No. 21-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,

Plaintiff-Appellee,

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 Southern District of Ohio

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rule:

Other Authorities:

STATEMENT REGARDING ORAL ARGUMENT

The federal government respectfully requests oral argument. The district court permanently enjoined the federal government from enforcing against Ohio the provision of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, that prohibits a State from using the new federal funds provided by the Act to offset a reduction in the State's net tax revenue. Oral argument is warranted given the importance of the issue.

STATEMENT OF JURISDICTION

Ohio invoked the district court's jurisdiction under 28 U.S.C. § 1331. Complaint ¶ 10, RE1, PageID #3. The district court entered final judgment in Ohio's favor on July 1, 2021. RE57, PageID #1018. The federal government timely appealed from that judgment on August 27, 2021. RE59, PageID #1096; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The American Rescue Plan Act provided nearly $200 billion in federal grants to help States mitigate the fiscal effects of the COVID-19 pandemic. 42 U.S.C. § 802(a)(1). The Act gives States considerable flexibility in determining how to use these new federal funds but specifies that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from changes in state tax law during the covered period. *Id.* § 802(c)(2)(A) (the "Offset Provision"). The district court permanently enjoined the federal government from enforcing the Offset Provision against Ohio, on the theory that it is "unconstitutionally ambiguous." The questions presented are:

1. Whether the district court's judgment should be reversed because Ohio's suit does not present a concrete controversy.

2. Whether, assuming the district court had jurisdiction, its judgment should be reversed on the merits.

STATEMENT OF THE CASE

A. Statutory Background

In the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, Congress created a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. § 802. The Fund provides nearly $200 billion in new federal grants to help States and the District of Columbia mitigate the fiscal effects of the COVID-19 pandemic. *Id.* § 802(a)(1); *see id.* § 803(b)(3)(A). Section 802 allows States to use Fiscal Recovery Funds to cover broadly defined categories of costs incurred through 2024, including to provide assistance to households, businesses, and industries affected by the pandemic; to provide premium pay to workers performing essential work during the pandemic; to pay for state government services to the extent of revenue losses due to the pandemic; and to make necessary investments in water, sewer, or broadband infrastructure. *Id.* § 802(c)(1).

In addition to identifying the permissible uses of Fiscal Recovery Funds, Section 802 includes two "[f]urther restrictions" on the use of the funds. 42 U.S.C. § 802(c)(2). One is that a State may not deposit the funds into a pension fund. *Id.* § 802(c)(2)(B). The other, at issue here, is that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from a change in state law during a covered time period. *Id.* § 802(c)(2)(A).[1]

[1] The covered period began on March 3, 2021 and ends on the last day of the state fiscal year "in which all funds received by the State … have been expended or returned to, or recovered by," the Treasury Department. 42 U.S.C. § 802(g)(1).

A State can receive its federal grant after providing "a certification" that it "requires the payment … to carry out the activities specified in" § 802(c) and that it "will use any payment … in compliance with" that provision. 42 U.S.C. § 802(d)(1). If a State uses its Fiscal Recovery Funds for impermissible purposes, it may be required to repay an amount equal to the funds misused. *Id.* § 802(e).

B. Implementing Regulations

Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802, which established the Fiscal Recovery Fund. 42 U.S.C. § 802(f). In May 2021, the Department issued an interim final rule detailing how it would implement the statutory conditions on the use of Fiscal Recovery Funds, including the Offset Provision. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) (codified at 31 C.F.R. § 35.1 *et seq.*); *see id.* at 26,815.

C. This Action

Ohio brought this action in March 2021, shortly after the enactment of the American Rescue Plan Act. The complaint alleged that the Offset Provision—which Ohio dubbed the "Tax Mandate"—"effectively prohibits reductions in taxes: any State that reduces taxes, and that experiences a loss in tax revenue, is subject to having billions of dollars in federal funding recouped by the Department of the Treasury." Complaint ¶ 6, RE1, PageID #2. Ohio challenged the constitutionality of the so-called Tax Mandate on various grounds and moved for a preliminary injunction. The district court

denied that motion because Ohio failed to identify any harm that the Offset Provision would cause during the pendency of proceedings. *Ohio v. Yellen*, 2021 WL 1903908 (S.D. Ohio May 12, 2021).

