The federal government timely appealed from that judgment on January 14, 2022. A146-147; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The American Rescue Plan Act provided nearly $200 billion in 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 new federal 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"). The district court permanently enjoined the federal government from enforcing the Offset Provision against the 13 plaintiff States, on the theory that it is "an unconstitutionally ambiguous condition on the States' receipt of federal funds." *West Virginia v. Department of the Treasury*, __ F. Supp. 3d. __, 2021 WL 5300944, at *14 (N.D. Ala. Nov. 15, 2021). The questions presented are:

1. Whether the district court's judgment should be reversed because there is no concrete controversy over the application of the Offset Provision.

2. Whether, assuming the district court had jurisdiction, its judgment should be reversed because plaintiffs' facial challenge to the Offset Provision is meritless.

STATEMENT OF THE CASE

A. Statutory Background

In the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, Congress created a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. § 802. The Fund provides nearly $200 billion in new federal grants to help States and the District of Columbia mitigate the fiscal effects of the COVID-19 pandemic. *Id.* § 802(a)(1); *see id.* § 802(b)(3)(A). Section 802 allows States to use Fiscal Recovery Funds to cover broadly defined categories of costs incurred through 2024, including to provide assistance to households, businesses, and industries affected by the pandemic; to provide premium pay to workers performing essential work during the pandemic; to pay for state government services to the extent of revenue losses due to the pandemic; and to make necessary investments in water, sewer, or broadband infrastructure. *Id.* § 802(c)(1).

In addition to identifying the permissible uses of Fiscal Recovery Funds, Section 802 includes two "[f]urther restriction[s]" on the use of the funds. 42 U.S.C. § 802(c)(2). One is that a State may not deposit the funds into a pension fund. *Id.* § 802(c)(2)(B). The other, at issue here, is 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 a change in state law during a covered time period. *Id.* § 802(c)(2)(A).[1]

The statute provides that, to receive a federal grant, a State must submit "a certification" that it "requires the payment … to carry out the activities specified in" § 802(c) and that it "will use any payment … in compliance with" that provision. 42 U.S.C. § 802(d)(1). If a State uses its Fiscal Recovery Funds for impermissible purposes, it may be required to repay an amount equal to the funds misused. *Id.* § 802(e).

B. Implementing Regulations

Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802, which established the Fiscal Recovery Fund. 42 U.S.C. § 802(f). In May 2021, the Department issued an interim final rule detailing how it would implement the statutory conditions on the use of Fiscal Recovery Funds, including the Offset Provision. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021); *see id.* at 26,815. In January 2022, the Department issued a final rule implementing the statutory conditions. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338 (Jan. 27, 2022); *see id.* at 4423-4429.

[1] The covered period began on March 3, 2021 and ends on the last day of the state fiscal year "in which all funds received by the State … have been expended or returned to, or recovered by," the Treasury Department. 42 U.S.C. § 802(g)(1).

C. This Action

Thirteen States—Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia—brought this facial challenge to the Offset Provision in March 2021, shortly after the enactment of the American Rescue Plan Act. The complaint alleged that the Offset Provision—which plaintiffs dubbed the "Federal Tax Mandate"—"disables States from decreasing taxes on their citizens for a period of over three years" (A27 ¶ 3), or that the provision's "broad and ambiguous scope" has "the likely and foreseeable effect of chilling almost any legislative action by the States that affect tax revenue" (A41 ¶ 74).

