No. 22-10560

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF MISSISSIPPI; STATE OF LOUISIANA,

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; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

REPLY BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LEIGHA SIMONTON
United States Attorney

MARK B. STERN
ALISA B. KLEIN
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulation:

Other Authority:

SUMMARY OF ARGUMENT

I. Recent decisions of the Sixth Circuit confirm that the permanent injunction in this case should be vacated. As the Sixth Circuit held in addressing the analogous claims of Ohio and Kentucky, plaintiffs' evidence failed to establish a justiciable controversy over the Offset Provision. *See Ohio v. Yellen*, 53 F.4th 983 (6th Cir. 2022); *Kentucky v. Yellen*, __ F.4th __, 2022 WL 17076099 (6th Cir. Nov. 18, 2022). Like Ohio and Kentucky, plaintiffs here assert that the Offset Provision "prohibits States from cutting taxes." Br. 1. Plaintiffs' theories of injury-in-fact all rest on that premise. The Sixth Circuit correctly held that such injuries are moot because they rest on a broad interpretation of the Offset Provision that the Treasury Department has disavowed. *See Ohio*, 53 F.4th at 989-994; *Kentucky*, 2022 WL 17076099, at *7-12.

II. Plaintiffs' challenges to the Offset Provision are also meritless. Their principal claim is that the provision would be unconstitutionally coercive and commandeering if it were interpreted as prohibiting state tax cuts. But there is no reason for the Court to interpret the provision that way. By its explicit terms, the provision is simply a restriction on the use of Fiscal Recovery Funds. The Treasury Department thus interpreted the provision to require only that States possess sufficient funds of their own to pay for a reduction in their net tax revenue resulting from tax cuts. In other words, plaintiffs must balance their budgets using their own funds, as they would do in the absence of Fiscal Recovery Funds. That grant condition does not raise any constitutional issue because Congress is not required to subsidize state tax cuts.

There is no doctrinal basis for a court to interpret the Offset Provision as a broad prohibition on state tax cuts, and then to declare the provision unconstitutional on that basis, in the face of the textually and constitutionally sound interpretation adopted by the Treasury Department. The canon of constitutional avoidance requires courts, "'out of respect for Congress,'" *Jones v. United States*, 526 U.S. 227, 239-240 (1999), to interpret statutes in a way that allows them to be upheld. That is easily done here.

It would be equally incorrect to sustain the injunction on the theory that the Offset Provision lacks sufficient clarity. That is true both because the clear-statement principle articulated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), is not a basis for holding a statute categorically unenforceable and because Congress spoke with the requisite clarity in enacting the provision.

The *Pennhurst* principle is simply a tool of statutory interpretation that the Supreme Court has used to resolve certain statutory ambiguities in a grant recipient's favor. As the Sixth Circuit recognized, it is not a basis to hold a funding condition facially unconstitutional. *Kentucky*, 2022 WL 17076099, at *16, *21 n.20. The Sixth Circuit nonetheless affirmed an injunction similar to the one here on the theory that the Offset Provision lacked sufficient clarity as "a matter of statutory interpretation." *Id.* at *17, *21 n.20. That was error. Simply put, the task of statutory interpretation is to give a statute meaning. A court cannot enjoin the enforcement of a federal statute against a party—on its face and in every context—in the name of "statutory interpretation." The

Sixth Circuit's ruling on the merits of Tennessee's claims thus should not be followed here.

Contrary to the Sixth Circuit's understanding, moreover, the Supreme Court's precedents allow Congress to assign responsibility to the Treasury Department for implementation details such as the baseline and other mechanics of calculating a reduction in a State's net tax revenue resulting from changes in tax law. Congress thus spoke with the requisite degree of clarity when it enacted the Offset Provision.

ARGUMENT

I. PLAINTIFFS' EVIDENCE FAILED TO ESTABLISH A JUSTICIABLE CONTROVERSY OVER THE OFFSET PROVISION

The district court's permanent injunction rests on the premise that the Offset Provision "prohibits tax cuts altogether." *Texas v. Yellen*, 2022 WL 1063088, at *6 (N.D. Tex. Apr. 8, 2022). Plaintiffs' theories of injury-in-fact all rest on that premise. But as the Sixth Circuit correctly held in addressing two materially identical injunctions, plaintiffs' theories of injury cannot support jurisdiction because the Treasury Department has disavowed that broad reading of the Offset Provision.