Ohio then submitted a signed certification to the Treasury Department under 42 U.S.C. § 802(d), agreeing to use its Fiscal Recovery Funds in accordance with Section 802 and the Treasury Department's implementing regulations and guidance. *See* First Decl. of Kimberly Murnieks ¶ 3, RE38-1, PageID #603. Ohio was allotted approximately $5.4 billion in Fiscal Recovery Funds, Second Decl. of Kimberly Murnieks ¶ 3, RE48-1, PageID #778, and received its first tranche of funds on May 18, First Decl. of Kimberly Murnieks ¶ 6, RE38-1, PageID #604.

The next day, Ohio moved for a permanent injunction to block the Treasury Department from enforcing Section 802's Offset Provision against Ohio. The district court granted that permanent injunction. *Ohio v. Yellen*, 2021 WL 2712220 (S.D. Ohio July 1, 2021). In concluding that there was an Article III controversy, the district court noted that Ohio had recently enacted a $1.6 billion tax cut and reasoned that "the Secretary certainly *could* conclude that this tax cut gives rise to a right to recoupment under the statute." *Id.* at *9. Addressing the merits, the court ruled that the Offset Provision is "unconstitutionally ambiguous" without implementing regulations, *id.* at *21, and the court interpreted Section 802's express grant of rulemaking authority to exclude the Offset Provision, *see id.* at *15-20.

SUMMARY OF ARGUMENT

In the American Rescue Plan Act, Congress offered Ohio more than $5 billion in new federal funds to help mitigate the effects of the pandemic. The statute gives the State considerable flexibility to use these federal funds for a range of specific purposes, but the Offset Provision specifies that the funds may not be used to directly or indirectly offset a reduction in a State's net tax revenue. The district court permanently enjoined the federal government from enforcing the Offset Provision against Ohio on the theory that the statutory provision is "unconstitutionally ambiguous."

The district court's injunction rests on a series of independent legal errors. As a threshold matter, Ohio failed to establish a concrete controversy over the Offset Provision. As other courts addressing analogous challenges have emphasized, the Offset Provision does not prohibit state tax cuts; it merely prohibits a State from *using the new federal funds* to pay for 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 is not implicated. Ohio's recent tax cut does not itself contravene the Offset Provision, and Ohio did not claim that it intends to use its new federal grant for purposes other than those permitted by Section 802(c). There is accordingly no live controversy supporting Article III jurisdiction.

Assuming the merits are presented, the Offset Provision is an unremarkable exercise of Congress's power to establish the permissible uses of federal grants. Its provision that Fiscal Recovery Funds may not be used to pay for tax cuts is a corollary to the list of uses to which the funds *may* be put. Congress unquestionably has authority to specify the permissible and impermissible uses of Fiscal Recovery Funds. And this Court and the Supreme Court have long 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); *see, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) (explaining that "the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of" a grant program).

The district court compounded its errors by declaring that the Treasury Department's regulations cannot address details such as the baseline against which a reduction in net tax revenue is measured. Congress expressly authorized the Treasury Department to issue regulations implementing Section 802, and there is no basis to exclude Section 802's Offset Provision from that express grant of rulemaking authority.

STANDARD OF REVIEW

The district court's permanent injunction presents issues of law that are reviewed de novo by this Court. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 428 (6th Cir. 2020).

ARGUMENT

I. OHIO FAILED TO ESTABLISH AN ARTICLE III CONTROVERSY

The premise of this suit is that the Offset Provision—which Ohio dubbed the "Tax Mandate" —"effectively prohibits reductions in taxes: any State that reduces taxes, and that experiences a loss in tax revenue, is subject to having billions of dollars in federal funding recouped by the Department of the Treasury." Complaint ¶ 6, RE1, PageID #2.

