Case 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

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:21-cv-00017

SUPPLEMENTAL BRIEF FOR THE COMMONWEALTH OF KENTUCKY AND STATE OF TENNESSEE

DANIEL CAMERON
Attorney General
of Kentucky
MATTHEW F. KUHN
Solicitor General
BRETT R. NOLAN
Principal Deputy Solicitor General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Brett.Nolan@ky.gov

HERBERT H. SLATERY III
Attorney General and Reporter
of Tennessee
ANDRÉE S. BLUMSTEIN
Solicitor General
BRANDON J. SMITH
Assistant Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492

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The Court requested supplemental briefs addressing two questions. The first question assumes that the States are injured because the Tax Mandate "arguably prohibit[s] all future tax cuts after receiving ARPA funds" and asks whether that specific injury is moot in light of the Interim Final Rule and Final Rule (together, the "Rule"). Order, Dkt. 45-2 at 1. The second question assumes that the only constitutional defect in the Tax Mandate is that the phrase "indirectly offset" is ambiguous and asks whether the indirect offset can be severed from the statute. *Id.* at 2. The answers respectively are *no* (the injury is not moot) and *yes* (the unlawful provision can be severed).

I. The Rule did not moot the States' injuries.

Assuming that the States are injured because the Tax Mandate "arguably prohibit[s] all future tax cuts after receiving ARPA funds," the Court asks whether the Rule moots that injury. *Id.* at 1. The answer is no. And that's for two reasons: First, the Rule expressly reserves authority to enforce the law as written—including the Tax Mandate. And second, the Rule does exactly the opposite of what the question suggests: It subjects a State to potential recoupment proceedings "just because a State that has accepted ARPA funds subsequently cuts taxes."[1] *Id.* The

[1] The State, of course, would have to spend the funds, not just accept them. But what it spends those funds on is irrelevant.

only way for a State to avoid that result is by enacting *other* taxing or spending policies to satisfy the Rule—taxing and spending policies the State might not have otherwise adopted. *See* 31 C.F.R. § 35.8(b)(4). Any limit on a State's ability to set its own tax policies is an intrusion on its sovereign authority and thus an injury in fact. The Rule does not ameliorate that injury—it perpetuates it.

1. To start, two preliminary matters warrant discussion. Mootness "addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (cleaned up). A case is moot only when the Court's decision will not have any "practical effect" on any of the parties. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (en banc). And the defendant bears the burden of establishing "that a once-live case has become moot." *West Virginia*, 142 S. Ct. at 2607.

Relevant here, mootness is about the Court's jurisdiction to hear a case (or claim), not a question about particular injuries. *See Resurrection Sch.*, 35 F.4th at 528. If the Court's decision will have a "practical effect" on one of the parties, the case is not moot. *Id.* So "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 307–08 (2012).

That matters here because, at the very least, Tennessee has "a concrete interest" in avoiding the compliance costs it must expend if the injunction against the Tax Mandate is reversed. *See* Appellees' Br. at 16–19. The Treasury Defendants have no real response to this point. The uncontroverted evidence establishes that Tennessee cannot comply with the Tax Mandate without incurring additional costs. For example, Tennessee must spend resources to fundamentally alter the way its legislature analyzes revenue and spending bills in order to ensure that it does not violate the prohibition on "indirectly offset[ting]" revenue reductions with Rescue Plan funds. [Eley Decl., R.25-3, PageID#229–31 (¶¶ 8) (quoting 42 U.S.C. § 802(c)(2)(A))]. These pocketbook expenses are directly traceable to the Tax Mandate and exist regardless of whether the Rule prohibits the States from cutting taxes at all.

The Treasury Defendants have no answer to that. They instead mischaracterize Tennessee's costs as *reporting* costs—without explanation. *See* Reply Br. at 4. But the evidence establishes that Tennessee will incur costs directly traceable to the Tax Mandate that are independent of any reporting costs and independent of costs necessary to comply with the Rule.[2] Appellees' Br. at 16–19; [*compare* Eley Decl., R.25-3, PageID#229–32 (¶¶ 5, 6, 8), *with id.* at PageID#230–32 (¶¶ 7, 9)]. That alone establishes Article III standing. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). And so the effect of the Rule has no bearing on whether this case is moot.

As for the second preliminary point: The Court's order asks the parties to assume the States suffer a very specific injury: that the Tax Mandate "could at least arguably prohibit all future tax cuts." Order, Dkt. 45-2 at 1. The States, however, have never argued the injury to their sovereign taxing authority only arises if the Tax Mandate could prohibit *all* future tax cuts. True, that kind of restriction injures the States. But the injury here is much broader. As explained in the States' merits brief, the States are injured because the Tax Mandate "limits the range of policy options available to the States." Appellees' Br. at 20–21. That's true even if the Tax Mandate only limits *some* of the policy options available because any restriction on the "sovereign interests and traditional prerogatives" of a State constitutes an injury in fact. *Kentucky v. Biden*, 23 F.4th 585, 602 (6th Cir. 2022).