Each of plaintiffs' three theories of injury-in-fact rests on the premise that the Offset Provision "prohibits States from cutting taxes." Br. 1. Plaintiffs say they were injured at the outset by Congress's offer of Fiscal Recovery Funds because that offer proposed an "invasion of" their "sovereign authority" to tax. Br. 9-10. They say they

continue to suffer the same harm to their sovereign authority because the Offset Provision "prevent[s] them from reducing taxes." Br. 11. And they say they face a credible threat that the Offset Provision will be enforced against them because their conduct—cutting taxes—"is arguably proscribed by" the provision. Br. 12.

As our opening brief explained, the Eighth Circuit correctly rejected similar jurisdictional arguments in *Missouri v. Yellen*, 39 F.4th 1063 (8th Cir. 2022), *pet. for cert. filed*, No. 22-352 (Oct. 12, 2022). More recently, the Sixth Circuit correctly did so as well. In *Ohio v. Yellen*, 53 F.4th 983 (6th Cir. 2022), the Sixth Circuit vacated a permanent injunction barring the enforcement of the Offset Provision against Ohio, on the ground that the district court lacked jurisdiction to issue that injunction. The Sixth Circuit explained that Ohio's claims rested on the proposition that the Treasury Department "*could* read the Offset Provision in a broad way—as barring *any* tax cut during [the American Rescue Plan Act's] covered period." *Id.* at 991. But the court found no live controversy over Ohio's challenge because the Treasury Department has "repeatedly disavowed" any prospect of applying the statute in the manner that Ohio claimed would be unconstitutional. *Id.*

Plaintiffs' theories of injury echo the theories that Ohio asserted. Ohio, like plaintiffs (Br. 9-10), claimed to have been "injured when it was denied its entitlement to an unambiguous and non-coercive offer," but the Sixth Circuit explained that any such "past injur[y]," to the extent cognizable at all, "does not create jurisdiction" to grant "a prospective remedy." 53 F.4th at 992. Ohio, like plaintiffs (Br. 10), argued "that it was

injured when it was forced to choose between 'receiving federal benefits' or 'surrendering some of its sovereign authority over tax policy,'" but the Sixth Circuit explained that "a past choice without a demonstrated continuing negative effect does not establish jurisdiction for injunctive relief," and that Ohio had not "established a continuing and concrete harm" because it had "identified no policy it wishes to pursue but that Treasury regards as proscribed." 53 F.4th at 993. Ohio, like plaintiffs (Br. 11), claimed that the Offset Provision "interferes with its sovereign authority" by preventing it from cutting taxes, but the Sixth Circuit explained that "after Treasury's disavowal[]" of the interpretation that Ohio feared, "Ohio never established any particular conduct it wishes to pursue but against which Treasury may credibly take action." 53 F.4th at 993. And Ohio, like plaintiffs (Br. 12-15), claimed to face a credible threat of recoupment because the Offset Provision "'arguably proscribes'" tax cuts—but the Sixth Circuit explained that there is no "reasonable possibility of a recoupment action predicated on that broad reading," when the Treasury Department "has repeatedly explained its position that it will pursue recoupment under the Offset Provision only should a state enact a revenue-reducing tax cut and then fail to identify a permissible source of offsetting funds, such as those derived from other state tax increases, state spending cuts, or macroeconomic growth." 53 F.4th at 992-993 (emphasis omitted). The Sixth Circuit's reasoning in *Ohio* thus equally disposes of plaintiffs' jurisdictional arguments here.

In another opinion issued the same day, the Sixth Circuit likewise vacated a permanent injunction barring the enforcement of the Offset Provision against Kentucky,

for the same reasons as in *Ohio*. *Kentucky v. Yellen*, __ F.4th __, 2022 WL 17076099, at *7-12 (6th Cir. Nov. 18, 2022). That opinion also held that Tennessee had established jurisdiction to challenge the Offset Provision, but it did so only on the theory that Tennessee had adduced a declaration substantiating "administrative burdens and compliance costs" arising from the Treasury Department's implementing regulations. *Id.* at *5-6; *see id.* at *13-16. Assuming *arguendo* that this compliance-cost theory was sound as to Tennessee, it provides no help to plaintiffs here because they produced no evidence akin to Tennessee's. Even in their brief, plaintiffs do not assert compliance costs as an injury for jurisdictional purposes, and, in any event, legal argument unsupported by evidence would be insufficient to support jurisdiction at the final-judgment stage. *See Ohio*, 53 F.4th at 994.