That premise is contrary to the Offset Provision's plain text, as other courts addressing analogous challenges have explained. The Offset Provision "'does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue.'" *Missouri v. Yellen*, 2021 WL 1889867, at *4 (E.D. Mo. May 11, 2021), *appeal pending*, No. 21-2118 (8th Cir.). The court considering Arizona's challenge accordingly recognized that Arizona's recent enactment of "a $1.9 billion tax cut" did not contravene the Offset Provision, in the absence of a showing that the State "used [federal] funds to supplement a reduction in its net income." *Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021), *appeal pending*, No. 21-16227 (9th Cir.). Likewise, the court considering Missouri's challenge emphasized that "Missouri's sovereign power to set its own tax policy is not implicated by the" Offset Provision, which leaves the "Missouri legislature … free to propose and pass tax cuts as it sees fit." 2021 WL 1889867, at *4.

Like Arizona and Missouri, Ohio did not show that it intended to take concrete actions that would contravene the Offset Provision. And like the lawsuits brought by those States, this case should be dismissed for lack of Article III jurisdiction. As in those cases, Ohio claimed that there is a risk that the Treasury Department will take future action to enforce the Offset Provision against the State. But when a plaintiff seeks to challenge the "threatened enforcement of a law," as opposed to actual enforcement, Article III's "injury-in-fact requirement" demands that the plaintiff "allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,'" and "'a credible threat'" that the statute will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) ("[T]hreatened injury must be 'certainly impending.'").

Like the other States, Ohio made no such showing. Although Ohio recently enacted a tax cut, Ohio (like Arizona) did "not even claim the tax cut will result in a reduction" of its net revenue, *Arizona*, 2021 WL 3089103, at *5, much less that it will use Fiscal Recovery Funds to pay for any such reduction. On the contrary, Ohio's public records suggest that its recent tax cut may well be offset by state revenue derived from macroeconomic growth.[2] And as the Treasury Department has emphasized, the

[2] *See* Ohio Legis. Budget Off. of the Legis. Serv. Comm'n, Table 1A – *Historical GRF Revenue, FY 1975–FY 2021* (July 13, 2021), https://perma.cc/JCA7-JHXT; Ohio Off. of Budget & Mgmt., *Governor DeWine's Executive Budget Proposal: Fiscal Years 2022*

Offset Provision is not implicated if state tax cuts are offset by revenue derived from macroeconomic growth, increases in other taxes, or spending cuts in areas where the State is not spending Fiscal Recovery Funds. *See Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786, 26,810 (May 17, 2021).

Thus, nothing in the record showed that Ohio's actions will not comply with the Offset Provision's restriction on the use of federal funds. Because Ohio failed to show how the Offset Provision "could apply to its recent tax cuts, it has not shown a realistic danger of sustaining a direct injury as a result of" the Offset Provision's "enforcement." *Arizona*, 2021 WL 3089103, at *5.

The district court here did not conclude otherwise. Instead, it premised Ohio's standing on the possibility that uncertainty regarding the Offset Provision "cast a pall over legislators' abilities to contemplate … tax changes." 2021 WL 2712220, at *7. But the district court itself regarded that theory of injury as "barely" sufficient to "clear[] the standing hurdle" and noted "that legitimate questions could be raised as to whether such an injury was 'concrete and particularized,' as opposed to intangible or amorphous." *Id.* at *6. And the theory is belied by the uncontested facts: despite the claimed uncertainty, Ohio enacted a budget including $2 billion in tax cuts. *See* Gov. Mike DeWine, *Bipartisan Stage Budget Invests in Ohio's Future and Cuts Taxes* (July 1, 2021),

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and 2023, at 6 (June 17, 2021), https://perma.cc/86R3-8SFV; Ohio Legis. Serv. Comm'n, *Baseline Forecast of GRF Tax Revenues and Medicaid Expenditures for the FY 2022-FY 2023 Biennial Budget*, attach. 1 (June 17, 2021), https://perma.cc/UE4T-DBXB.

https://perma.cc/Z28Y-7VG8. Ohio identifies nothing in the record suggesting that the Offset Provision played any role in state legislators' enactment of that budget. Vague allegations that the Offset Provision "subject[s] the State to the risk that it may be made to return funding to the federal government," Complaint ¶ 12, RE1, PageID #3, cannot establish standing without concrete facts showing why the funding is at risk. Ohio's "purported injuries to legislative proceedings and the prospect of recoupment of federal recovery funds are too abstract and remote" to establish a justiciable controversy. *Missouri*, 2021 WL 1889867, at *5.