Plaintiffs moved for a preliminary injunction, claiming that they needed immediate relief to be in a position to submit the certification required by Section 802 to receive Fiscal Recovery Funds. The district court denied a preliminary injunction. A58-82. Ten of the thirteen plaintiffs then submitted the required certification and accepted Fiscal Recovery Funds (A103), and every plaintiff enacted revenue-related laws (*see* A83-86). Nonetheless, the district court granted plaintiffs' request for a permanent injunction, ruling that they "continue to suffer an injury in fact due to being presented with an ambiguous deal" and that the Offset Provision imposes "an unconstitutionally ambiguous condition on the States' receipt of federal funds." *West Virginia v. Department*

of the Treasury, __ F. Supp. 3d. __, 2021 WL 5300944, at *7, *14 (N.D. Ala. Nov. 15, 2021).[2]

D. Standard of Review

This Court reviews de novo the conclusions of law underlying a district court's issuance of a permanent injunction. *Alabama v. Centers for Medicare & Medicaid Servs.*, 674 F.3d 1241, 1244 n.2 (11th Cir. 2012) (per curiam).

SUMMARY OF ARGUMENT

In the American Rescue Plan Act, Congress offered the plaintiff States billions of dollars in new federal funds to help mitigate the effects of the pandemic. The statute gives the State considerable flexibility to use these federal funds for a range of specific purposes, but the Offset Provision specifies that the funds may not be used to directly or indirectly offset a reduction in a State's net tax revenue. The district court permanently enjoined the federal government from enforcing the Offset Provision against plaintiffs on the theory that the provision is "an unconstitutionally ambiguous condition on the States' receipt of federal funds." *West Virginia v. Department of the Treasury*, __ F. Supp. 3d. __, 2021 WL 5300944, at *14 (N.D. Ala. Nov. 15, 2021).

[2] The district court did not address plaintiffs' other constitutional challenges to the Offset Provision. The court denied the Wisconsin Legislature's motion to intervene as a plaintiff, a ruling that the Wisconsin Legislature has not appealed.

That injunction rests on a series of independent legal errors. First, there is no live controversy over the Offset Provision. As the Supreme Court's precedents demonstrate, disputes over the meaning (or ambiguity) of funding conditions are not adjudicated in the abstract; they are resolved if and when a concrete dispute arises over the condition's application. The clear-statement principle articulated by the Supreme Court simply provides a rule of statutory construction, to be applied in concrete disputes—not a basis to hold a condition facially invalid and enjoin its enforcement against any conduct the plaintiffs might later undertake.

Here, moreover, plaintiffs provided no evidence to suggest that a concrete dispute over the Offset Provision will ever arise. By its explicit terms, the Offset Provision does not prohibit tax cuts; it merely prohibits a State from *using the new federal funds* to pay for a reduction in net tax revenue. The Treasury Department has therefore repeatedly recognized that, if a State offsets tax cuts by other means—such as by revenue derived from macroeconomic growth, by tax increases, or by spending cuts in areas in which the State is not using the new federal funds—the Offset Provision is not implicated. No plaintiff submitted any evidence that it intends to use its Fiscal Recovery Funds (rather than another funding source) to pay for a net reduction in state tax revenue. And plaintiffs' own evidence belied their allegations that the Offset Provision "disables States from decreasing taxes on their citizens" (A27 ¶ 3) or "chill[s] almost any legislative action by the States that affect tax revenue" (A41 ¶ 74).

In any event, plaintiffs' challenge to the Offset Provision is meritless. Every State that has a balanced-budget requirement—as every plaintiff does—is familiar with the need to "offset" any negative revenue effects of a tax cut, either with increased revenue from economic growth, or with increases to other taxes, or with spending cuts. The effect of the Offset Provision is simply that, when States determine how to balance their books, they may not use these new federal funds to do so; any negative revenue effect of a tax cut must be offset with state funds alone. Congress unquestionably has authority to specify the permissible and impermissible uses of Fiscal Recovery Funds. And "'[o]nce Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper.'" *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Plaintiffs' speculation that disputes may arise over applications of the Offset Provision is no basis for a court to enjoin the enforcement of the statutory provision on its face. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

ARGUMENT

I. THIS CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

The posture of this suit is unprecedented. Neither the Supreme Court, nor any appellate court of which we are aware, has declared a condition on federal funds to be

"unconstitutionally ambiguous" in the abstract. Rather, in adjudicating concrete disputes over the application of particular funding conditions, the Supreme Court and other courts have relied on the clear-statement principle as a tool of statutory interpretation.

