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

REPLY BRIEF FOR APPELLANTS

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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants-Appellants certify that the following have an interest in the outcome of this appeal, in addition to those identified in the opening brief's Amended Certificate of Interested Persons:

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SUMMARY OF ARGUMENT

Plaintiffs' brief rests, beginning to end, on the notion that the Offset Provision forbids States from cutting taxes. It does not. As its text makes clear, and as the Treasury Department has explained in implementing regulations, the provision leaves States free to cut taxes so long as they can pay for the tax cuts using state funds—whether through the growth of their economies, increases in other taxes, or cuts in state spending. The provision simply prevents States from using the new federal funds to finance tax cuts. Plaintiffs have not claimed (nor could they) any constitutional interest in doing that, so there is no genuine controversy here.

Plaintiffs' merits arguments similarly fail. Neither the Supreme Court nor any other court of which we are aware has declared any other condition on federal funds to be facially invalid on the ground that it is "unconstitutionally ambiguous." Rather, the Supreme Court and other courts have relied on the clear-statement principle articulated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), as a tool of statutory interpretation, to be used in resolving concrete disputes over the application of a funding condition. This Court has explained, moreover, that the clear-statement requirement is satisfied "'[o]nce Congress clearly signals its intent to attach federal conditions to Spending Clause legislation'"; Congress "'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). The Offset Provision easily satisfies that standard.

Finally, plaintiffs' coercion, anti-commandeering, and relatedness arguments all rest on the theory that the Offset Provision is not a restriction on the use of the new federal funds. But as discussed above and in the opening brief, that argument is contrary to the text of the provision. Moreover, the canon of constitutional avoidance would not allow the Court to adopt plaintiffs' broad reading of the Offset Provision if, as they contend, doing so would render the provision unconstitutional. The judgment of the district court should therefore be reversed.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

Plaintiffs' case rests on the premise (Br. 16) that the Offset Provision "restricts … the States' taxing powers." It does not. As its text makes clear, the provision leaves States free to cut taxes as long as they can pay for the tax cuts using their own funds—whether through the growth of their economies, increases in other taxes, or cuts in state spending. Indeed, every plaintiff has enacted tax cuts or credits since the enactment of the provision. A83-86; *see also, e.g.*, *Arizona v. Yellen*, 550 F. Supp. 3d 791, 798 (D. Ariz. 2021) (Arizona enacted "a $1.9 billion tax cut" after accepting Fiscal Recovery Funds), *appeal pending*, No. 21-16227 (9th Cir.). Plaintiffs thus challenge a statute that does not actually exist. The federal courts lack jurisdiction to entertain such imagined disputes.

Plaintiffs claim (Br. 19) that to assess the actual meaning of the statute is to conflate jurisdiction with the merits. It is not. The merits question in this case is the *constitutionality* of the Offset Provision. The statutory meaning of the provision is not the

merits question; it is an antecedent issue that is a predicate for plaintiffs' jurisdictional and constitutional claims.

Even if plaintiffs' broad understanding of the statute were consistent with its text, moreover, and even if that understanding were constitutionally suspect, it would be improper for the Court to adopt that broad interpretation and declare the Offset Provision facially unconstitutional on that basis. That would turn the canon of constitutional avoidance on its head: Where possible, a court must interpret an Act of Congress in a way that allows the court to uphold it. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

Given the proper interpretation of the statute, plaintiffs' asserted grounds of jurisdiction fall away. Plaintiffs claim (Br. 16) that the Offset Provision harms their sovereignty "[w]hether [it] restricts all or some of [their] taxing powers," but the provision does not restrict their ability to set their own taxing policy using their own funds. And although plaintiffs invoke "the threat of a recoupment proceeding" (Br. 17), they make no attempt to show how the Offset Provision forbids their means of paying for the tax cuts they have undertaken (nor do they even identify those means) and therefore fail to show any imminent prospect of recoupment. Their argument rests on the faulty proposition that the Offset Provision forbids tax cuts.

Nor can plaintiffs create a justiciable controversy over the Offset Provision by stating (Br. 17) that they would prefer not to track and report their uses of Fiscal Recovery Funds. Such reporting requirements are a common feature of federal spending

programs, and any costs for them here are traceable not to the Offset Provision but to the distinct provision that requires any State accepting Fiscal Recovery Funds to "provid[e] a detailed accounting of," among other things, "all modifications to [its] tax revenue sources during the covered period." 42 U.S.C. § 802(d)(2). Plaintiffs do not contend that that reporting requirement exceeds Congress's Spending Clause authority, and an injunction against the enforcement of the Offset Provision would not relieve them of costs associated with the reporting requirement.[1]

II. THE OFFSET PROVISION IS A PROPER EXERCISE OF CONGRESS'S POWER UNDER THE SPENDING CLAUSE

Assuming the Court concludes that plaintiffs established jurisdiction, it should reverse the district court's injunction on the merits.