The district court should have heeded the limits on its jurisdiction. "'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Clapper*, 568 U.S. at 408. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches," and the standing inquiry is "'especially rigorous when reaching the merits of the dispute would force'" a court "'to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Id.* To "determine the scope of the" Offset Provision in a "hypothetical context" is not a "'proper exercise of the judicial function.'" *Missouri*, 2021 WL 1889867, at *5.

Dismissing this suit for lack of jurisdiction will not deprive Ohio of an opportunity to seek relief if it is ever actually harmed by the funding conditions. If a concrete

dispute over allegedly misused Fiscal Recovery Funds were to arise, Ohio could assert its challenge at that time. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 658 (1985) (explaining that "the dispute is whether the Secretary correctly demanded repayment based on a determination that Kentucky violated requirements that Title I funds be used to supplement, and not to supplant, state and local expenditures for education"); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985) (dispute arose from the Secretary's final decision ordering repayment of specified federal education funds).

II. OHIO'S CHALLENGE TO THE OFFSET PROVISION IS MERITLESS

A. The Offset Provision Is A Proper Exercise Of Congress's Power To Specify The Uses Of Federal Grants

Assuming the district court had jurisdiction, its permanent injunction should be reversed on the merits. The Offset Provision is a familiar exercise of Congress's authority to determine the purposes for which federal grants may be used. In Section 802, Congress appropriated hundreds of billions of dollars to help States mitigate the fiscal impacts of the pandemic. Congress identified broad categories of permissible uses of these federal funds, such as providing assistance to households and businesses affected by the pandemic and providing premium pay to workers performing essential work during the pandemic. And Congress placed certain limited restrictions on the uses of these federal funds, including that they may not be used to directly or indirectly offset a reduction in a State's net tax revenue resulting from changes in state law during the covered period. The limited restriction that Fiscal Recovery Funds may not be used to

pay for tax cuts is a corollary to Section 802(c)'s identification of purposes for which the funds *may* be used, and serves to reinforce the boundaries of permissible uses.

As explained above, the Offset Provision "'does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue,'" *Missouri*, 2021 WL 1889867, at *4—that is, to use federal funds to pay for a tax cut. The Offset Provision is therefore not implicated if a State that accepts the funds offsets tax cuts with increases in other taxes, revenue derived from macroeconomic growth, or spending cuts in areas where the State is not spending Fiscal Recovery Funds. *See supra* pp. 7-9. The district court was thus wrong to suggest that, "[b]ased on the [Offset Provision's] language, the Secretary could deem essentially *any* reduction in the rate of any one or more state taxes—even if other tax rates were increased—to be a 'change in [tax] laws' that results in an 'indirect[] offset [of] a reduction in [Ohio's] net tax revenues.'" 2021 WL 2712220, at *15. By its plain terms, the Offset Provision is simply a restriction on the use of federal funds. *See* 42 U.S.C. § 802 ("Further restriction on use of funds").

Congress unquestionably has authority to specify the permissible and impermissible uses of Fiscal Recovery Funds. 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*, 567 U.S. 519, 580 (2012) (plurality opinion); *see, e.g.*, *South*

Dakota v. Dole, 483 U.S. 203, 206-208 (1987). Congress provided that Fiscal Recovery Funds may be used for various categories of expenditures, but may not be used to fill a revenue hole created by state tax cuts. And Congress permissibly specified that a State cannot circumvent that restriction through indirect means. If (for example) a State were simply to deposit its federal grant into its general treasury in order to fill a revenue hole created by a $2 billion tax cut, the State would be using the federal funds to directly offset a reduction in state tax revenue. Congress permissibly forbade the State from achieving the same result indirectly by reducing the State's own expenditures by $2 billion to offset the tax cut and using $2 billion in federal funds to pay for those expenditures instead. By preventing States from using Fiscal Recovery Funds simply to displace sources of non-federal revenue ordinarily used to pay for state expenditures, the Offset Provision resembles the maintenance-of-effort requirements that are a longstanding feature of Spending Clause legislation. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 659 (explaining that Title I of the Elementary and Secondary Education Act "from the outset prohibited the use of federal grants merely to replace state and local expenditures"); *Mayhew v. Burwell*, 772 F.3d 80 (1st Cir. 2014) (upholding a Medicaid maintenance-of-effort requirement); *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249, 252 (4th Cir. 2013) (describing the maintenance-of-effort requirement in the Individuals with Disabilities Education Act, which generally requires the Secretary to reduce a State's grant by the same amount by which the State has failed to maintain its expenditures for special education for children with disabilities).