Plaintiffs contend (Br. 14, 16-17) that the Court cannot consider the Treasury Department's regulations in determining jurisdiction because the regulations postdate the complaint. The Sixth Circuit correctly rejected the same argument. "A foundational principle of Article III is that 'an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.'" *Trump v. New York*, 141 S. Ct. 530, 534 (2020) (per curiam). And as the Sixth Circuit recognized, even if a concrete controversy existed at the outset of this litigation, it was destroyed by the Treasury Department's disavowal of the broad interpretation that plaintiffs challenged as unconstitutional. *Ohio*, 53 F.4th at 989-994; *Kentucky*, 2022 WL 17076099, at *7-12.

Plaintiffs are likewise wrong to argue (Br. 15-16) that these objections improperly conflate jurisdiction with the merits. They do not. The merits question in this case, as framed by plaintiffs, is whether the Offset Provision is unconstitutional. The jurisdictional question is whether plaintiffs' evidence showed that the Offset Provision was causing them ongoing or imminent injury. And, as with Ohio and Kentucky, the evidence that plaintiffs submitted failed to make that showing. The permanent injunction therefore should be vacated for lack of jurisdiction.

II. PLAINTIFFS' CHALLENGES TO THE OFFSET PROVISION ARE MERITLESS

If the Court reaches the merits, it should uphold the Offset Provision as a permissible restriction on the use of Fiscal Recovery Funds.

A. Plaintiffs' Coercion And Commandeering Claims Fail Because The Offset Provision Simply Restricts The Use Of Federal Funds

Plaintiffs appear to agree that the Offset Provision is neither unconstitutionally coercive nor commandeering if it is simply a restriction on the use of the federal grants awarded under the statute at issue here. Their argument rests on the proposition that the Offset Provision "does not govern States' use of federal grant money." Br. 21. They claim it "is in substance a federal command to States to not reduce taxes." Br. 20.

But by its explicit terms, the Offset Provision—like the rest of 42 U.S.C. § 802—merely governs *the use of* Fiscal Recovery Funds. Section 802(c) establishes parameters for States' "Use of funds." 42 U.S.C. § 802(c)(1). Section 802(c)(1) empowers States to

use Fiscal Recovery Funds to cover broadly defined categories of costs incurred through 2024. In turn, Section 802(c)(2) establishes two "restriction[s] on [the] use" of the funds. *Id.* § 802(c)(2). One is that a State may not deposit the funds "into any pension fund." *Id.* § 802(c)(2)(B). The other is the Offset Provision, which specifies that "[a] State … shall not *use the funds* … to either directly or indirectly offset a reduction in [its] net tax revenue … resulting from" a covered change in tax law. *Id.* § 802(c)(2)(A) (emphasis added).

Plaintiffs fail to give the emphasized statutory text any meaning. In their view, the Offset Provision is a circuitous way of saying: "If a State accepts Fiscal Recovery Funds, it is prohibited from cutting taxes." But that is not what the provision says. It is certainly not a compelled interpretation of the provision. And if that broad reading presents serious constitutional problems (as plaintiffs contend), then the answer to that concern is simple: The Court should reject that broad interpretation, as the Treasury Department has done. Bedrock principles of constitutional avoidance require the Court to interpret the statute in a way that allows the Court to uphold it. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018); *Davidson v. Georgia-Pacific, LLC*, 819 F.3d 758, 763 (5th Cir. 2016). There is no basis for the Court to adopt plaintiffs' broad reading, and then declare the Act of Congress unconstitutional on that basis, in the face of the textually and constitutionally sound interpretation already adopted by the Treasury Department.

