

NO. 21-6108
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, *et al.*

Defendants - Appellants.

* * *

**RESPONSE IN OPPOSITION TO
MOTION TO HOLD APPEAL IN ABEYANCE**

The Commonwealth of Kentucky and the State of Tennessee oppose the Defendants' motion to hold this appeal in abeyance, and they respectfully ask the Court to deny the motion.

1. This case challenges the constitutionality of part of the American Rescue Plan Act, which prohibits the States from providing tax relief to their citizens for several years if they accept federal relief for the Covid-19 pandemic. *See* 42 U.S.C. § 802(c)(2)(A). The States have raised four independent constitutional defects with the provision, and the district court granted summary judgment in their favor below. It goes without saying that finality about these issues is incredibly important to the States, as

the States must make long-term budgeting and revenue decisions within only a short period of time each year.

2. The Defendants ask the Court to hold this matter in abeyance pending a decision in *Ohio v. Yellen*, No. 21-3787 (6th Cir.), a case that involves overlapping issues. But the Defendants have known about *Ohio* (a case in which they are parties) since the outset of this appeal. In fact, the Defendants identified *Ohio* as a related case in their initial filings with this Court. *See* Civil Appeal Statement of Parties & Issues, Dkt. 10. Yet at no point during the last six months in which the parties briefed this case did the Defendants ask the Court to hold this matter in abeyance. Instead, they waited until the panel assigned the case to its argument calendar to reverse course.

3. It is not clear what changed. For more than six months, the Defendants have moved forward with this case without raising any objection to the Court about briefing or scheduling argument. And as of three weeks ago, the Defendants contemplated having argument next month—asking only that the Court not schedule argument for three particular days. *See* Letter, Dkt. 35. Nothing about the status of *Ohio* has changed in a manner that could explain the Defendants’ sudden objection to allowing the Court to resolve this case on its own merits.

4. In any event, removing the case from the argument calendar would serve no purpose other than to unnecessarily delay a final resolution. The issues are fully briefed, and the case is ripe for argument on those briefs and the record below. If a decision in *Ohio* issues before the argument, the parties can submit supplemental

briefing if necessary. And if no decision has issued in *Ohio*, this Court can make a more informed decision about whether to hold this case in abeyance after it has heard arguments from counsel. Nor would that be a forgone conclusion. The standing issue in this case, for example, differs significantly from that in *Ohio*. Either way, there is no reason to remove this case from the argument calendar indefinitely for a decision that may or may not address the issues necessary for this Court to resolve *this* case.

5. The States have spent significant resources defending their judgment below, and it is important to obtain finality on that judgment as soon as possible. Legislative decisions about budgets and revenue are complicated, and the States have only a limited window in which to make those decisions each year. Delaying this case indefinitely only prolongs the uncertainty that the States face.

6. The Court should deny the Defendants' motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this response complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(A) because it contains 552 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond font using Microsoft Word.

s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on June 3, 2022, the foregoing was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the same was automatically served on all parties registered with the CM/ECF system on the same date.

s/ Brett R. Nolan