The district court did not question Congress's authority under the Spending Clause to condition a grant of federal funds on the recipient's use of those funds for specified purposes. The court nonetheless deemed the Offset Provision "unconstitutionally ambiguous," 2021 WL 2712220, at *21, because Congress did not identify the Offset Provision's "outer contours," *id.* at *15. That reasoning is foreclosed by controlling precedents of the Supreme Court and this Court. In *Bennett v. Kentucky Department of Education*, the Supreme Court emphasized that, "[g]iven the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I" of the Elementary and Secondary Education Act of 1965. 470 U.S. at 669. "Moreover," the Supreme Court observed, "the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." *Id.* Reversing a decision of this Court, the Supreme Court explained that its earlier decision in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)—which had stated that "'Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds'"—"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 v. Kentucky Dep't of Educ.*, 470 U.S. at 665-666 (emphasis omitted) (quoting *Pennhurst*, 451 U.S. at 24).

This Court has applied that reasoning to reject an argument by Ohio that was analogous to the one the district court accepted 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).[3]

This Court rejected Ohio's argument, emphasizing that "Congress need not 'delineate every instance in which a State may or may not comply with the least restrictive means test.'" *Cutter*, 423 F.3d at 586 (quoting *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003)). This Court explained that RLUIPA's text put a State "on notice" of the statutory condition 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

[3] This Court decided *Cutter* on remand from the Supreme Court's decision in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which addressed an Establishment Clause challenge to RLUIPA, *see id.* at 713.

conditioned upon compliance with certain standards." *Id.* (quoting *Pennhurst*, 451 U.S. at 25). In so ruling, this Court followed the reasoning of the Seventh Circuit. The Eighth, Ninth, and Eleventh Circuits reached the same conclusion. *See Wyhe v. Reisch*, 581 F.3d 639, 650-651 (8th Cir. 2009) (explaining that it is "neither feasible nor required" for a statute to "set[] forth every conceivable variation" of how a funding condition is to be applied); *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) ("The federal law in *Pennhurst* was unclear as to whether the states incurred any obligations at all by accepting federal funds, but RLUIPA is clear that states incur an obligation when they accept federal funds, even if the method for compliance is left to the states. *Pennhurst* does not require more."); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (explaining that grant conditions established by statute "may be 'largely indeterminate,' so long as the statute 'provid[es] clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply'" (quoting *Pennhurst*, 451 U.S. at 24-25)).

As the *Arizona* court recognized, the logic of these precedents forecloses the State's challenge to the Offset Provision, where "Congress has done at least as much as it did in RLUIPA" by "ma[king] the existence of the condition upon which [a State] could accept funds 'explicitly obvious.'" *Arizona*, 2021 WL 3089103, at *4. That a State may be "unsure of 'every factual instance' of possible noncompliance does not amount to a violation of Congress' duty." *Id.*

Even though the district court here acknowledged that Congress need not specify with "exactitude" how a condition on federal funds is to be applied, 2021 WL 2712220, at *12, the court made no effort to reconcile its ruling with the Supreme Court and Sixth Circuit precedents discussed above. Matters that the district court perceived as ambiguities—such as the baseline from which to measure whether a State experiences a reduction in its net tax revenue and whether that measurement reflects actual or projected tax revenues, *see id.* at *13—do not affect a State's ability to understand, when it accepts a Fiscal Recovery Fund grant, the existence or basic nature of the funding condition, and they are in any event addressed in the implementing regulations. Requiring Congress to specify details such as these would flout this Court's holding that under Supreme Court precedent, "Congress need not 'delineate every instance in which a State may or may not comply with'" a funding condition; it "need provide no more than 'clear notice' to the states that funding is conditioned upon compliance with certain standards." *Cutter*, 423 F.3d at 586. Moreover, the fact that "direct" and "indirect" offsets are functionally similar is not a flaw or ambiguity in the statute, as the district court believed, 2021 WL 2712220, at *14. By using the phrase "directly or indirectly," Congress simply made clear that the States could not evade the restriction on the use of federal funds through accounting maneuvers that are substantively indistinguishable from a direct offset.