Contrary to plaintiffs' suggestion (Br. 21-22), the inclusion of the phrase "directly or indirectly" in the Offset Provision does not compel the Court to treat this explicit restriction on the use of Fiscal Recovery Funds as if it were a flat prohibition on tax cuts. The phrase does not alter the statute's fundamental proscription against using Fiscal Recovery Funds to "offset" a revenue loss from tax cuts; it simply emphasizes that that rule cannot be circumvented through artifice. That is how statutes and regulations often use the phrase, as the Supreme Court has recognized. For instance, under the SEC's Rule 10b-5, "it is unlawful for 'any person, directly or indirectly, … [t]o make any untrue statement of a material fact' in connection with the purchase or sale of securities." *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 141 (2011) (quoting 17 C.F.R. § 240.10b-5(b)). The Supreme Court explained that, in that provision, the phrase "directly or indirectly" does not "broaden the meaning of 'make'"; it "merely clarifies that as long as a statement is made, it does not matter whether the statement was communicated directly or indirectly to the recipient." *Id.* at 147 n.11. Here, then, the phrase "directly or indirectly" simply means a State cannot circumvent the Offset Provision by using Fiscal Recovery Funds to displace state spending in a particular department or agency and then using the saved state funds to pay for a net reduction in state tax revenue resulting from tax cuts, because that would be functionally indistinguishable from using the Fiscal Recovery Funds in a more direct or explicit manner to pay for the tax cuts.

Rather than adopt plaintiffs' interpretation of the Offset Provision, which in plaintiffs' view renders the provision unconstitutional, the Court should adopt the Treasury Department's interpretation—which, as noted above, plaintiffs implicitly concede raises no coercion or commandeering concerns. Under the Treasury Department's interpretation, the Offset Provision requires only that, if States choose to cut taxes, they balance their budgets using their own funds and not with Fiscal Recovery Funds. That modest interpretation gives effect to Congress's explicit instruction that the Offset Provision is merely a restriction on the use of Fiscal Recovery Funds: A State may keep its full allotment of Fiscal Recovery Funds, while cutting taxes, as long as it possesses sufficient state funds to pay for the tax cut (whether from increased revenue due to economic growth or tax increases, or from spending cuts outside a department or agency where the State is spending Fiscal Recovery Funds). *See Missouri v. Yellen*, 39 F.4th at 1069-1070, 1070 n.6; 87 Fed. Reg. 4338, 4423-4429 (Jan. 27, 2022).

The issue is not, as plaintiffs suggest (Br. 22-23), whether the Treasury Department's interpretation is entitled to *Chevron* deference. This Court need not afford deference to the Treasury Department's interpretation in resolving the merits of this case. Indeed, whereas the issue of deference typically arises when an agency has interpreted a statute in a way that *harms* the opposing party's interests, here the Treasury Department has interpreted the Offset Provision narrowly, in a way that *benefits* plaintiffs. It is plaintiffs who are demanding a broad reading that is contrary to their own interests,

which they then invite the Court to use as a ground to nullify part of an Act of Congress. That approach—construing a statute in a manner that unnecessarily maximizes constitutional doubt—would disregard the "'respect'" that courts owe to Congress, given the "'assum[ption]'" that Congress "'legislates in the light of constitutional limitations,'" *Jones v. United States*, 526 U.S. 227, 239-240 (1999).

B. The *Pennhurst* Clear-Statement Principle Does Not Allow A Court To Enjoin The Offset Provision's Enforcement

Plaintiffs argue in the alternative that the district court's permanent injunction should be upheld on the ground that the Offset Provision is "unconstitutionally ambiguous." Br. 8, 25 & n.2. That argument is equally meritless, both because the clear-statement principle set out in *Pennhurst* is not a basis for holding a statute categorically unenforceable and because Congress spoke with the requisite clarity in enacting the provision.

1. Plaintiffs' argument rests on a basic misunderstanding of the clear-statement principle. The principle is a tool of statutory interpretation, which the Supreme Court and other courts have used to resolve disputes over the meaning of grant conditions in a grant recipient's favor. *See, e.g.*, *School Dist. of City of Pontiac v. Secretary of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring) ("Even though this clear-statement rule has constitutional roots, it remains a rule of *statutory* interpretation[.]"). The principle is not a basis to declare a federal statute categorically unenforceable.

