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

SUPPLEMENTAL BRIEF FOR APPELLANTS

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The government respectfully responds below to the two questions posed by the Court in the July 12 order.

Question 1: Assuming the States had standing when the complaint was filed on the ground that the Offset Provision could at least arguably prohibit all future tax cuts after receiving ARPA funds on the theory that money is fungible, did that alleged injury nonetheless become moot when the Treasury Department promulgated its Interim Final and Final Rules clarifying its view that the Offset Provision does not prohibit tax cuts per se, and that it does not intend to initiate recoupment actions just because a State that has accepted ARPA funds subsequently cuts taxes?

Yes, this alleged injury became moot when the Treasury Department confirmed in its Interim Final and Final Rules that the Offset Provision does not prohibit tax cuts per se, and that the Treasury Department does not intend to initiate recoupment actions just because a State that has accepted ARPA funds subsequently cuts taxes.

The Treasury Department's rules recognize important circumstances in which tax cuts do not implicate the Offset Provision and thus do not provide a basis for recoupment. For example, if revenue lost due to tax cuts is offset by revenue gained due to economic growth, there is no reduction in net tax revenue and thus no basis for recoupment. *See* 87 Fed. Reg. 4338, 4427 (Jan. 27, 2022) ("Safe harbor").[1] Furthermore, even if tax cuts result in a reduction in net tax revenue, there is no violation if the State offsets that reduction by cutting its expenditures in areas where it is not spending ARPA

[1] The Final Rule and Interim Final Rule are materially identical in relevant respects. For simplicity, we cite the Final Rule.

funds. *See id.* ("Covered spending cuts"). Thus, a unanimous panel of the Eighth Circuit recently affirmed the dismissal of Missouri's similar suit, reasoning that "[t]he Offset Restriction simply prohibits states from cutting taxes in a way that reduces net revenue more than a de minimis amount and then failing to account for that reduction through non-ARPA sources, such as through organic economic growth, increases in revenue from other sources, or spending cuts in sectors not related to ARPA." *Missouri v. Yellen*, __ F.4th __, 2022 WL 2719929, at *4 (8th Cir. July 14, 2022) (citing 31 C.F.R. § 35.8(b)).

There is accordingly no plausible basis for a State to fear that the Treasury Department will regard the Offset Provision as prohibiting tax cuts per se. Assuming *arguendo* that plaintiffs could originally have premised standing on that theory, that fear has since been dispelled and the alleged injury is moot. Like Missouri, plaintiffs here are seeking "a quintessential advisory opinion" to enjoin "a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without alleging any concrete, imminent injury from the Secretary's actual interpretation." *Missouri*, 2022 WL 2719929, at *4.[2]

[2] Of course, we do not concede that the Offset Provision could reasonably have been read to prohibit tax cuts per se. On the contrary, the Treasury Department's regulations flow naturally from the Offset Provision's plain text. However, we have accepted the premises of the Court's questions for purposes of this supplemental brief.

Question 2: Assuming that only the "indirectly offset" portion of the Offset Provision is unconstitutionally ambiguous, could that portion of the Offset Provision be severed from the statute, leaving the remainder of the Offset Provision enforceable?

If the Court concludes that this case is justiciable and that the "indirectly offset" language is unconstitutionally ambiguous, the Court should sever the phrase "either directly or indirectly" and leave the remainder of the Offset Provision enforceable. Severing "or indirectly" alone would do unnecessary "damage to Congress's work," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2210 (2020) (plurality op.)

The phrase "directly or indirectly"—which appears more than a thousand times in the U.S. Code and in many state statutes—is commonly used simply to underscore that a restriction cannot be circumvented through formalities. For instance, a court observed that a Connecticut law governing the solicitation of charitable funds used the phrase "directly or indirectly" in order "to sweep within its ambit both straightforward requests for money—*e.g.*, 'Would you like to donate?'—and less straightforward requests—*e.g.*, 'The organization is happy to accept donations.'" *Kissel v. Seagull*, 552 F. Supp. 3d 277, 286 (D. Conn. 2021). As our briefs explain, that is how Congress used the phrase in the Offset Provision: to make clear that the restriction encompasses not only the express use of ARPA funds to pay for a state tax cut but also evasion of that restriction through budget artifices, such as by using ARPA funds to replace state expenditures by a particular state agency and using the saved state funds to pay for a tax cut.

Plaintiffs have never argued that States have a constitutional right to use ARPA funds to pay for tax cuts, nor have they argued that the Constitution limits Congress to forbidding only "direct" offsets. Rather, their constitutional challenges rest on the premise that—because the Offset Provision contains the phrase "'either directly or indirectly offset"'—it can "plausibl[y]" be "read … as prohibiting the States from enacting tax relief during the covered period." Br. 38.

Our briefs explain that this broad reading is contrary to the statute's text. And if the Court has any doubt on that point, it could simply impose a narrowing construction that holds as a matter of statutory interpretation that the Offset Provision does not forbid tax cuts per se. But if the Court nonetheless concludes that the statute as enacted is unconstitutional, the Court could cure the alleged problem by severing the phrase "either directly or indirectly" and thereby eliminating the possibility that the Offset Provision could be read to prohibit all tax cuts, as opposed to simply preventing the use of ARPA funds to pay for tax cuts.

"'[W]hen confronting a constitutional flaw in a statute,'" a court must "'try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.'" *Seila Law*, 140 S. Ct. at 2209 (plurality op.) (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010)). "Even in the absence of a severability clause, the 'traditional' rule is that 'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.'" *Id.* (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)); *see*

also id. at 2224 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in the judgment with respect to severability). Severing the phrase "either directly or indirectly" would be consistent with that approach: it would eliminate the asserted constitutional problem while avoiding "regulatory disruption" or doing "appreciable damage to Congress's work." *Id.* at 2210 (plurality op.). If the "either directly or indirectly" phrase were severed, the Offset Provision could not be read (as plaintiffs assert it now can) to forbid all tax cuts, but the Offset Provision would still properly be applied to forbid not just the express use of ARPA funds to pay for a state tax cut but also the evasion of that prohibition through the budget artifices described above. By contrast, severing only the "indirectly" language could give the mistaken impression that only explicit offsets are forbidden—an interpretation that would permit easy circumvention of the statutory restriction and that Congress would not have intended.

In short, severing the phrase "either directly or indirectly" in the Offset Provision would be both more responsive to the argument that plaintiffs advance and more faithful to Congress's intent, while eliminating any conceivable ambiguity as to whether the statute prohibits state tax cuts per se.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit set by the Court's July 12 order because it contains 1,289 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 Word for Microsoft 365 in 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
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