Furthermore, even if there were uncertainty regarding the Offset Provision's "outer contours," 2021 WL 2712220, at *15, that would not provide a basis for the

district court's injunction against enforcement of the Offset Provision on its face. The possibility that a concrete dispute could eventually arise with respect to the application of the Offset Provision to certain expenditures of Fiscal Recovery Funds does not allow a court to preemptively enjoin the application of the Offset Provision to *all* expenditures, including those that clearly violate that provision. In any event, there is no reason to assume that a concrete dispute over the Offset Provision will ever arise: as in *Bennett v. Kentucky Department of Education*, the Fiscal Recovery Fund is an "ongoing, cooperative program," which means that grant recipients have the "opportunity to seek clarification of the program requirements." 470 U.S. at 669.[4]

B. Section 802's Express Grant Of Rulemaking Authority Includes Section 802's Offset Provision

The district court compounded its errors by interpreting Section 802's express grant of rulemaking authority to exclude the Offset Provision from its scope. It is well settled that Congress can assign agencies responsibility to implement federal spending programs. Indeed, the Supreme Court and this Court have given deference to regulations implementing funding conditions, recognizing agencies' authority to fill in the details of Spending Clause legislation. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (giving deference to regulation establishing conditions on funding under the Aid to

[4] The Treasury Department routinely provides grant recipients with technical assistance, *see* 86 Fed. Reg. at 26,817, and also maintains an updated list of responses to frequently asked questions concerning the Fiscal Recovery Fund, *see* Dep't of the Treasury, *Coronavirus State and Local Fiscal Recovery Funds: Frequently Asked Questions*, https://go.usa.gov/xF4k9 (last updated July 19, 2021).

Families with Dependent Children (AFDC) program); *Harris v. Olszewski*, 442 F.3d 456, 467-468 (6th Cir. 2006) (giving deference to regulations implementing the Medicaid program); *United States v. Miami Univ.*, 294 F.3d 797, 814-815 (6th Cir. 2002) (giving deference to regulations implementing conditions on federal education funds).[5]

As the district court recognized, the Treasury Department regulations implementing Section 802 address details of the Fiscal Recovery Fund program, such as the baseline from which to measure whether a State experiences a reduction in its net tax revenue and whether that measurement reflects actual or projected tax revenues. 2021 WL 2712220, at *13. The district court did not suggest (and Ohio did not allege) that these regulations are in any way inconsistent with the Offset Provision's text. And the district court offered no sound basis for interpreting Section 802's express grant of

[5] *See also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-892 (1984) (applying regulations implementing conditions education funds); *Westside Mothers v. Olszewski*, 454 F.3d 532, 544 (6th Cir. 2006) (reversing the judgment of a district court that "ignored the Medicaid Act's implementing regulations"); *Snider v. Creasy*, 728 F.2d 369, 371-373 (6th Cir. 1984) (holding that regulations implementing the AFDC program preempted state law); *Baptist Mem'l Hosp. - Golden Triangle, Inc. v. Azar*, 956 F.3d 689, 692-693 (5th Cir. 2020) (applying Medicaid regulations); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019) (same); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 778-791 (D.C. Cir. 2012) (applying regulations implementing the IDEA).

In *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam), the court held that a regulation implementing the IDEA was contrary to the statute's plain language. *Id.* at 561. There is no such claim in this case. The *Riley* court also suggested in dicta that Spending Clause legislation cannot be implemented by regulations, but that dicta was contrary to the controlling Supreme Court precedent discussed above.

rulemaking authority to exclude the Offset Provision. In Section 802(f), Congress provided that the Secretary of the Treasury "shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. § 802(f). The district court acknowledged that "this section" means Section 802, which established the Coronavirus State Fiscal Recovery Fund. *See* 2021 WL 2712220, at *19 n.8. Thus, by its plain terms, the grant of rulemaking authority encompasses regulations implementing the Offset Provision in Section 802(c)(2).