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[2] As explained in the States' Rule 28(j) letter from May 20, 2022, that fact also distinguishes this case from the Ninth Circuit's analysis of Arizona's administrative costs in *Arizona v. Yellen*, No. 21-16227, 2022 WL 1574217, at *5 (9th Cir. May 19, 2022).

2. Turning to the precise question the Court asked, the injury of the Tax Mandate "arguably prohibit[ing] all future tax cuts" did not become moot after Treasury promulgated the Rule. That's because the Rule expressly reserves the Secretary's authority to enforce the Tax Mandate regardless of the specific provisions in the Rule. 31 C.F.R. § 35.4(a). The Rule protects the "authority of the Secretary to take action to enforce conditions or violations of law." *Id.* It expressly states that "[n]othing" in the Rule (which includes its interpretation of the Tax Mandate) "shall limit" the Secretary's authority. *Id.*

And this is consistent with Treasury's commentary in the Interim Final Rule, which provided the Secretary with virtually limitless discretion to decide whether the States had engaged in "an evasion of the restrictions of the offset provision and seek recoupment of such amounts." Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26,810 (May 17, 2021). So even if the Rule could be interpreted as clarifying that Treasury does not intend to initiate recoupment just because a State cuts taxes, it walks back any such clarification by reserving the right to enforce the statute regardless of the regulation if the Secretary deems it necessary.[3]

[3] It is worth reiterating that although the Rule may affect the injury analysis under Article III, it has no bearing on the merits. Treasury conceded as much below:

3. Even putting Treasury's reservation of rights aside, the States' injuries are not moot. That's because nothing in the Rule prevents recoupment against a State just for cutting its taxes. In fact, the opposite is true. If a State spends Rescue Plan funds and simultaneously establishes a tax cut that lowers its revenue *and does nothing else*, Treasury can seek recoupment under the Rule. And so the State would be subject to recoupment if it spends Rescue Plan funds and "subsequently cuts taxes." Order, Dkt. 45-2 at 1.

The only way to avoid it, according to Treasury, is for the States to do *something else*—either raise other taxes or lower expenditures elsewhere in the budget to offset their revenue reduction. *See* 31 C.F.R. § 35.8. But that *something else* is precisely the problem. Without the Tax Mandate, the States are free to enact their own taxing policies. *See* Appellees' Br. at 20–21. But with the Tax Mandate, any State wishing to cut taxes while also spending Rescue Plan funds must enact other

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rulemaking cannot cure the Tax Mandate's constitutional deficiencies. [Mot., R.31, PageID#360 ("[A]gency regulations should have no bearing on the Spending Clause analysis.")]. And that is correct. *See, e.g.*, *Commonwealth of Va., Dep't of Educ. v. Riley*, 106 F.3d 559, 561, 567 (4th Cir. 1997) (en banc).

policies (that it would otherwise not choose) to avoid Treasury deeming the Rescue Plan funds an "indirect[] offset" of the tax reduction. 42 U.S.C. § 802(c)(2)(A). And *that* is an injury to the States' sovereign interests.[4]

The Rule, in other words, does not foreclose a recoupment proceeding "just because" a State cuts taxes after spending Rescue Plan funds. Order, Dkt. 45-2 at 1. To avoid that recoupment, the Rule requires a State to balance its budget in a specific way—that is, by ensuring that every kind of revenue adjustment that Congress deems a tax cut is offset by a different State policy that Treasury has approved of (higher taxes or budget cuts).

Of course, most States do balance their budgets. But whether *and how* they do so is a policy decision for the sovereign, not Treasury. *See* Appellees' Br. at 20. Absent the Tax Mandate, the States are free to balance their budgets in a way that is different than what is required by the Rule (or the Tax Mandate). And so the Rule, although it purports to allow the States to enact tax cuts, comes with strings: The States must surrender their policymaking prerogatives and adopt the federal

[4] The States, of course, are not arguing that the federal government can never require the States to surrender their policymaking authority as a condition on spending. But the federal government must do so in a constitutional way. So *if* the Tax Mandate is an unconstitutional spending condition (a merits question), then the States are injured by *any* restriction on their ability to enact their preferred tax policies.

government's view of a revenue-neutral budget if they want to reduce the tax burden on their citizens.

Tennessee crystallizes this problem. Like most States, Tennessee balances its budget—just not in the way required by the Tax Mandate or the Rule. [Eley Decl., R.25-3, PageID#230 (¶ 6)]. Specifically, in balancing its budget, Tennessee does not calculate revenue losses from bills resulting in "forgone" revenue—such as those that delay imposition of a scheduled tax increase. [Eley Decl., R.25-3, PageID#230 (¶ 6)]. But the Tax Mandate specifically requires States to include any change that "delays the imposition of any tax or tax increase." 42 U.S.C. § 802(c)(2)(A). So when Tennessee balances its budget free from the constraints of the Tax Mandate, Tennessee can delay a tax increase without having to raise other taxes or lower expenditures. But under the Rule, Tennessee would be subject to recoupment if it enacted such a tax measure without doing anything else. In other words, Tennessee would face recoupment "just because" it spends Rescue Plan funds and "subsequently cuts taxes" by delaying a tax increase. Order, Dkt. 45-2 at 1.