For example, in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), a school district challenged a court order requiring it to pay the expert-witness fees incurred by parents who had prevailed in an action under the Individuals with Disabilities Education Act (IDEA). In that concrete setting, the Supreme Court held, as a matter of statutory interpretation, that the IDEA's fee-shifting provision did not clearly encompass expert-witness fees. Similarly, in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court vacated an injunction requiring a state institution to comply with the "'bill of rights' provision" of the Developmentally Disabled Assistance and Bill of Rights Act, reasoning that the provision was meant "to be hortatory" and thus did not impose an enforceable condition at all. *Id.* at 13, 24; *see id.* at 15-27. And in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), the Supreme Court considered (and rejected) a State's ambiguity-based argument in the context of a concrete dispute over the recoupment of federal education funds.

The clear-statement principle set out in the Supreme Court's precedents is not, in other words, a basis to enjoin the enforcement of a statutory provision on its face, in a pre-enforcement context, on the theory that its application might be unclear in

some hypothetical future context. It simply provides a rule of statutory construction, to be applied in concrete disputes.

Even if the prospect of a future dispute were relevant to jurisdiction, moreover, plaintiffs failed to show that any concrete dispute over the application of the Offset Provision will *ever* arise. Because plaintiffs moved for final judgment, it was their burden to produce evidence that substantiated the injuries alleged in the complaint. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, however, plaintiffs' own evidence contradicted those allegations. Plaintiffs alleged that the Offset Provision "disables States from decreasing taxes on their citizens for a period of over three years" (A27 ¶ 3), or has "the likely and foreseeable effect of chilling almost any legislative action by the States that affect tax revenue" (A41 ¶ 74). But by the time the district court ruled on plaintiffs' motion for a permanent injunction, ten of the thirteen plaintiffs had already accepted the conditions of Fiscal Recovery Funds, *West Virginia v. Department of the Treasury*, __ F. Supp. 3d. __, 2021 WL 5300944, at *5 (N.D. Ala. Nov. 15, 2021), and every plaintiff had enacted revenue-related laws, *see* A83-86 (plaintiffs' list of "Certain Revenue-Related Laws Enacted After March 3, 2021").[3] Other States that brought analogous challenges to the Offset Provision likewise enacted significant tax cuts after accepting Fiscal Recovery Funds. *Arizona v. Yellen*, 2021 WL 3089103, at *4 (D. Ariz. July 22, 2021) (noting Arizona's passage of $1.9 billion in tax cuts), *appeal pending*, No. 21-

[3] All plaintiffs have now accepted the conditions and received their first tranche of funds.

16227 (9th Cir.); *Ohio v. Yellen*, 2021 WL 2712220, at *9 (S.D. Ohio July 1, 2021) (noting Ohio's passage of $1.6 billion in tax cuts), *appeal pending*, No. 21-3787 (6th Cir.).

It is unsurprising that plaintiffs' evidence contradicted their allegations. 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*, 538 F. Supp. 3d 906, 912 (E.D. Mo. 2021), *appeal pending*, No. 21-2118 (8th Cir.). The court considering Arizona's challenge accordingly recognized that Arizona's recent enactment of "a $1.9 billion tax cut" did not contravene the Offset Provision, absent a showing that the State "used [federal] funds to supplement a reduction in its net income." *Arizona*, 2021 WL 3089103, at *5. Likewise, the court considering Missouri's challenge emphasized that "Missouri's sovereign power to set its own tax policy is not implicated by the" Offset Provision, which leaves the "Missouri legislature … free to propose and pass tax cuts as it sees fit." 538 F. Supp. 3d at 913.

Because the Offset Provision restricts only *the use of Fiscal Recovery Funds* to pay for tax cuts, the Treasury Department has repeatedly recognized that, if a State offsets tax cuts by other means—such as by revenue derived from macroeconomic growth, increases in other taxes, or spending cuts in areas in which the State is not using the new federal funds—the Offset Provision is not implicated. *See* 86 Fed. Reg. at 26,810; 87 Fed. Reg. at 4423-4429.

