No. 16-3093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF OHIO, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

The transitional reinsurance program is a three-year program established by the Patient Protection and Affordable Care Act (ACA) to help stabilize premiums in the early years of the ACA's implementation. The program generally works by collecting contributions from health insurers and self-insured group health plans, and using the funds to make reinsurance payments to insurers that covered high-risk (and correspondingly high-cost) individuals in the individual market. *See* 42 U.S.C. § 18061.

In this suit, plaintiffs alleged that group health plans offered by state and local government employers should have been exempted from the requirement to make contributions under the transitional reinsurance program. They argued, as a statutory matter, that group health plans offered by state and local government employers are not "group health plans" within the meaning of Title I of the ACA—a term that is defined by cross-reference to provisions of the Public Health Service Act (PHSA) and the Employee Retirement Income Security Act of 1974 (ERISA). Alternatively, plaintiffs alleged that it violates the Tenth Amendment and the doctrine of intergovernmental tax immunity for Congress to subject plans offered by state and local government employers to the same payment obligations that Congress imposed on plans offered by private employers and the federal government.

The district court dismissed the suit for failure to state a claim, and a unanimous panel of this Court affirmed. Rejecting the statutory claim, the panel explained that numerous provisions of the PHSA and ERISA show that the term

"group health plan" includes group health plans offered by state and local government employers. Op. 10-11. For example, the PHSA expressly allows state and local government plans—described in the statute as "non-Federal governmental plans"—to opt out of certain requirements applicable to group health plans. 42 U.S.C. § 300gg-21(a)(2). That opt-out provision would be meaningless if, as plaintiffs contend, state and local governmental health plans were not "group health plans" in the first place. Moreover, the PHSA expressly vests the federal government with authority to take enforcement action against "group health plans that are non-Federal governmental plans," *id.* § 300gg-22(b)(1)(B), which confirms that the term "group health plan" includes group health plans offered by state and local government employers.

The panel explained that plaintiffs' reliance on clear-statement principles does not advance their position because the relevant provisions clearly encompass group health plans offered by state and local government employers. Op. 9-10 (contrasting *Michigan v. United States*, 40 F.3d 817, 823-24 (6th Cir. 1994)). The panel explained that plaintiffs' Tenth Amendment claim is foreclosed by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that Congress may subject state and local government employers to the same obligations that Congress places on private-sector employers. Op. 11-13. And the panel explained that the doctrine of intergovernmental tax immunity is inapposite because that immunity protects against discriminatory taxes levied directly on the states, whereas the transitional reinsurance

program imposes payment obligations on private-sector employers and governmental employers alike. Op. 13-14 (citing *Michigan*, 40 F.3d at 822).

The petition for rehearing en banc should be denied. The panel decision is correct and does not conflict with any decision of this Court, another circuit, or the Supreme Court. Indeed, we are not aware of any other case presenting the claims alleged here. Moreover, the transitional reinsurance program ends with the 2016 benefit year, so the practical effect of the panel decision is limited. Accordingly, this case does not meet any of the criteria for rehearing en banc.

ARGUMENT

I. The Term "Group Health Plan" In The Relevant Statutory Provisions Clearly Encompasses Group Health Plans Offered By State And Local Government Employers.

The ACA's transitional reinsurance provision provides that "health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments to an applicable reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014." 42 U.S.C. § 18061(b)(1)(A). In 2013, the U.S. Department of Health & Human Services (HHS) explained that the statutory term "group health plans" encompasses plans offered by both private employers and governmental employers, including plans offered by the federal government, state and local governments, and tribes. *See* 78 Fed. Reg. 15410, 15459 (Mar. 11, 2013); 77 Fed. Reg. 17220, 17235 (Mar. 23, 2012).

In this suit, the State of Ohio and some of its political subdivisions alleged that the term "group health plans" in the transitional reinsurance provision does not encompass group health plans offered by state and local government employers. The panel correctly rejected that argument. The relevant statutory provisions clearly show that the term "group health plans" includes such governmental plans.

The transitional reinsurance provision expressly relies on the definition of "group health plan" in the Public Health Service Act, *see* 42 U.S.C. § 18021(b)(3), and longstanding PHSA provisions show that the term "group health plan" includes plans offered by state and local government employers (referred to in the PHSA as "non-Federal governmental plans"). These include the PHSA's opt-out provision that allows non-Federal governmental plans to make an annual election to exclude themselves from certain requirements applicable to group health plans, *see id.* § 300gg-21(a)(2)(A), and the PHSA's enforcement provision that applies specifically to "group health plans that are non-Federal governmental plans," *id.* § 300gg-22(b)(1)(B). These provisions would be meaningless if, as plaintiffs assert, non-Federal governmental plans were not "group health plans" in the first place.