A. The Offset Provision Is Not "Unconstitutionally Ambiguous"

Plaintiffs' ambiguity-based challenge to the Offset Provision (Br. 24-35) rests on a basic misunderstanding of the Supreme Court's precedents. Neither the Supreme Court nor any other court of which we are aware has declared any other funding condition to be "unconstitutionally ambiguous" in the abstract, as a facial matter. Rather, as the opening brief explains (at 8-9), the Supreme Court and other courts have relied

[1] Moreover, States can use Fiscal Recovery Funds to pay for such costs. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338, 4435-4436, 4437, 4444 (Jan. 27, 2022).

on the clear-statement principle articulated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), as a tool of statutory interpretation in resolving concrete disputes about the application of a particular funding condition.

As this Court has explained, moreover, *Pennhurst* does not require Congress to detail how a funding condition will be applied. "The federal law in *Pennhurst* was unclear as to whether the states incurred any obligations at all by accepting federal funds[.]" *Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004). "'[O]nce Congress clearly signals its intent to attach federal conditions to Spending Clause legislation,'" however, "'it need not specifically identify and proscribe in advance every conceivable state action that would be improper.'" *Id.* at 1306. "*Pennhurst* does not require more" than a clear statement "that states incur an obligation when they accept federal funds." *Id.* at 1307; *see also, e.g.*, *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005) (rejecting the argument "that Spending Clause legislation requires a level of specificity beyond that applicable to other legislation").

Plaintiffs fail to respond to those points. They claim that a funding condition cannot "'admit[] of two plausible interpretations'" (Br. 25), but the case they quote for that proposition—*Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005)—was discussing the unrelated rule that, "where … there are two plausible constructions of a statute of limitations, [a court] should adopt the construction that starts the time limit running when the cause of action … accrues," *id.* at 419. In the Spending Clause context, this Court has recognized that it would be "'too

onerous, and, perhaps, impossible'" for Congress to specify "'every factual instance in which a state will fail to comply with a condition.'" *Benning*, 391 F.3d at 1307. Like many statutes, conditions on the use of federal funds routinely leave unaddressed details of implementation that agencies are free to resolve. *See* Opening Br. 17. The questions plaintiffs identify about the application of the Offset Provision fall into that category. The method for determining whether a State's "net tax revenues were 'reduc[ed]'" (Br. 25), for example, is precisely the sort of implementation detail that Congress need not specify and that agencies routinely address by regulation.

Plaintiffs' merits arguments, like their jurisdictional arguments, also disregard the text of the Offset Provision itself. Plaintiffs assert that "virtually any change to any law, rule, or policy that intentionally or inadvertently causes reduced net revenue may trigger" recoupment under the Offset Provision (Br. 27). But Congress made explicit that the Offset Provision is simply a restriction on the use of federal funds. *See* 42 U.S.C. § 802(c)(2)(A) ("A State or territory *shall not use the funds provided under this section* … to either directly or indirectly offset a reduction in the net tax revenue of such State or territory[.]") (emphasis added)). Because the Offset Provision restricts only the use of Fiscal Recovery Funds to pay for tax cuts, a State is free to cut taxes as long as it can balance its books with other revenue, as the Treasury Department has repeatedly conceded. *See Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786, 26,807-808 (May 17, 2021) (Offset Provision is not implicated if a State has sufficient funds to offset tax cuts from economic growth, other tax increases, or spending cuts in areas in

which it is not using Fiscal Recovery Funds); *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338, 4423-4429 (Jan. 27, 2022) (same).

As our opening brief explained (at 7)—and plaintiffs do not dispute—every plaintiff is already subject to a state-law balanced budget requirement. The Offset Provision merely prevents a State from relying on the new federal funds to balance any negative revenue effect of a tax cut. By specifying that a State cannot use the new federal funds to "directly or indirectly" offset a reduction in net tax revenue (the phrase that plaintiffs emphasize, *e.g.*, Br. 26-27), Congress simply ensured that States cannot circumvent that restriction through budgeting formalities, such as using the new federal funds to displace state spending in a given area and then using the saved state money to pay for tax cuts.[2]

In that respect, the Offset Provision is similar to the maintenance-of-effort provisions that are common in other federal funding programs. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 660 (1985) (noting the longstanding requirement that federal education funds be used to "'supplement'" and not to "supplant" funds from non-federal sources). The fact that the Offset Provision is phrased somewhat differently than other maintenance-of-effort provisions simply reflects the breadth of the uses that Congress permitted for Fiscal Recovery Funds and the flexibility that it gave States to

[2] Congress routinely uses the same "directly or indirectly" language to prevent circumvention in other contexts. *See, e.g.*, 18 U.S.C. § 982 (stating, in various provisions, that property obtained "directly or indirectly" from a crime is subject to forfeiture).

set their own taxing and spending policies, subject only to the basic constraint that they not use the new federal funds to pay for tax cuts.