No plaintiff submitted any evidence that it intends to use its Fiscal Recovery Funds (rather than another funding source) to pay for a reduction in net tax revenue. Plaintiffs thus failed to show "a credible threat" that the Treasury Department will take enforcement action against them. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) ("[T]hreatened injury must be 'certainly impending.'"). As the district court observed in dismissing Arizona's similar challenge, plaintiffs have simply failed to demonstrate how the Offset Provision "could apply to" any tax cuts they have made. *Arizona*, 2021 WL 3089103, at *5.

The district court here did not conclude otherwise. Instead, it found that it had jurisdiction on the theory that plaintiffs' "legislatures do not have sufficient information in considering tax changes to determine the impact such changes will have on their ability to retain the federal grant money." 2021 WL 5300944, at *7. But the court erred in basing that conclusion on an Alabama legislator's declaration stating that "uncertainty surrounding the" meaning of the Offset Provision had caused a tax-cut bill to fail in the Alabama legislature "due to fear that" the Treasury Department could regard the bill as a basis for recoupment of Fiscal Recovery Funds. *Id.* (citing A87-89). That declaration rested on the incorrect assumption that the Offset Provision "extend[s] so broadly as to effectively restrict a State's ability to reduce any tax or reduce net tax revenue for the fiscal year." A88-89 ¶ 7. For the reasons already discussed, that assumption is contrary to the statute's plain text and belied by the tax cuts that plaintiffs and

other States have enacted. In any event, the declaration of an Alabama legislator could not be a basis to award relief to the twelve other plaintiff States. *See, e.g.*, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1340 (11th Cir. 2013) ("Each plaintiff must establish standing on the facts of the case before the court.").

The district court should have heeded the limits on its jurisdiction. "'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Clapper*, 568 U.S. at 408. To "determine the scope of the" Offset Provision in a "hypothetical context" is not a "'proper exercise of the judicial function.'" *Missouri*, 538 F. Supp. 3d at 914.

II. PLAINTIFFS' CHALLENGE TO THE OFFSET PROVISION IS MERITLESS

A. The Offset Provision Established An Unremarkable Restriction On The Use Of Federal Funds

If the Court reaches the merits, the injunction should be reversed because this challenge to the Offset Provision is meritless. 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*, 567 U.S. 519, 580 (2012) (plurality opinion).

Here, Congress provided that Fiscal Recovery Funds may be used for various categories of expenditures but may not be used to fill a revenue hole created by state

tax cuts. Any State that has a balanced-budget requirement—as all of the plaintiff States do—is familiar with the need to "offset" any negative revenue effects of a tax cut, either with increased revenue from economic growth, or with increases to other taxes, or with spending cuts. The effect of the Offset Provision is simply that, when States determine how to balance their books, they may not use these new federal funds to do so; any negative revenue effect of a tax cut must be offset with state funds alone.

The phrase "directly or indirectly" simply underscores that a State cannot circumvent Congress's restriction on the use of federal funds through a mere formality. Even if that phrase were stricken from the Offset Provision, the restriction on using federal funds to "offset" a reduction in net tax revenue would properly be read to mean the same thing: A State must use its own funds, rather than the federal funds, to pay for its tax cuts. If a State were simply to deposit its federal grant into its general treasury in order to fill a revenue hole created by (say) a $2 billion tax cut, the State would be using the federal funds to directly offset a reduction in state tax revenue; Congress permissibly prevented the State from achieving the same result indirectly by reducing the State's own expenditures by $2 billion to offset the tax cut and using $2 billion in federal funds to pay for those expenditures instead.

