No. 21-6108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY and STATE OF TENNESSEE,

Plaintiffs-Appellees,

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 Eastern District of Kentucky

REPLY BRIEF FOR APPELLANTS

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SUMMARY OF ARGUMENT

The issues presented in this appeal are currently pending before this Court in *Ohio v. Yellen*, No. 21-3787, where oral argument was heard on January 26, 2022. Like plaintiffs here, Ohio argued that the Offset Provision is "unconstitutionally ambiguous" and that Congress "improperly coerce[d] the States into accepting" that funding condition. Appellee's Br. 2, *Ohio v. Yellen*, No. 21-3787 (6th Cir. Oct. 12, 2021). The federal government's briefs explained that there is no justiciable controversy over the Offset Provision and that, in any event, Ohio's claims lack merit. This Court's resolution of the *Ohio* appeal thus will be controlling here. Although Kentucky and Tennessee suggest (Br. vi) that "the record here is significantly different and the issues are not identical," their brief does not identify any material differences between the cases.

If the Court reaches the issues, plaintiffs' brief confirms that this suit should be dismissed for lack of a justiciable controversy or, alternatively, for failure to state a claim. The supposed controversy underlying this suit is that the Offset Provision "effectively prohibits the States from lowering their taxes." Pl. Br. 2. But that is an imagined controversy: As its text makes clear, the provision leaves States free to cut taxes so long as they can pay for the tax cuts using state funds.

Plaintiffs' merits arguments rest on a basic misunderstanding of the principles that they invoke. The Supreme Court has never declared a condition on federal funds to be "unconstitutionally ambiguous" in the abstract. Rather, the Supreme Court and other courts, including this one, have relied on the clear-statement principle articulated

in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), as a tool for resolving concrete disputes regarding the statutory meaning of such conditions. Furthermore, this Court has rejected the contention that "Spending Clause legislation 'requires a level of specificity beyond that applicable to other legislation.'" *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005). Plaintiffs make no attempt to reconcile their claim here with that controlling circuit precedent, which their brief neglects even to cite. And plaintiffs' coercion argument ignores the relevant holding in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519 (2012). Although the Supreme Court held in *NFIB* that Congress could not make a State's *preexisting* Medicaid funds contingent on the State's expansion of Medicaid eligibility to all low-income adults, the Court held that Congress could make the *new* federal funds offered under the Affordable Care Act—which totaled $100 billion per year—contingent on that expansion of Medicaid eligibility. Here, the only federal funds at stake are the new funds offered by the American Rescue Plan Act. Just as Congress can specify the affirmative uses of those new funds, it can specify that the funds may not be used for deposit into a pension fund or to offset a net reduction in state tax revenue.

ARGUMENT

I. THERE IS NO JUSTICIABLE CONTROVERSY OVER THE OFFSET PROVISION

Plaintiffs' constitutional claims are premised (Br. 3) on the idea that the Offset Provision "effectively prohibits the States from lowering their taxes." To see that the

provision has no such effect, the Court need look no further than the actions of Ohio, which enacted a budget including $2 billion in tax cuts after receiving Fiscal Recovery Funds. *See* Gov. Mike DeWine, *Bipartisan Stage Budget Invests in Ohio's Future and Cuts Taxes* (July 1, 2021), https://perma.cc/Z28Y-7VG8. Although plaintiffs assert (Br. vi) that "the record here is significantly different" from the record in the *Ohio* case, they never explain why the Offset Provision left Ohio free to enact a major tax cut but ostensibly prohibits them from doing so.

Contrary to plaintiffs' suggestion (Br. 22), the Court may not assume that the Offset Provision prohibits tax cuts, counter to its text, and then declare the provision facially unconstitutional on that basis. But even assuming a tax-cut prohibition would be constitutionally suspect, plaintiffs' position turns the canon of constitutional avoidance on its head: It is the duty of a court to 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). And here, by its plain terms, the Offset Provision merely prohibits a State from *using the new federal funds* to offset a reduction in net tax revenue. Thus, 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 will not be implicated. *See Arizona v. Yellen*, 550 F. Supp. 3d 791, 798 (D. Ariz. 2021) (explaining that Arizona's enactment of "a $1.9 billion tax cut" did not contravene the Offset Provision, absent evidence that the State was using Fiscal Recovery Funds to offset that tax cut), *appeal pending*, No. 21-16227 (9th Cir.).