The district court nonetheless declared that it would not interpret Section 802(f) to encompass regulations implementing the Offset Provision because that provision implicates "billions of dollars in spending each year" and a "core State function, the power to tax." 2021 WL 2712220, at *19 (quotation marks omitted). The court concluded that Congress did not intend to give the Secretary authority to address these matters, which the court described as having "deep 'economic and political significance.'" *Id.* (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)).

Those were not permissible reasons for the court to excise the Offset Provision from the express grant of rulemaking authority in Section 802(f). Section 802 in its entirety implicates billions of dollars in spending each year, because Section 802 provides nearly $200 billion to States and specifies the permissible and impermissible uses of these new federal funds. Yet there is no doubt that Congress authorized the Secretary to issue regulations that implement Section 802. More generally, the federal statutes that provide funding for Medicaid and education programs involve billions of dollars

of spending each year, and, as explained above, the Supreme Court and this Court have long applied regulations implementing those programs. The import of the district court's reasoning seems to be that there is some threshold of monetary significance above which Congress cannot issue express delegations of rulemaking authority to agencies. There is no support for that novel proposition.

The district court's observation that the Offset Provision implicates a "core State function, the power to tax," 2021 WL 2712220, at *19, is likewise no basis to infer that this provision cannot be implemented by regulations. It is common ground that Congress cannot dictate state tax policy, and the Offset Provision does not do so. With the general proviso that States may not use Fiscal Recovery Funds to offset a reduction in their net tax revenue, States are free to structure their tax laws as they choose. As explained above, the Offset Provision's limitation on the use of federal funds is similar to maintenance-of-effort requirements, which ensure that federal grants are used to supplement, rather than supplant, state spending. Although maintenance-of-effort requirements implicate a State's spending power—which, like a State's taxing power, is a core state function—such requirements are unquestionably permissible tools to ensure that the funds appropriated by Congress are used for their intended purposes.

The district court's reliance on *King v. Burwell* was entirely misplaced. In *King*, the Supreme Court rejected the plaintiffs' argument that a provision of the Patient Protection and Affordable Care Act should be interpreted in a way that would destabilize health insurance markets. In so ruling, the Court relied on its prior admonition that

federal courts "cannot interpret federal statutes to negate their own stated purposes," *New York State Dep't of Social Servs. v. Dublino,* 413 U.S. 405, 419-420 (1973) (quoted in *King*, 576 U.S. at 492-493)). Addressing the question whether the Internal Revenue Service (IRS) could (counterfactually) have interpreted that provision in a way that would have destabilized insurance markets, the Supreme Court found it "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *King*, 576 U.S. at 486. If "Congress wished to assign" such "a question of deep 'economic and political significance'" to "an agency," the Court explained, "it surely would have done so expressly." *Id.* at 485 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

That reasoning has no purchase here. The matters addressed by the regulations implementing the Offset Provision, such as the baseline from which a net reduction in tax revenue is measured, and whether the metric relies on actual or projected tax revenues, fall squarely within the Treasury Department's "expertise," *King*, 576 U.S. at 485-486. And in assigning rulemaking authority regarding those matters to the Treasury Department, Congress did exactly what the Supreme Court in *King* said it should do: it assigned the authority "expressly." *Id.* at 485. Moreover, the district court's logic would implicate *any* rule the Treasury Department might promulgate to implement the Fiscal Recovery Fund, because all such rules potentially affect the billions of dollars that Congress appropriated. The district court's interpretation would essentially nullify Section

802(f)'s express grant of rulemaking authority. The Supreme Court, however, has repeatedly held that courts should construe a statute "so that effect is given to all its provisions." *Clark v. Rameker*, 573 U.S. 122, 131 (2014) (quotation marks omitted).

