No. 21-16227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,

Plaintiff-Appellant,

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-Appellees.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

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:

Other Authorities:

STATEMENT OF JURISDICTION

Arizona invoked the district court's jurisdiction under 28 U.S.C. § 1331. SER-8. The district court entered final judgment dismissing the case on July 22, 2021. 1-ER-2. Arizona filed a timely appeal of that judgment on July 23, 2021. 3-ER-375–376. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The American Rescue Plan Act provided nearly $200 billion in new 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 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).

Arizona contends that the Offset Provision would be unconstitutional if it were broadly interpreted to "only permit States to *raise* taxes, rather than cut them, until 2025." Opening Brief (Br.) 2. The district court dismissed the action for lack of an Article III controversy, explaining that the federal government had disavowed that broad reading as contrary to the Offset Provision's plain text and that Arizona did not allege an intent to take any action that would be inconsistent with the Offset Provision as correctly construed. The questions presented are:

1. Whether Arizona failed to establish a concrete controversy sufficient to support Article III jurisdiction.

2. Whether, assuming that there is jurisdiction, Arizona's constitutional challenges to the Offset Provision are meritless.

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions are reproduced in the addendum to this brief.

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. It 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]

If a State wishes to accept its federal grant, it submits to the Treasury Department "a certification" that the State "requires the payment … to carry out the activities specified in" § 802(c) and "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" the Fiscal Recovery Fund. 42 U.S.C. § 802(f). In May 2021, the Department issued an interim final rule explaining 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

Arizona brought this action in March 2021, shortly after the enactment of the American Rescue Plan Act. 3-ER-394. The complaint alleged that the Offset Provision—which Arizona dubbed the "Tax Mandate"—would be unconstitutional if it were

[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).

broadly interpreted as a "blanket prohibition forbidding States from cutting taxes in any manner whatsoever through 2024," SER-4 ¶ 2.[2] Arizona inferred from a newspaper article that one of the Offset Provision's proponents in Congress had intended such a blanket prohibition. SER-4 ¶ 2. Arizona recognized, however, that the Treasury Department had explained that the Offset Provision "'is not implicated'" if "'States lower certain taxes but do not use the funds under the Act to offset those cuts.'" SER-5 ¶ 3. Based on what Arizona perceived as a disagreement between a Member of Congress and the Treasury Department, Arizona alleged that the Offset Provision is "patently ambiguous." SER-5 ¶ 4. Emphasizing that its state legislature "must finalize a budget before it adjourns for the year," SER-12 ¶ 38, Arizona stated that it "need[ed] clarity on the legality and meaning of this provision," SER-7 ¶ 12, and moved for a preliminary injunction.

With the parties' consent, the district court consolidated the preliminary-injunction proceedings with its adjudication of the merits and allowed supplemental briefing. 1-ER-13–14. The district court then issued a final judgment dismissing the case on the ground that there was no concrete controversy over the Offset Provision. *See Arizona v. Yellen*, 2021 WL 3089103 (D. Ariz. July 22, 2021). By the time of the court's decision, Arizona had already certified to the Treasury Department that it would comply with

[2] Arizona's excerpts of record omit the first 49 paragraphs of its complaint. We have reproduced the full complaint in our supplemental excerpts of record.

Section 802(c)'s conditions and accepted Fiscal Recovery Funds. *See* 2-ER-26. Moreover, Arizona's legislature had recently enacted a budget providing for $1.9 billion in tax cuts. *See Arizona*, 2021 WL 3089103, at *4.