By preventing States from choosing to eliminate a source of non-federal revenue ordinarily used to pay for a state expenditure, replacing that source with Fiscal Recovery Funds, and using the saved state funds to pay for a tax cut, the Offset Provision resem-

bles the maintenance-of-effort requirements that are a longstanding feature of Spending Clause legislation. *See, e.g.*, *Bennett*, 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 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).

B. Congress Is Not Required To Address With Specificity How A Funding Condition May Be Applied

There is no merit to the district court's conclusion that the Offset Provision is "unconstitutionally ambiguous" because it does not address with even greater specificity how a State may (or may not) use federal funds. In *Bennett v. Kentucky Department of Education*, the Supreme Court emphasized that "the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I" of the Elementary and Secondary Education Act of 1965. 470 U.S. at 669. "Moreover," the Court observed, "the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." *Id.* The Court explained that its earlier

decision in *Pennhurst*—which had stated that "'Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds'"—"does not suggest that the Federal Government may recover misused federal funds only if every improper expenditure has been specifically identified and proscribed in advance." *Id.* at 665-666 (emphasis omitted) (quoting *Pennhurst*, 451 U.S. at 24).

This Court applied the same reasoning in rejecting a State's challenge to the grant conditions established by 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). In *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), Georgia argued that the "least restrictive means" standard was "too ambiguous to allow a state an informed choice" as to whether to accept the funds. *Id.* at 1305. This Court disagreed, explaining that "'[o]nce Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper.'" *Id.* at 1306. The Court went on to explain that *Pennhurst*'s "'clear notice'" requirement demands only that a condition's existence be clear from the statute—not that the statute resolve how the condition will be applied in all possible circumstances. *See id.* at 1307 ("The 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 …. *Pennhurst* does not require more.").

As this Court observed in *Benning*, its holding was consistent with prior decisions of the Seventh and Ninth Circuits. *See* 391 F.3d at 1307 (citing *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002)). This Court's decision is likewise consistent with the subsequent court of appeals decisions addressing the issue. *See Van Wyhe v. Reisch*, 581 F.3d 639, 650-651 (8th Cir. 2009); *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005).

Here, as in RLUIPA, Congress made clear the existence of a condition—namely that States not use Fiscal Recovery Funds to pay for tax cuts. That is sufficient to satisfy *Pennhurst*'s clarity requirement. *See, e.g.*, *Arizona*, 2021 WL 3089103, at *3. To the extent that the statute leaves certain details of implementation for the Treasury Department to resolve, that is commonplace and appropriate. Matters such as the baseline from which to measure whether a State experiences a reduction in its net tax revenue, or whether that measurement reflects actual or projected tax revenues, do not affect a State's ability to understand the existence or basic nature of the condition Congress imposed on its expenditure of Fiscal Recovery Funds. Those details bear only on how the condition will be applied in a range of factual circumstances—which, as the Supreme Court made clear in *Bennett*, and this Court made clear in *Benning*, Congress need not resolve ahead of time.

Agencies responsible for implementing statutory conditions on federal grants routinely resolve such details by regulation. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (giving deference to regulation establishing conditions on funding under the Aid to Families with Dependent Children program); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-892 (1984) (applying regulations implementing conditions on education funds); *Harris v. Olszewski*, 442 F.3d 456, 467-468 (6th Cir. 2006) (giving deference to regulations implementing the Medicaid program); *Baptist Mem'l Hosp. - Golden Triangle, Inc. v. Azar*, 956 F.3d 689, 692-693 (5th Cir. 2020) (applying Medicaid regulations); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019) (same). To require Congress to specify such details would flout the principle that "'Congress is not required to list every factual instance in which a state will fail to comply with a condition'"; it need only "'make the existence of the condition'" clear. *Benning*, 391 F.3d at 1307 (quoting *Mayweathers*, 314 F.3d at 1067).

Attempting to distinguish the RLUIPA cases, the district court stated that "the Federal Government's paramount interest in protecting individuals from discrimination that was present in *Benning* is simply not present in this case." 2021 WL 5300944, at *18. But the holding of *Benning* and the other RLUIPA cases did not depend on the government's interest in protecting individuals from discrimination. The key point was that Congress can place conditions on federal funds without specifying every detail of how the funding conditions will apply.