Finally, the district court's observation that a State might in theory have submitted the "certification" required to receive Fiscal Recovery Funds, 42 U.S.C. § 802(d)(1), before the Treasury Department issued regulations implementing that program, *see* 2021 WL 2712220, at *20, is not license to disregard the implementing regulations that are in place when expenditures of Fiscal Recovery Funds are made. Moreover, although the statute did not provide a timeline for state certifications, it did provide a timeline for the Treasury Department to disburse funds: "[t]o the extent practicable, … not later than 60 days after" certification. 42 U.S.C. § 802(b)(6)(A)(i). In effect, then, Congress gave the Treasury Department at least 60 days to promulgate regulations before it would be required to disburse any grants under the Fiscal Recovery Fund. And there is no dispute that Ohio (and every other State) had notice of Treasury's implementing regulations at the time of its "acceptance of federal funds," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

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 6,047 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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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Under Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 1	Complaint	1-12
RE 3	Motion for Preliminary Injunction	24-50
RE 29	Opposition to Motion for Preliminary Injunction	226-264
RE 30	Reply in Support of Motion for Preliminary Injunction	265-292
RE 36	Opinion and Order Denying Motion for Preliminary Injunction	536-570
RE 38	Motion for Permanent Injunction and Declaratory Judgment	574-601
RE 38-1	First Declaration of Kimberly Murnieks and attachments	603-611
RE 45	Motion to Dismiss and Opposition to Motion for Permanent Injunction and Declaratory Judgment	709-745
RE 48-1	Second Declaration of Kimberly Murnieks	778-780
RE 49	Reply in Support of Motion for Permanent Injunction and Declaratory Judgment and Opposition to Motion to Dismiss	781-808
RE 53	Reply in Support of Motion to Dismiss	859-878
RE 56	Opinion and Order Granting Permanent Injunction, Denying Declaratory Judgment, and Denying Motion to Dismiss	969-1017
RE 57	Judgment	1018
RE 59	Notice of Appeal	1096-1097

ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 802

§ 802. Coronavirus State Fiscal Recovery Fund

(a) Appropriation

In addition to amounts otherwise available, there is appropriated for fiscal year 2021, out of any money in the Treasury not otherwise appropriated—

(1) $219,800,000,000, to remain available through December 31, 2024, for making payments under this section to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)..

(b) Authority to make payments

…

(3) Payments to each of the 50 States and the District of Columbia

(A) In general

The Secretary shall reserve $195,300,000,000 of the amount appropriated under subsection (a)(1) to make payments to each of the 50 States and the District of Columbia.

…

(6) Timing

(A) States and territories

(i) In general

To the extent practicable, subject to clause (ii), with respect to each State and territory allocated a payment under this subsection, the Secretary shall make the payment required for the State or territory not later than 60 days after the date on which the certification required under subsection (d)(1) is provided to the Secretary.

…

(c) Requirements

(1) Use of funds

Subject to paragraph (2), and except as provided in paragraph (3), a State, territory, or Tribal government shall only use the funds provided under a payment made under this section, or transferred pursuant to section 803(c)(4) of this title, to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024—

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to

households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

(2) Further restriction on use of funds

(A) In general

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 either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

(B) Pension funds

No State or territory may use funds made available under this section for deposit into any pension fund.

…

(d) Certifications and reports

(1) In general

In order for a State or territory to receive a payment under this section, or a transfer of funds under section 803(c)(4) of this title, the State or territory shall provide the Secretary with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of this section and will use any payment under this section, or transfer of funds under section 803(c)(4) of this title, in compliance with subsection (c) of this section.

(2) Reporting

Any State, territory, or Tribal government receiving a payment under this section shall provide to the Secretary periodic reports providing a detailed accounting of—

(A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and

(B) such other information as the Secretary may require for the administration of this section.

(e) Recoupment

Any State, territory, or Tribal government that has failed to comply with subsection (c) shall be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection, provided that, in the case of a violation of subsection (c)(2)(A), the amount the State or territory shall be required to repay shall be lesser of—

(1) the amount of the applicable reduction to net tax revenue attributable to such violation; and

(2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made under section 803(c)(4) of this title.

(f) Regulations

The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section.

(g) Definitions

In this section:

(1) Covered period

The term "covered period" means, with respect to a State, territory, or Tribal government, the period that--

(A) begins on March 3, 2021; and

(B) ends on the last day of the fiscal year of such State, territory, or Tribal government in which all funds received by the State, territory, or Tribal government from a payment made under this section or a transfer made under section 803(c)(4) of this title have been expended or returned to, or recovered by, the Secretary.

…