The district court rejected Arizona's argument that its alleged "uncertainty" regarding the Offset Provision's meaning created an Article III controversy. The court explained that, although Arizona had alleged that the Offset Provision would "cast[] a cloud of uncertainty over Arizona policymakers' ability to oversee the State's budgetary matters," *id.* at *2, there was "no evidence that the lawmakers' decision was at all influenced by the [Provision]," *id.* at *4. Arizona "offered no concrete facts showing the [Provision's] impact on policymakers." *Id.*

The district court also rejected Arizona's contention that, "because it recently passed a $1.9 billion tax cut, it faces the realistic danger that it will have to return some of the [Fiscal Recovery Funds] to the Secretary." *Id.* at *5. The court explained that Arizona did "not even claim the tax cut [would] result in a reduction in [its] net income," much less claim that it "directly or indirectly used [Fiscal Recovery Funds] to supplement a reduction in its net income." *Id.* Moreover, Arizona "certified that it would comply with the [Offset Provision], 'under its own reasonable reading of the language,'" and did not "show how the tax cuts could violate the [Provision] under any other reading." *Id.* (quoting Arizona's brief). The court thus ruled that Arizona had "not shown a realistic danger of sustaining a direct injury as a result of the [Provision's] enforcement." *Id.*

The district court rejected Arizona's attempts to premise an Article III controversy on abstract notions of sovereign rights or coercion that were divorced from a concrete injury. *See id.* at *3-4, *5. And the court likewise held that Arizona could not base its challenge to the Offset Provision on the assertion that the implementing regulations impose reporting requirements that go beyond those of the statute. *See id.* at *4.

SUMMARY OF ARGUMENT

In the American Rescue Plan Act, Congress appropriated nearly $200 billion for new grants to help States mitigate the fiscal impacts of the COVID-19 pandemic. Congress gave States considerable latitude to determine how to use their grants, but it specified in the Offset Provision that the grants 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 district court correctly dismissed this challenge to the Offset Provision for lack of a justiciable controversy. The explicit premise of the complaint was that the Offset Provision might be interpreted as "a blanket prohibition forbidding States from cutting taxes in any manner whatsoever through 2024." SER-4 ¶ 2. But that interpretation is contrary to the plain text of the Offset Provision, and the federal government has repeatedly disavowed it. The statute establishes, and the Treasury Department's implementing regulations confirm, that tax cuts alone do not contravene the Offset Provision. Rather, the provision restricts only the use of Fiscal Recovery Funds to offset the revenue effects of tax cuts. Thus, the provision is not implicated if States

use other means to offset tax cuts, including increases in other taxes, revenue derived from macroeconomic growth, or spending cuts in areas where the State is not spending Fiscal Recovery Funds.

Although Arizona had the burden to establish standing, the State did not even claim that its recent tax cut would result in a reduction of its net tax revenue. On the contrary, Arizona emphasized its desire to engage in "stimulus through tax relief." Br. 68. Moreover, even if Arizona had projected that its tax cut would reduce its net tax revenue, the State did not claim that it intended to use Fiscal Recovery Funds to fill such a (hypothetical) revenue hole. Thus, the district court correctly dismissed this pre-enforcement challenge to the Offset Provision for want of a concrete controversy.

Assuming the merits are presented, the Offset Provision falls easily within Congress's authority to specify the permissible uses of federal grants. The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), forecloses any contention that a restriction on the use of new federal grants is "coercive"; that decision makes clear that a State is not coerced by conditions, such as the Offset Provision, that Congress places on the use of *new* federal funding. And Arizona's "ambiguity" argument rests on the false premise that the Offset Provision could properly be construed to prohibit all state tax cuts—an interpretation that is contrary to the statute's plain text, inconsistent with the Treasury Department's implementing regulations, and belied by Arizona's own enactment of a major tax cut after it had certified that it would comply with the Offset Provision and accepted Fiscal Recovery Funds.

STANDARD OF REVIEW

This appeal presents issues of law that are subject to de novo review in this Court. *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 652 (9th Cir. 2021); *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 821 (9th Cir. 2017).