Said another way: Without the Tax Mandate, Tennessee can change its tax policy by eliminating a scheduled tax increase without having to cut spending to balance its budget. But with the Tax Mandate—and under the Rule—if Tennessee enacts that same tax policy, Tennessee must do something else (such as cutting expenditures) to avoid recoupment. If it does not act in such a manner, Tennessee will be subject to a "recoupment action[] just because" it has spent Rescue Plan funds and "subsequently cut taxes." Order, Dkt. 45-2 at 1. And the only way to avoid the possibility of recoupment is to take further action—to enact taxing and spending policies that Tennessee otherwise would not enact. So, at a minimum, the Rule in no way moots the harm to the States' "sovereign interests and traditional prerogatives" caused by the Tax Mandate. *Kentucky*, 23 F.4th at 602.

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A case remains live as long as there would be *some* "practical effect" from the Court's ruling, *Resurrection Sch.*, 35 F.4th at 528, no matter how small, *Knox*, 567 U.S. at 307–08. Even assuming that the only concrete injury in this case is the harm caused by the Tax Mandate arguably prohibiting the States from enacting any tax cuts, the Rule does not extinguish that harm.

II. If the only constitutional defect in the Tax Mandate is the "indirectly offset" provision, those words can be severed.

The Court next asked whether, assuming that only the indirect offset portion of the Tax Mandate is unconstitutionally ambiguous, the indirect offset portion could be severed. Order, Dkt. 45-2 at 1. For clarity, the Tax Mandate is unconstitutional for other reasons as well, and those other reasons render the entire provision unenforceable.[5] But the States interpret this question as asking what should happen if the Court finds that the only constitutional defect is that the phrase "indirectly offset" is unconstitutionally ambiguous. In such a case, the indirect-offset provision should be severed from the rest of the Tax Mandate.

When some provision of a law is determined to be unconstitutional, severability analysis looks first to whether Congress included a severability or nonseverability clause. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality op.). If so, the court should "hew closely to the text of the severability or nonseverability clause[]." *Id.* (citations omitted). If no such clause exists, however, the Court should find the remaining provisions unconstitutional only if it is "evident that Congress would not have enacted those provisions which are within its power, independently of those which are not."' *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (cleaned up). When Congress has not included a severability clause, the court "presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute," and so tries to limit the solution to the constitutional problem by not invalidating any

[5] The entire Tax Mandate is unconstitutionally coercive, Appellees' Br. at 29, and unconstitutional under the anti-commandeering principles of the Tenth Amendment, *id.* at 44. The phrase "reduction in the net tax revenue . . . resulting from a change in law" is also unconstitutionally ambiguous and is not severable.

more of the law than is necessary to solve the problem. *Barr*, 140 S. Ct. at 2350 (plurality op.).

Here, the Rescue Plan does not include a severability provision, *see* Pub. L. No. 117-2, and so, given the presumption in favor of severability, the question is whether the Congress would have enacted the Tax Mandate without the provision prohibiting indirect offsets.

Under this test, the States cannot say that Congress would have failed to enact the Tax Mandate without the indirect offset. The States do not know of any evidence that would answer this "nebulous inquiry into hypothetical congressional intent." *Murphy*, 138 S. Ct. at 1486 (Thomas, J. concurring) (citation omitted). Instead, it should suffice to note that reading the Tax Mandate without the indirect offset provision produces a requirement that is facially operational: "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 [] directly [] offset a reduction in the net tax revenue . . . ." 42 U.S.C. § 802(c)(2)(A) (indirect offset portions omitted). Assuming that the rest of this provision is constitutional, the language reads as an enforceable provision. And so the unconstitutional provision is severable.[6]

[6] Recently, a plurality of the Supreme Court has rephrased the severability inquiry to return to the "traditional rule." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140

Respectfully submitted by,

s/ Brett R. Nolan
DANIEL CAMERON
Attorney General
of Kentucky
MATTHEW F. KUHN
Solicitor General
BRETT R. NOLAN
Principal Deputy Solicitor General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Brett.Nolan@ky.gov

s/ Andrée S. Blumstein (w/ permission)
HERBERT H. SLATERY III
Attorney General and Reporter
of Tennessee
ANDRÉE S. BLUMSTEIN
Solicitor General
BRANDON J. SMITH
Assistant Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492

S. Ct. 2183, 2209 (2020) (plurality op.) (citation and quotation marks omitted). Instead of asking whether Congress would have passed the bill without the unconstitutional provisions, the Supreme Court "presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute." *Barr*, 140 S. Ct. at 2350 (plurality op.). The remaining provisions are still enforceable "unless the statute created in its absence is legislation that Congress would not have enacted." *Seila Law*, 140 S. Ct. at 2209 (plurality op.) (quotation marks omitted). Any daylight between these two standards does not matter here. There is no basis to conclude that Congress would not have passed the Tax Mandate without the indirect offset provision.

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the Court's order requesting supplemental briefing because it contains 2,717 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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 a proportionally spaced typeface, Garamond, in 15-point font using Microsoft Word.

s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on July 18, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Brett R. Nolan