The result is the same under ERISA's definition of "employee welfare benefit plan," which the PHSA's definition of "group health plan" cross-references. ERISA's provisions show that group health plans offered by state and local government employers are "employee welfare benefit plans." ERISA specifically addresses plans offered by state and local governments for their employees. The statute provides that

"[t]he term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). And ERISA defines a "plan" as an "employee welfare benefit plan" or, for pension benefits, as an "employee pension benefit plan." *Id.* § 1002(3). Plaintiffs' plans do not provide pension benefits. Accordingly, plaintiffs' plans are, by definition, "employee welfare benefit plans" under ERISA.

That conclusion is underscored by the ERISA provision that exempts governmental plans from the substantive requirements that apply to employee welfare benefit plans. 29 U.S.C. § 1003(b)-(b)(1). That exemption would be unnecessary if, as plaintiffs contend, governmental plans were not employee welfare benefit plans. Accordingly, this Court and other courts of appeals have long recognized that plans offered by state or local government employers are employee benefit plans under ERISA. *See Weiner v. Klais & Co.*, 108 F.3d 86, 90 n.3 (6th Cir. 1997) (explaining that "a plan may be an 'employee benefit plan' and thus fall within the scope of ERISA, but then be excluded from ERISA coverage because it is a governmental plan"); *Gualandi v. Adams*, 385 F.3d 236, 242 (2d Cir. 2004) (explaining that "Title I of ERISA specifically excludes from its coverage any employee benefit plan that is a governmental plan"); *Shirley v. Maxicare Tex., Inc.*, 921 F.2d 565, 567 (5th Cir. 1991)

(holding that school district's employee benefit plan was exempt from the substantive requirements of ERISA because it was a governmental plan).[1]

Plaintiffs provide no basis to disregard this body of precedent. The cases cited above involved plans established by local governments and school districts that are materially indistinguishable from the plans at issue here. Plaintiffs' reliance on ERISA's definition of "person" is doubly flawed. First, there is no need to consult ERISA's definition of "person," because ERISA expressly defines "governmental plan" as a "plan" offered by a state or local government, 29 U.S.C. § 1002(32), and defines "plan" to mean (as relevant here) an "employee welfare benefit plan," *id.* § 1002(3). Thus, plaintiffs' plans are "employee welfare benefit plans" under the plain terms of these ERISA definitions. Second, even if the definition of "person" were relevant, the general presumption that the term "person" does not include a sovereign entity is overcome when, as here, the statute indicates that such entities are covered. This Court thus rejected an analogous contention that state and local governments are not subject to the Fair Labor Standards Act (FLSA) because they are not listed in that

[1] Plaintiffs properly did not rely on ERISA's substantive exclusion; while ERISA exempts "governmental plans" from the scope of its coverage, the PHSA definition references an "employee welfare benefit plan" as *defined by* ERISA, not one that is *subject to* ERISA after applying the governmental plan exclusion. *See* 42 U.S.C. § 300gg-91(a)(1) (citing the definition in 29 U.S.C. § 1002(1)).

statute's nearly identical definition of "person." *See Cunningham v. Gibson Cty.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at *2 (6th Cir. Mar. 18, 1997) (per curiam).[2]

Clear statement principles do not advance plaintiffs' position, because the relevant statutory text clearly encompasses their plans. The Supreme Court's cases "have never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000); *see also*, *e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (noting that Congress need not "incant magic words in order to speak clearly," and that the Court "consider[s] 'context, including this Court's interpretations of similar provisions in many years past'"). The statutory question here bears no resemblance to the statutory question presented in *Michigan v. United States*, 40 F.3d 817 (6th Cir. 1994), where the issue was whether a state education trust was subject to the federal tax imposed upon "every corporation" under 26 U.S.C. § 11(a). The United States could not identify any indication that Congress intended to tax state trusts, and it conceded that "this section has never been interpreted as imposing a tax on income