In *Pennhurst* itself, the question was whether Congress intended the provision at issue, 42 U.S.C. § 6010, "to be hortatory" or "mandatory." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). In adopting the former construction, the Court relied on a close analysis of the provision's text, structure, and legislative history. For example, the Court emphasized that "[w]hen Congress intended to impose conditions on the grant of federal funds, as in" other provisions of the same statute, "it proved capable of doing so in clear terms," and that the provision in question, "in marked contrast, in no way suggests that the grant of federal funds is 'conditioned' on a State's funding the rights described therein." *Id.* at 23. The Court found that interpretation of the text to be well supported by the statutory structure and legislative history. *Id.*

In later cases, the Supreme Court has relied on the *Pennhurst* clear-statement principle to resolve other statutory ambiguities in a grant recipient's favor. In *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), for example, the Supreme Court considered the meaning of the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA). In interpreting that provision, the Court concluded that it encompassed attorneys' fees but did not clearly encompass expert fees. The Court thus vacated an award of expert fees but did not call into question the provision's ongoing applicability to attorneys' fees. Similarly, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), the Supreme Court interpreted the term "appropriate relief" in certain nondiscrimination statutes. The Court concluded that this term encompassed traditional contract remedies but did not clearly encompass emotional-

distress damages. For that reason, the Court vacated an award of emotional-distress damages but did not call into question the ongoing availability of traditional contract remedies under that provision.

This Court and other courts of appeals have applied the *Pennhurst* rule in the same way. In the decision that the Supreme Court affirmed in *Cummings*, for example, this Court adopted reasoning similar to the Supreme Court's. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020). In *Texas Education Agency v. United States Department of Education*, 992 F.3d 350, 360 (5th Cir. 2021), this Court concluded that the funding condition in question "lack[ed] the clarity required for a knowing waiver" of state sovereign immunity and thus interpreted the statute not to require such a waiver. And in *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam), the Fourth Circuit concluded that the "the plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities." *Id.* at 561.

In other words, the Supreme Court and other courts, including this one, have applied *Pennhurst*'s clear-statement principle to resolve concrete disputes over particular applications of funding conditions. Those decisions did not hold or suggest that the provisions at issue were categorically unenforceable because they were ambiguous in certain respects.

A contrary approach would be inconsistent not just with *Pennhurst* and its progeny but with the doctrine governing facial constitutional challenges. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It would be impermissible to hold that a funding condition can *never* be applied—even against conduct that violates the condition's plain terms—simply because the condition is in some respects ambiguous.

2. In adjudicating the merits of Tennessee's challenges to the Offset Provision, the Sixth Circuit correctly recognized that the *Pennhurst* principle is merely "a federalism-based clear-statement rule" that courts "employ … when construing spending legislation as a matter of *statutory* interpretation." *Kentucky*, 2022 WL 17076099, at *16. However, that court mistakenly ruled that this tool of statutory interpretation was a basis to affirm a permanent injunction that bars the Treasury Department from enforcing the Offset Provision against Tennessee. If this Court reaches the merits, it should not follow that approach. Rather, the Court should conclude that the *Pennhurst* principle would come into play only in the context of a concrete dispute in which the plaintiff States sought to use Fiscal Recovery Funds in a way that the Offset Provision arguably prohibited—not as a mechanism to enjoin enforcement of the Offset Provision against the plaintiff States in any context.

That approach is fully consistent with *Pennhurst* itself. There, as noted above, the Court held that the provision at issue could not be enforced against the defendant state entity because Congress intended it "to be hortatory" rather than "mandatory." *Pennhurst*, 451 U.S. at 24. Here, by contrast, Congress itself specified that Fiscal Recovery Funds may not be used to pay for tax cuts, and there is no doubt that Congress meant for that prohibition to be mandatory. The Offset Provision parallels the statute's other restriction on the use of Fiscal Recovery Funds, which prohibits the use of such funds for deposit in a pension fund. Just as the Treasury Department may recoup Fiscal Recovery Funds that a State spends beyond the categories of permissible use identified in the statute, 42 U.S.C. § 802(c)(1), it may recoup funds that a State spends in contravention of the restrictions set forth in § 802(c)(2). For these reasons, the Offset Provision bears no resemblance to the provision that was at issue in *Pennhurst*.

Plaintiffs object (Br. 27-28) that Congress left certain details about the Offset Provision's implementation to the Treasury Department—such as the fiscal year that is the baseline for calculating a reduction in state tax revenue and the mechanics of measuring a reduction in tax revenue resulting from changes in state law. The Sixth Circuit expressed a similar concern. *See Kentucky*, 2022 WL 17076099, at *17-21. But there is nothing unusual or impermissible about a statute that allows a federal agency to fill in certain details regarding grant conditions, and Congress's decision to leave such details regarding the implementation of a statute to an agency is certainly not a basis to enjoin *any* enforcement of the statute.