The district court thus erred in ruling that the Offset Provision does not establish a condition on the use of federal funds with the clarity contemplated by *Pennhurst*. The statute clearly provides that States may not use Fiscal Recovery Funds to offset a reduction in their net tax revenue caused by tax cuts; as noted above, that is sufficient to satisfy *Pennhurst*'s clarity requirement. The fact that questions may later arise as to exactly how the condition applies in various circumstances does not mean that the condition is *facially* unconstitutional—in other words, that it "'could never be applied in a constitutional manner,'" *American Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013)—or that its enforcement can properly be enjoined, in a pre-enforcement challenge, even as to potential future conduct by the plaintiff States that would violate *any* reasonable construction of the condition. Indeed, we are not aware of any other spending condition that has ever been held facially unconstitutional on ambiguity grounds. Rather, as discussed above, courts properly apply *Pennhurst*'s clear-statement principle as a tool of statutory construction in resolving the meaning of conditions in the context of concrete controversies. Assuming *arguendo* that a particular application of the Offset Provision could pose a constitutional problem, the statute would properly be interpreted to avoid the constitutional issue. *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.'").

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 4,640 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

ADDENDUM

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42 U.S.C. § 802

§ 802. Coronavirus State Fiscal Recovery Fund

(a) Appropriation

In addition to amounts otherwise available, there is appropriated for fiscal year 2021, out of any money in the Treasury not otherwise appropriated—

(1) $219,800,000,000, to remain available through December 31, 2024, for making payments under this section to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)..

(b) Authority to make payments

…

(3) Payments to each of the 50 States and the District of Columbia

(A) In general

The Secretary shall reserve $195,300,000,000 of the amount appropriated under subsection (a)(1) to make payments to each of the 50 States and the District of Columbia.

…

(6) Timing

(A) States and territories

(i) In general

To the extent practicable, subject to clause (ii), with respect to each State and territory allocated a payment under this subsection, the Secretary shall make the payment required for the State or territory not later than 60 days after the date on which the certification required under subsection (d)(1) is provided to the Secretary.

…

(c) Requirements

(1) Use of funds

Subject to paragraph (2), and except as provided in paragraph (3), a State, territory, or Tribal government shall only use the funds provided under a payment made under this section, or transferred pursuant to section 803(c)(4) of this title, to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024—

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to

households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

(2) Further restriction on use of funds

(A) In general

A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

(B) Pension funds

No State or territory may use funds made available under this section for deposit into any pension fund.

…

(d) Certifications and reports

(1) In general

In order for a State or territory to receive a payment under this section, or a transfer of funds under section 803(c)(4) of this title, the State or territory shall provide the Secretary with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of this section and will use any payment under this section, or transfer of funds under section 803(c)(4) of this title, in compliance with subsection (c) of this section.

(2) Reporting

Any State, territory, or Tribal government receiving a payment under this section shall provide to the Secretary periodic reports providing a detailed accounting of—

(A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and

(B) such other information as the Secretary may require for the administration of this section.

(e) Recoupment

Any State, territory, or Tribal government that has failed to comply with subsection (c) shall be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection, provided that, in the case of a violation of subsection (c)(2)(A), the amount the State or territory shall be required to repay shall be lesser of—

(1) the amount of the applicable reduction to net tax revenue attributable to such violation; and

(2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made under section 803(c)(4) of this title.

(f) Regulations

The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section.

(g) Definitions

In this section:

(1) Covered period

The term "covered period" means, with respect to a State, territory, or Tribal government, the period that--

(A) begins on March 3, 2021; and

(B) ends on the last day of the fiscal year of such State, territory, or Tribal government in which all funds received by the State, territory, or Tribal government from a payment made under this section or a transfer made under section 803(c)(4) of this title have been expended or returned to, or recovered by, the Secretary.

…