[2] Plaintiffs also rely on statements in a supplemental brief filed by the government in response to questions raised *sua sponte* by the trial court in *Call Henry, Inc. v. United States*, No. 14-989 (Fed. Cl.). However, *Call Henry* did not involve the transitional reinsurance program or the PHSA and, as plaintiffs acknowledge (Pet. 7), the government later withdrew the statements on which plaintiffs rely. The Federal Circuit's decision affirming the judgment in *Call Henry* did not rely on or even mention those statements. *See Call Henry, Inc. v. United States*, No. 16-1732, 2017 WL 1521788 (Fed. Cir. Apr. 28, 2017).

earned directly by a state, a political subdivision of a state, or 'an integral part of a State.'" *Michigan*, 40 F.3d at 823. This Court also pointed to sixty years of government guidance suggesting that states did not fall within the Internal Revenue Code's definition of "corporation." *Ibid.* By contrast, as discussed above, numerous provisions show that group health plans offered by state and local government employers are "group health plans" within the meaning of the PHSA and "employee welfare benefit plans" within the meaning of ERISA.

II. Plaintiffs' Constitutional Claims Are Meritless.

Plaintiffs' contention that the transitional reinsurance program is unconstitutional as applied to group health plans offered by state and local governments is equally meritless. The panel correctly held that plaintiffs' Tenth Amendment claim is foreclosed by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that Congress may impose on state and local employers the same requirements that it imposes on employers generally. The Supreme Court explicitly rejected the contention that a generally applicable requirement is invalid because it imposes costs on state or local governments. *See ibid.*; *see also South Carolina v. Baker*, 485 U.S. 505, 515 & n.8 (1988) (noting with approval that, "[a]fter *Garcia*, for example, several States and municipalities had to take administrative and legislative action . . . or raise the funds necessary to comply with the wage and overtime provisions of the" FLSA).

Plaintiffs' reliance on the Supreme Court's anti-commandeering decisions is misplaced because the transitional reinsurance provision does not commandeer state or local governments. The Supreme Court has repeatedly explained that no such commandeering occurs when Congress regulates state and local governments directly, rather than enlisting them to enact or enforce a federal regulatory scheme. *See Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (contrasting the Driver's Privacy Protection Act, which regulates states directly, with the statutes at issue in the Court's anti-commandeering decisions, *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)).

Plaintiffs' constitutional challenge fares no better when couched in terms of intergovernmental tax immunity. The Supreme Court's modern precedents place the "nondiscrimination principle at the heart of modern intergovernmental tax immunity case law." *Baker*, 485 U.S. at 525 n.15 (explaining that "the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion"); *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 n.17 (1994) (noting that in the "field of intergovernmental taxation . . . nondiscrimination . . . plays a central role in setting the boundary between the permissible and the impermissible"). Accordingly, this Court has expressed confidence that "today's Supreme Court would say that Congress is free to impose a non-discriminatory tax" on a state government. *Michigan*, 40 F.3d at 823.

Even assuming the payments required under the transitional reinsurance program should be regarded as taxes, those payments are nondiscriminatory because they apply to private-sector employers and governmental employers alike. That is all the Constitution requires. Plaintiffs do not cite any modern decision that has invalidated a nondiscriminatory federal tax imposed on state governments. There is nothing unusual about federal taxes that apply to state employers, as illustrated by the familiar federal payroll taxes that apply to state (as well as private) employers, *see* 26 U.S.C. §§ 3111-3112, 3125. Plaintiffs rely on *Massachusetts v. United States*, 435 U.S. 444 (1978), but that case upheld a federal user fee as applied to state-owned aircraft. The Court had "no occasion to decide either the present vitality of the doctrine of state tax immunity or the conditions under which it might be invoked." *Id.* at 454. [3]

CONCLUSION

The petition should be denied.

[3] We preserve the argument that the Court of Federal Claims had exclusive jurisdiction over plaintiffs' refund claims. Although this Court took a broad view of district court jurisdiction over refund claims in *Horizon Coal Corp. v. United States*, 43 F.3d 234, 239 (6th Cir. 1994) (per curiam), and that decision was binding on the panel, we note that the Tenth Circuit expressly declined to follow *Horizon*'s reasoning, *see Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127 (10th Cir. 2011).

Respectfully submitted,

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MAY 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the page limit imposed by order of this Court because it does not exceed ten pages. It complies with typeface and type-style requirements because the text is proportionally spaced, Garamond, 14-point font.

/s/ Samantha L. Chaifetz
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically filed the foregoing response with the Clerk of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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