The Supreme Court has long held that Congress may leave details of implementing a condition on federal grants to the agency charged with administering the spending program. In *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), for example, the Supreme Court addressed a State's expenditure of federal funds provided under Title I of the Elementary and Secondary Education Act. It held that in evaluating the State's past expenditures, the Department of Education should rely on "the statutory provisions, regulations, and other guidelines provided by the Department at that time." *Id.* at 670. The Supreme Court thus left no doubt that Spending Clause legislation, like other legislation, may be implemented by a federal agency through regulation and sub-regulatory guidance. Indeed, the Supreme Court emphasized that "the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements" from the agency. *Id.* at 669. "Accordingly," the Court rejected the argument that "ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement." *Id.*

The Sixth Circuit was mistaken in suggesting that an agency's implementing regulations must be confined to "arcane topics." *Kentucky*, 2022 WL 17076099, at *22. On the contrary, the Supreme Court recently upheld a regulation requiring that workers in facilities funded by Medicare or Medicaid be vaccinated against COVID-19. *See Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam). In so ruling, the Court emphasized that the Department of Health and Human Services "has established long lists of detailed

conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds." *Id.* at 650. The Court specifically rejected the argument that "the seemingly broad [statutory] language … authorizes the [Department] to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid." *Id.* at 652.[1]

Congress expressly vested the Treasury Secretary with authority to adopt regulations to the extent necessary or appropriate to implement the section of the American Rescue Plan Act that established the Fiscal Recovery Fund (including the Offset Provision). *See* 42 U.S.C. § 802(f). The complaint did not challenge any aspect of the implementing regulations. Any potential dispute about the reasonableness of the baseline year or the mechanics of measuring a reduction in net tax revenue would not provide a ground to enjoin enforcement of the Offset Provision itself.

[1] *Pennhurst*'s clear-statement requirement likewise does not preclude courts from determining the details of how a grant condition applies in particular cases. In that regard, every court of appeals to consider the issue has rejected the argument that the grant conditions established by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) are insufficiently clear because their application in particular circumstances may not be possible to predict with certainty ahead of time. *See Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009); *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002). Although the Sixth Circuit's opinion in *Kentucky* suggested that its *Cutter* decision did not agree with the Seventh Circuit's reasoning in *Charles*, *see Kentucky*, 2022 WL 17076099, at *23-24, we respectfully note that *Cutter* quoted the Seventh Circuit's reasoning with approval, *see Cutter*, 423 F.3d at 586.

3. Applying the Sixth Circuit's approach would be problematic for the additional reason that it would eliminate plaintiffs' asserted cause of action. Plaintiffs' complaint relies on a nonstatutory cause of action to restrain alleged violations of the Constitution. ROA.21-26. Plaintiffs never identified a cause of action that would allow them to seek an injunction against the enforcement of the provision as a matter of statutory interpretation.

C. The Offset Provision Is Related To Congress's Purpose

Finally, plaintiffs assert (Br. 29-31) that the Offset Provision is unconstitutional "because its tax-cut ban is unrelated to [the American Rescue Plan Act's] purpose." That argument fails both because the Offset Provision is not a "tax-cut ban," as discussed above, and because it is definitionally related to Congress's purpose in providing these federal grants: It ensures the funds are spent for the purposes Congress intended and not those it did not intend.

Plaintiffs' argument is essentially that Congress made the wrong policy choice in precluding States from using federal funds to pay for tax cuts, while providing various forms of federal tax relief. But that policy choice was for Congress to make. 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). A restriction on the use of funds cannot be invalidated on the

ground that a funding recipient disagrees with Congress's "view of the 'general Welfare.'" *Id.*

More generally, any decision to uphold the injunction would be contrary to the long-term interests of the States. If Congress comes to believe that it allocates funds to States at its peril—with no assurance that States will expend the funds in the manner that Congress provided—then Congress will have strong incentive to bypass the States and provide grants directly to third parties instead. The flexibility that Congress gave States to determine appropriate uses of Fiscal Recovery Funds necessarily carried with it the assumption that the States would expend those funds only for the uses that Congress authorized, and not for uses that Congress proscribed.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LEIGHA SIMONTON
United States Attorney

MARK B. STERN
ALISA B. KLEIN

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
daniel.l.winik@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,868 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
Daniel Winik