ARGUMENT

I. ARIZONA FAILED TO ESTABLISH AN ARTICLE III CONTROVERSY OVER THE OFFSET PROVISION

A. The Broad Interpretation That Arizona Feared Is Contrary To The Offset Provision's Plain Text

The premise of this suit is that the Offset Provision would be unconstitutional if it were broadly interpreted to "dictate taxing policy to the States by imposing a one-way ratchet—*i.e.*, Congress would henceforth only permit States to *raise* taxes, rather than cut them, until 2025." Arizona Br. 2. Arizona inferred, from a newspaper article, that one of the Offset Provision's congressional supporters "intended (and believed) that the Tax Mandate enacts a blanket prohibition forbidding States from cutting taxes in any manner whatsoever through 2024." SER-4 ¶ 2. The complaint alleged that "if the Act actually prohibits the States from engaging in any form of tax relief," it is "an unconstitutional intrusion upon the sovereignty of the States." SER-6 ¶ 6. Alternatively, the complaint alleged that the Offset Provision is at least "susceptible to" this broad interpretation, SER-6 ¶ 6, and that "[t]his ambiguity alone renders the Tax Mandate unconstitutional," SER-5 ¶ 5.

As district courts have explained both here and in an analogous suit by Missouri, the Offset Provision is not susceptible to the broad interpretation that Arizona (like Missouri) fears. On the contrary, that broad interpretation is foreclosed by the Offset Provision's plain text. First, the Offset Provision is not implicated unless a State reduces in its "*net* tax revenue." 42 U.S.C. § 802(c)(2)(A) (emphasis added). Thus, it is not implicated if reductions in some taxes are balanced by increases in others and no "net" reduction in tax revenue occurs. Second, even if a State reduces its net tax revenue, the Offset Provision is not implicated unless the State uses its Fiscal Recovery Funds to "offset"—that is, pay for— that "reduction," *id.*; indeed, the statute makes explicit that the Offset Provision a "restriction on use of" the Fiscal Recovery Funds, *id.* § 802(c)(2). Thus, by its plain terms, 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.); *see also Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021) (explaining that "[n]owhere does Arizona claim to have directly or indirectly used [Fiscal Recovery Funds] to supplement a reduction in its net income").

In light of the Offset Provision's plain terms, the Treasury Secretary emphasized at the outset that "[n]othing in the Act prevents States from enacting a broad variety of tax cuts." 3-ER-335 (March 21, 2021 letter). "'That is, the Act does not 'deny States the ability to cut taxes in any manner whatsoever.'" 3-ER-335. On the contrary, the

Secretary explained, the Act "simply provides that funding received under the Act may not be used to offset a reduction in net tax revenue resulting from certain changes in state law." 3-ER-335. "If States lower certain taxes but do not use funds under the Act to offset those cuts—for example, by replacing the lost revenue through other means—the limitation in the Act is not implicated." 3-ER-335. Likewise, when the Treasury Department issued an interim final rule that implemented the Fiscal Recovery Fund, the agency emphasized that the Offset Provision is not implicated if a State cuts taxes but offsets any resulting reduction in revenue with revenue derived from macroeconomic growth, revenue derived from 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, 26,809-810 (May 17, 2021).

In short, the Offset Provision is not "susceptible to" an interpretation that "actually prohibits the States from engaging in any form of tax relief" or strips States of the power "to engage in macroeconomic stimulus through tax cuts," as Arizona alleged, SER-6 ¶ 6; SER-14 ¶ 45. That broad interpretation would be foreclosed by the Offset Provision's text even if there were support for it in the official statements of individual legislators. The Supreme Court has admonished that "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). And the Supreme Court has stated that "floor statements by individual legislators rank among the least illuminating forms of legislative history." *Id.* at 943. Here, Arizona purported to divine Congress's intent

from a newspaper article that simply quoted a Senator as saying that "states should not be cutting taxes at [this] time," Br. 14 (quoting 3-ER-288–298), which hardly suggests that Congress stripped States of their power to do so.

B. Arizona Did Not Allege An Intent To Take Any Action That Would Contravene The Offset Provision As Correctly Construed

1. 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 it "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.'"). As the district court explained, Arizona did not allege an intent to take any action that would contravene the Offset Provision, as correctly interpreted.