Plaintiffs claim (Br. 22) that to assess the correct interpretation of the statute is to "conflate[] the standing inquiry with the merits." But as plaintiffs recognize (*id.*), "[t]he merits question in this case is" the *constitutionality* of the Offset Provision. The meaning of the Offset Provision is not the "merits" question; it is a predicate for plaintiffs' jurisdictional and merits arguments. There is no jurisdiction over a challenge to an imaginary statute.

Plaintiffs also cannot create a justiciable controversy over the Offset Provision by stating (Br. 16-19) 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 are traceable not to the Offset Provision but to a distinct provision requiring States that accept Fiscal Recovery Funds to "provid[e] a detailed accounting of," among other things, "all modifications to [their] tax revenue sources during the covered period." 42 U.S.C. § 802(d)(2)(A). Plaintiffs do not contend that that reporting requirement exceeds Congress's Spending Clause authority.[1]

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE MERITLESS

A. The Offset Provision Is Not "Unconstitutionally Ambiguous"

Plaintiffs' "ambiguity"-based argument rests on a basic misunderstanding of the Supreme Court's precedents. Neither the Supreme Court nor any other court of which

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

we are aware has declared any other funding condition to be "unconstitutionally ambiguous" in the abstract, as a facial matter. Rather, the Supreme Court and other courts, including this one, have relied on the clear-statement principle as a tool of statutory interpretation, to be used when adjudicating concrete disputes over the application of particular funding conditions.

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 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. This Court has likewise treated the clear-statement requirement for funding conditions as a rule of statutory construction, as explained in several opinions—joined, in combination, by well over a majority of the en banc Court—in *School District of the City of Pontiac*

v. Secretary of the U.S. Department of Education, 584 F.3d 253 (6th Cir. 2009) (en banc). *See id.* at 284 (Sutton, J., concurring) (despite its "constitutional roots," clarity requirement for Spending Clause legislation is a "rule of *statutory* interpretation"); *id.* at 311 (Gibbons, J., concurring in part and dissenting in part) (similar); *id.* at 271-272 (plurality opinion) (applying the rule in this fashion).

Furthermore, the Supreme Court has emphasized that *Pennhurst* "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." *Bennett*, 470 U.S. at 665-666 (emphasis omitted). Indeed, the Supreme Court has noted that "the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of" a funding condition. *Id.* at 669.

This Court has applied that reasoning to reject an argument analogous to the one that plaintiffs assert here. In *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005), Ohio challenged 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). Ohio argued "that Spending Clause legislation requires a level of specificity beyond that applicable to other legislation" and that RLUIPA's "'least restrictive means' standard constituted an ambiguous condition" that

was impermissible under *Pennhurst*. *Cutter*, 423 F.3d at 586 (quotation marks omitted). But this Court disagreed, explaining that "Congress need not 'delineate every instance in which a State may or may not comply with the least restrictive means test.'" *Id.* (quoting *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003)). The Court concluded that RLUIPA's text puts States "'on notice'" of the statutory condition, *id.*, and that "[n]othing more is required under *Pennhurst*, which held that Congress need provide no more than 'clear notice' to the states that funding is conditioned upon compliance with certain standards," *id.* (quoting *Pennhurst*, 451 U.S. at 25). In addition to the Seventh Circuit, whose reasoning this Court followed, the Eighth, Ninth, and Eleventh Circuits reached the same conclusion. *See Van Wyhe v. Reisch*, 581 F.3d 639, 650-651 (8th Cir. 2009); *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002).