B. The Offset Provision Is Not Unconstitutionally Coercive

Plaintiffs equally fail to show (Br. 35-38) that the Offset Provision is unconstitutionally coercive. The only funds at issue here are the new funds that Congress offered in the American Rescue Plan Act—and a violation of the Offset Provision would implicate only the portion of the new funds used in violation of the provision, not even a State's full award, *see* 42 U.S.C. § 802(e). The Supreme Court has never declared a condition on the use of new federal funds to be unconstitutionally coercive. Rather, 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). "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).

NFIB forecloses plaintiffs' coercion argument. There, a majority 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. *See* 567 U.S. at 580-585 (plurality opinion); *id.* at 681-689 (joint dissent). But a different majority upheld the same requirement as a condition on the *new* federal funds offered by the Affordable Care Act,

which totaled $100 billion per year. *See id.* at 576, 585-586 (Roberts, C.J., joined by Breyer, J., and Kagan, J.); *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 [Affordable Care Act] contingent on acceptance of the terms of the Medicaid Expansion." *Id.* at 687-688 (joint dissent).

Plaintiffs do not contend that they should be free to spend Fiscal Recovery Funds for uses beyond the ones set forth in § 802(c)(1) simply because the grants are large. It is equally clear that plaintiffs may not ignore the restrictions on the use of Fiscal Recovery Funds that Congress set forth in § 802(c)(2), which include the prohibition on depositing the federal funds into a pension fund and the prohibition on using the federal funds to offset a reduction in a State's net tax revenue.

As *NFIB* explains, the Supreme Court applied a coercion analysis to a condition on highway funds in *South Dakota v. Dole*, 483 U.S. 203 (1987), only because that "condition was not a restriction on how the highway funds … were to be used"; rather, it required States accepting highway funds to do something else (namely, maintain a minimum drinking age). *NFIB*, 567 U.S. at 580 (plurality opinion). *NFIB* thus draws a bright line between Congress's broad "authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds," *id.*, and its more limited authority to use federal grants as a means of encouraging or discouraging state policies more broadly. Other courts have drawn the same distinction. *See, e.g.*, *Gruver v.*

Louisiana Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 183-184 (5th Cir. 2020); *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 179 (D.C. Cir. 2015) (per curiam).

Plaintiffs recognize all this, which is why they claim (Br. 37) that the Offset Provision "regulate[s] not just how States spend federal funds, but how States may spend their own funds." But for the reasons discussed above and in the opening brief, that description of the Offset Provision is at odds with its text. And, again, even if plaintiffs' interpretation were textually plausible, and even if that interpretation would raise constitutional concerns, it would upend the canon of constitutional avoidance to adopt that broad interpretation and declare the provision facially unconstitutional on that basis.

C. The Offset Provision Does Not Violate Anti-Commandeering Principles

Plaintiffs' anti-commandeering claim (Br. 42-47) fails for the same reason. It rests on the premise that the Offset Provision "commandeer[s] the 'legislative processes of the States' and direct[s] state legislatures to refrain from enacting certain policies Congress disapproved" (Br. 44). But as discussed above, the provision does no such thing; it prevents States only from using Fiscal Recovery Funds to pay for tax cuts. The States do not and could not assert any constitutional interest in doing that.

D. The Offset Provision Is Reasonably Related To The Fiscal Recovery Fund's Purpose

Finally, plaintiffs fail to show that the Offset Provision is insufficiently "relate[d] to the purposes of the grant" provided in the Fiscal Recovery Fund (Br. 39; *see* Br. 39-

42). The provision could not be any more closely related to the purposes of the Fiscal Recovery Fund: Its explicit function is to ensure that the federal grants from that fund are used for the purposes Congress permitted. A restriction that Congress places on the use of federal funds is definitionally related to the purpose of the funds, because Congress determines the permitted purposes of funds that it appropriates. Plaintiffs' argument is essentially that Congress made a poor policy choice in "preclud[ing] the States from" using federal funds to pay for tax cuts, which plaintiffs describe as "an important economic tool" (Br. 40), but that policy choice was for Congress to make.

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 2,783 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
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