The district court correctly rejected Arizona's contention that, "because it recently passed a $1.9 billion tax cut, it faces the realistic danger that it will have to return some of the [Fiscal Recovery Funds] to the Secretary." 2021 WL 3089103, at *5. As the court observed, Arizona did "not even claim the tax cut [would] result in a reduction in [its] net income," much less show that the State "directly or indirectly used [Fiscal Recovery Funds] to supplement a reduction in its net income," *id.*—which is all that the Offset Provision precludes States from doing with their federal grants. Arizona thus

failed to show "a realistic danger of sustaining a direct injury as a result of the [Provision's] enforcement." *Id.*

Moreover, Arizona's enactment of a $1.9 billion tax cut belied its allegation that the Offset Provision had "cast[] a cloud of uncertainty over Arizona policymakers' ability to oversee the State's budgetary matters." 2021 WL 3089103, at *2. Arizona alleged that its state legislature needed to "finalize a budget before it adjourns for the year," SER-12 ¶ 38, and that it accordingly needed "clarity on the legality and meaning" of the Offset Provision, SER-7 ¶ 12. But there is no dispute that the Arizona legislature enacted a budget including major tax cuts even though Arizona had by then certified that it would comply with the Offset Provision and accepted Fiscal Recovery Funds. *See* Arizona Br. 46. And as the district court explained, Arizona produced "no evidence that the lawmakers' decision was at all influenced by the [Provision]," 2021 WL 3089103, at *4, even though it was the State's burden to demonstrate standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court thus rightly noted that Arizona had "offered no concrete facts" showing how it is harmed by its supposed uncertainty about the scope of the Offset Provision. 2021 WL 3089103, at *4.

Arizona's assertion that certain reporting requirements in Treasury's interim final rule will impose compliance costs, Br. 37, has no bearing on whether there is a concrete controversy over the Offset Provision. Arizona did not challenge the interim final rule in the complaint, which was filed before the rule was issued. Instead, Arizona asked

the district court to enjoin enforcement of the Offset Provision but failed to demonstrate a concrete controversy with respect to that provision.

2. It is common ground that "analysis of the merits is distinct and separate from the question of whether there is standing." Arizona Br. 33. It is equally clear, however, that Arizona cannot manufacture an Article III controversy over the Offset Provision by attacking a straw man: a broad interpretation of the provision that is foreclosed by the statute's plain terms, that the Treasury Department has disavowed, and that is contradicted by Arizona's own actions. To the extent that Arizona asserted injuries that it attributed to the Offset Provision, those assertions relied on the untenable assumption that the Offset Provision prohibits all tax cuts. And for the reasons already explained, the Offset Provision cannot reasonably be read to "prohibit[] the States from cutting taxes in essentially any manner," "to usurp the sovereign taxing powers of the States," or to coerce a State into "sacrific[ing] its sovereign power to set its own tax policy." SER-17 ¶¶ 65, 67-69.

In dismissing this suit, the district court properly 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.*

The district court's dismissal of this action does not, of course, prevent Arizona from challenging an application of the Offset Provision if a concrete dispute ever arises. Disputes over funding conditions are routinely resolved in the context of concrete controversies, not as an abstract matter. That was the posture of the case on which Arizona principally relies, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). There, the Supreme Court reversed an order that required a school district to pay the expert fees of parents who prevailed in an action under the Individuals with Disabilities Education Act (IDEA), holding that the IDEA's fee-shifting provision was not properly interpreted to encompass expert fees. *See id.* at 294-295. Likewise, the Supreme Court has resolved other disputes over the meaning of funding conditions in the context of enforcement actions. *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).

By contrast, the pre-enforcement challenges to the Offset Provision brought by Arizona, Missouri, and various other States rest "upon contingent future events that may not occur." *Missouri*, 2021 WL 1889867, at *5. The adjudication of such challenges

is "'too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Id.* And it is long established that federal courts "are without jurisdiction … to adjudicate … abstract questions" of political power or "sovereignty." *Massachusetts v. Mellon*, 262 U.S. 447, 484-485 (1923); *see Texas v. United States*, 523 U.S. 296, 297, 301-302 (1998) (finding no Article III jurisdiction where Texas's claim to "suffer[] the immediate hardship of a 'threat to federalism'" was an "abstraction"). Arizona cites no authority for the type of pre-enforcement challenge that it asserted here.[3]

II. THE OFFSET PROVISION FALLS EASILY WITHIN CONGRESS'S SPENDING POWER

Assuming this Court reaches the merits, the Offset Provision falls easily within Congress's authority to determine the purposes for which federal grants may be used. Arizona makes no serious attempt to show that the Offset Provision—as correctly construed—presents a constitutional issue.

A. The Offset Provision Is Simply A Restriction On The Use Of Federal Funds, Which Presents No Constitutional Issue

As explained above, Arizona's constitutional challenges rest on the false assumption that the Offset Provision "prohibits the States from cutting taxes in essentially any manner." SER-17 ¶ 65. Arizona argues, for example, that "prohibiting states from

[3] To the extent that other district courts found an Article III controversy in addressing analogous claims, those rulings were incorrect and should not be followed here. *See Ohio v. Yellen*, 2021 WL 2712220, at *5-9 (S.D. Ohio July 1, 2021), *appeal pending*, No. 21-3787 (6th Cir.); *West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863, at *6-7 (N.D. Ala. July 14, 2021); *Kentucky v. Yellen*, 2021 WL 4394249, at *2-3 (E.D. Ky. Sept. 24, 2021).

making any tax reduction" or "engaging in any form of stimulus through tax relief" is "irrational," Br. 68, and that Congress's offer of $4.9 billion "[c]oerce[d]" Arizona into relinquishing its taxing power, Br. 69.

As we have explained, however, the Offset Provision imposes no such prohibition. States are free to lower (or raise) taxes; they are simply not allowed to use Fiscal Recovery Funds to pay for a reduction in their *net* tax revenue. Thus, the Offset Provision is not implicated if tax cuts do not reduce net tax revenue—which, as Arizona itself emphasizes, can happen when a State successfully engages in "stimulus through tax relief." Br. 68. Even if tax cuts have the effect of reducing net tax revenue, moreover, the Offset Provision is not implicated if a State offsets that reduced revenue with revenue from macroeconomic growth or spending cuts in areas where the State is not spending Fiscal Recovery Funds. *See supra* pp. 9-10. The Offset Provision merely prohibits the *use of federal funds* to "offset"—that is, pay for—that "reduction," 42 U.S.C. § 802(c)(2)(A).

Congress unquestionably has the authority to specify the permissible and impermissible uses of federal grants. 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* (*NFIB*), 567 U.S. 519, 580 (2012) (plurality opinion); *see, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206-208 (1987). "The power to keep a watchful eye on

expenditures … is bound up with congressional authority to spend in the first place." *Sabri v. United States*, 541 U.S. 600, 608 (2004).

Congress's restrictions on the uses of a federal grant are, by definition, "[r]elated [t]o" the grant program, Br. 67, because they define the contours of the program. And the Supreme Court's reasoning in *NFIB* forecloses any contention that Congress's restrictions on the uses of federal funds can be deemed impermissibly "coercive" merely because a federal grant is so generous that a State cannot resist the temptation to accept it. In *NFIB*, a majority of the Justices held that Congress could not make a State's *preexisting* Medicaid funding contingent on the State's agreement to extend coverage to all low-income adults—an expansion that the majority regarded as an entirely new program. *See* 567 U.S. at 580-585 (plurality opinion); *id.* at 681-689 (joint dissent). But a different majority of Justices upheld the same requirement as a condition on the *new* federal funds offered by the Affordable Care Act, which totaled $100 billion per year. *See id.* at 576, 585-586 (Roberts, C.J., joined by Breyer, J., and Kagan, J.) (emphasizing that "[n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use"); *id.* at 646 (Ginsburg, J., jointed by Sotomayor, J., agreeing with this aspect of the plurality opinion). Even the dissenting Justices agreed that "Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion,"

although they disagreed with the majority about whether that funding condition was severable. *Id.* at 687-688 (joint dissent).