The Offset Provision meets that standard: It clearly places States "on notice" that their acceptance of Fiscal Recovery Funds "is conditioned upon compliance with" the requirement not to use those funds to pay for tax cuts. Plaintiffs object that the Offset Provision—as distinct from the Treasury Department's implementing regulations—does not describe precisely how the Department "will determine whether a State indirectly offset its tax credits with [Fiscal Recovery Funds] or with a budget reduction" or specify the "baseline" against which revenue changes will be measured. Br. 40. But those questions do not bear on the nature of the funding condition itself; they are the sort of implementation details that Congress routinely leaves for agencies to resolve by

regulation. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (deferring to regulation establishing conditions on funding under the Aid to Families with Dependent Children program); *Harris v. Olszewski*, 442 F.3d 456, 467-468 (6th Cir. 2006) (deferring to regulations implementing the Medicaid program); *United States v. Miami Univ.*, 294 F.3d 797, 814-815 (6th Cir. 2002) (deferring to regulations implementing conditions on federal education funds). To insist that Congress itself specify details like that would be to demand, contrary to *Cutter*, that Congress "'delineate every instance in which'" the statutory condition would be violated. 423 F.3d at 586. *Cutter* rejected the argument "that Spending Clause legislation 'requires a level of specificity beyond that applicable to other legislation.'" *Id.*

B. The Offset Provision Is Not 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 the plaintiffs' 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. In *NFIB*, the Court concluded that Congress could not make a State's *preexisting* Medicaid funds contingent on the State's expansion of Medicaid eligibility to all low-income adults. *See* 567 U.S. at 580-585 (plurality opinion); *id.* at 681-689 (joint dissent). At the same time, however, the Court held that Congress could make the new funding offered by the Affordable Care Act, which totaled $100 billion dollars, contingent on that expansion

of Medicaid eligibility. *See id.* at 576, 585-586 (plurality opinion); *id.* at 646 (Ginsburg, J., joined by Sotomayor, J., agreeing with this aspect of the plurality opinion); *see also id.* at 687-688 (joint dissent). The Court specifically reaffirmed "Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds," and it observed that *South Dakota v. Dole*, 483 U.S. 203 (1987), had applied a coercion analysis to a condition on federal highway funds only because "the condition was *not* a restriction on how the highway funds … were to be used." 567 U.S. at 580 (plurality opinion) (emphasis added). Other courts have likewise recognized the distinction between conditions on the use of new federal funds (which are permissible) and conditions that seek to leverage a grant of federal funds to require a State to undertake, or prevent it from taking, actions in another sphere. *See, e.g.*, *Gruver v. Louisiana Bd. of Supervisors*, 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 do not contend that they should be free to spend Fiscal Recovery Funds for uses beyond the ones set forth in Section 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 Section 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.

Plaintiffs acknowledge all this (Br. 32) but insist that the Offset Provision is *not* a restriction on the use of Fiscal Recovery Funds. They posit (Br. 35) a hypothetical in

which "a State simultaneously spends Rescue Plan funds on healthcare infrastructure while also providing tax credits to individuals of the same amount and reducing its budget for the department of corrections by the same amount." And they declare that it is "impossible to say" whether this hypothetical implicates the Offset Provision. But as our opening brief explained (at 5), the Offset Provision is not implicated if a State cuts spending to the same extent as it cuts tax revenue. Because the Offset Provision restricts only the *use of Fiscal Recovery Funds* to pay for tax cuts, the Treasury Department has repeatedly recognized that States are free to cut taxes if they pay for those cuts by other means, including spending cuts in areas in which the State is not using the new federal funds. *See Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786, 26,807-808 (May 17, 2021); *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338, 4423-4429 (Jan. 27, 2022).

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

Plaintiffs' anti-commandeering claim (Br. 44-47) adds nothing to their other arguments. Like the coercion claim, it rests on the premise that the Offset Provision "prohibit[s] the States from offering tax relief to their citizens" (Br. 46). But as discussed above, the provision does no such thing. It prevents States only from using Fiscal Recovery Funds to pay for tax cuts.

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 2,674 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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