No. 21-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *Appellee-Plaintiff*, v. JANET YELLEN, in her official capacity as Secretary of the Treasury, et al., *Appellants-Defendants*.	: : : : : : : :	On Appeal from the United States District Court for the Southern District of Ohio District Court Case No. 1:21-cv-181

REPLY IN SUPPORT OF OHIO'S MOTION TO EXPEDITE

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REPLY

Ohio previously moved the Court to expedite this appeal. The Secretary opposes that motion. Her reasons are unconvincing.

First, the Secretary says that the briefing deadline gives "the federal government just eleven days from the docketing of its appeal to file its opening brief and only eleven days to file its reply brief." Resp.3. But the Secretary filed her notice of appeal a week ago (August 27), and the State sought her approval to expedite these proceedings on Monday (August 30). Thus, under the proposed schedule, the Secretary has eighteen days since noticing her appeal and fifteen days since learning of the proposed schedule in which to brief this case. What is more, the State gave itself just ten days in which to file its response—less time than the schedule gives the federal government to file a reply. And on top of that, the Secretary waited nearly sixty days to file her notice of appeal. One of the many lawyers in the Department of Justice could have started drafting long ago. (Ohio's lawyers did.) In any event, the purely legal issues presented have been fully briefed in the District Court, and in courts around the country. *See Missouri v. Yellen*, No. 21-2118 (8th Cir.); *Arizona v. Yellen*, No. 21-16227 (9th Cir.); *West Virginia, et al. v. Dep't of Treasury, et al.*, No. 7:21-cv-00465 (N.D. Ala.); *Texas, et al. v. Yellen, et al.*,

2:21-cv-79 (N.D. Tex.). So the Secretary should not struggle to prepare a polished brief by September 14.

Second, the Secretary says that "Ohio has not identified any imminent intention (or, indeed, any intention at all) to make use of its Fiscal Recovery Funds in a manner that would violate" the Tax Mandate. Resp.3. This overlooks the problem at the heart of this case: the Tax Mandate is hopelessly ambiguous. Even the Secretary has been unable (and at times unwilling) to explain how States are supposed to know whether a law reducing tax burdens causes a "reduction in the net tax revenue" of a State. Nor has she explained how States can tell whether any given reduction in net tax revenue is "indirectly offset" with Rescue Plan funds. *See* Op & Order, R.56., PageID#998–1003; Prelim. Inj. Op., R.36, PageID#560–63. So if the State has failed to identify any impending action that will *certainly* cause it to violate the Mandate, that is only because the Mandate fails to supply the clear notice that the Constitution requires. (Ohio has identified changes to tax law that, depending on what the Tax Mandate means, *might* violate its terms. *See, e.g.*, Sub. S.B. 18, 134th Gen. Assemb. (Ohio, enrolled Mar. 31, 2021), https://tinyurl.com/SubSB18; Reply Br., R.30, PageID#286–87.) The lack of clear notice is precisely why Ohio needs expedited review: until the Secretary stops appealing or the Supreme Court holds the Tax Mandate unconstitutional, Ohio must exercise its sovereign power to

set taxing policy without any ability to confidently predict whether it is violating the Mandate's terms. The State is injured every day it is forced to operate under this cloud of uncertainty. Prelim. Inj. Op., R.36, PageID#549–50.

Finally, the Secretary says that there is no way for Ohio to obtain Supreme Court review during October Term 2021. Resp.4. It notes that any "petition for a writ of certiorari would need to be filed no later than November in order to be granted in time for the case to be heard before the end of the Term." Resp.4. Even if that were true, it would pose no problem: Ohio asked for a ruling by November 1, and it can have a *certiorari* petition completed in a matter of days. Regardless, Ohio could seek to expedite proceedings before the Supreme Court. The United States did so last Term. *See Trump v. New York*, 141 S. Ct. 221 (2020). The pressing interests of the States that form the Union are just as important, and so just as worthy of expedited review, as the interests of the Union itself.

CONCLUSION

The Court should grant the motion to expedite the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a motion and contains 678 words. Fed. R. App. P. 27(d)(2)(C).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, this motion was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS