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.	No. 21-3787

RESPONSE TO OHIO'S MOTION TO STRIKE

Ohio moves to strike the federal government's response to its Rule 28(j) letter on the theory that the response raises a new argument. That is wrong. Ohio's motion underscores its misunderstanding not just of our arguments but of the clarity requirement for conditions on the use of federal funds.

1. The premise of Ohio's motion—that our letter was nonresponsive to Ohio's letter—is incorrect. Ohio's letter invoked a recent decision of this Court for the proposition that Ohio's supposed "'sovereign and quasi-sovereign'" interests support federal jurisdiction in this case. Our letter responded that the recent decision has no bearing on the jurisdictional flaw in this case: Challenges to the clarity of a condition on the use of federal funds are properly resolved in the context of concrete disputes

about the condition's meaning. A State cannot challenge the condition in the absence of any concrete controversy simply by asserting that the provision's supposed lack of clarity offends its sovereignty.

2. Our letter also did not make any new argument, much less an argument "regarding the scope of" the injunction (Mot. 1).

We have consistently argued that jurisdiction is lacking here because Ohio failed to establish a concrete controversy as to the meaning of the Offset Provision, and that "determin[ing] the scope of the Offset Provision in a hypothetical context is not a proper exercise of the judicial function." Opening Br. 10 (quotation marks omitted); *see* Opening Br. 7-11; Reply Br. 7-8. Relatedly, we argued that "[t]he 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." Opening Br. 18. And we explained that the fact "[t]hat a State may be unsure of every factual instance of possible noncompliance" with a funding condition "does not amount to a violation of Congress' duty." Opening Br. 16 (quotation marks omitted); *see* Reply Br. 15.

Ohio acknowledges one of those statements but characterizes it as "a single line" in our brief. Mot. 1. But we pervasively argued that the district court erred in holding the Offset Provision facially unconstitutional on the theory that the provision does not answer every question about how it would be applied in circumstances not presented

here. This is not an argument "regarding the scope of" the injunction (Mot. 1); it is a challenge to the entire injunction, both jurisdictionally and on the merits.

3. In any event, Ohio's efforts to respond to the supposedly new argument underscore the basic flaws of its challenge to the Offset Provision. Ohio draws a novel parallel between the clarity requirement articulated in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), and the void-for-vagueness doctrine applied to criminal statutes, as in *Johnson v. United States*, 576 U.S. 591 (2015), but the two doctrines have nothing to do with each other.

We are not aware of any instance in which *Pennhurst*'s clarity requirement has been applied, as the void-for-vagueness doctrine has, to hold that a prohibition is too ambiguous *ever* to be enforced for constitutional reasons. Rather, as our briefs explained, courts have applied the requirement in resolving concrete disputes as to the meaning of a funding condition. *See, e.g.*, Opening Br. 11; Reply Br. 7-8 (citing inter alia *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985), and *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006)). Our letter points out that several of the opinions in *School District of the City of Pontiac v. Secretary of Education*, 584 F.3d 253 (6th Cir. 2009) (en banc)—opinions joined, in combination, by well over a majority of the en banc Court—treat the requirement in that way: as a rule of statutory construction.

Ohio claims that *Pennhurst* itself was a facial challenge to a funding condition. Mot. 2-3. It was not. The question the Supreme Court resolved in *Pennhurst* was

whether, as the court of appeals had held, the "'bill of rights' provision" of the Developmentally Disabled Assistance and Bill of Rights Act authorized an injunction requiring a state institution to comply with the provision. *See Pennhurst*, 451 U.S. at 8-9. The Supreme Court held, as a matter of statutory interpretation, that Congress had not clearly imposed that obligation on States accepting federal funds; it had meant for the provision "to be hortatory." *Id.* at 24; *see id.* at 25 ("Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.").

Ohio attempts to defend the unprecedented injunction it obtained on the theory that this "is not a typical case." Mot. 4. Indeed, it is not: In prior cases, ranging from *Pennhurst* to *City of Pontiac* to *Arlington Central*, States have challenged funding conditions in the context of concrete disputes regarding the application of those conditions. This suit is premature.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this response complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 839 words, according to Microsoft Word.

/s/ Daniel Winik
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