Even if *NFIB* had not foreclosed the argument, moreover, common sense refutes the notion that Congress loses its power to determine how grants will be used if the grants exceeds a certain (unspecified) size. For example, if Congress offered Arizona $4.9 billion to build bridges and roads, the State could not seek to invalidate that condition and use the grant for other purposes simply because, "[i]n the current economic situation," Arizona found it difficult to "turn down this 'financial inducement,'" Arizona Br. 69 (quoting *NFIB*, 567 U.S. at 580 (plurality opinion)).

Here, Congress offered States billions of dollars of new federal grants and identified the permissible and impermissible uses of these funds. Arizona does not argue otherwise. The State does not dispute that it must comply with the limitations on the permissible uses of funds set out in Section 802(c)(1) or with Section 802(c)(2)'s provision that States may not use the funds "for deposit into any pension fund." On the contrary, Arizona agrees that these "conditions/limitations are not at issue here." Br. 13. And for the same reason, Arizona cannot disregard the other funding restriction in Section 802(c)(2), which simply prevents the State from using its Fiscal Recovery Funds to pay for revenue that is lost as the result of tax cuts.[4]

[4] A district court recently accepted a coercion-based challenge to the Offset Provision; however, that court overlooked the part of *NFIB* that upheld Congress's restrictions on the uses of the ACA's massive new grants, as well as the common-sense problems with the coercion argument. *See Kentucky*, 2021 WL 4394249, at *3-6.

B. Congress Permissibly Specified That A State Cannot Circumvent The Offset Provision Through Indirect Means

Arizona concedes (Br. 2) that the Offset Provision would be "simple and inoffensive" if it is a "restriction on how the States spend particular federal funds directly and nothing more." In other words, Arizona does not claim that it has the right to deposit its $4.9 billion federal grant into its general treasury to offset a (hypothetical) $4.9 billion revenue hole created by state tax cuts. That would be using the federal grant to offset the tax cut "directly."

Congress quite reasonably specified that a State cannot achieve the same result "indirectly." As a practical matter, the Offset Provision would be meaningless if Arizona could reduce its own expenditures by $4.9 to offset the (hypothetical) tax cut described above, and use its $4.9 billion federal grant to pay for those expenditures instead. Accordingly, Congress specified that the federal grant cannot be used "directly or indirectly" to offset a net reduction in state tax revenue.

A funding restriction of this kind is unremarkable. 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 is similar to 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).

Arizona's suggestion that it will be unable to identify the "areas" in which it is using Fiscal Recovery Funds, Br. 65, is difficult to credit. Even if there were no Offset Provision, the State would be obligated to keep track of its expenditures and ensure that the federal funds are used for permissible purposes. *See* 42 U.S.C. § 802(d)(2) (requiring a State that accepts Fiscal Recovery Funds to submit to the Treasury Department "periodic reports providing a detailed accounting" of "the uses of funds by such State"). And the Treasury Department regulations that implement the Offset Provision explain that, to "align with existing reporting and accounting," the Treasury Department will look to whether the State "has spent Fiscal Recovery Funds on th[e] same department, agency, or authority" "from which spending has been cut." 86 Fed. Reg. at 26,809-810. In short, the Offset Provision's restriction on the use of Fiscal Recovery Funds to "indirectly" offset revenue losses from tax cuts is just as straightforwardly permissible as its restriction on the use of funds to "directly" offset such losses.

C. Controlling Precedent Forecloses The Argument That Congress Must Identify All Potential Applications Of A Funding Condition

Like Arizona's other arguments, its contention that the Offset Provision is impermissibly ambiguous rests on the mistaken premise that the statute may reasonably be read to prohibit "essentially *any* reduction in the rate of any one or more state taxes." Arizona Br. 53 (quoting *Ohio v. Yellen*, 2021 WL 2712220, at *15 (S.D. Ohio July 1, 2021), *appeal pending*, No. 21-3787 (6th Cir.)). As we have already explained, that reading is contrary to the provision's plain text. Accordingly, the Treasury Department has consistently disavowed it, *see supra* pp. 9-10, as has the Department of Justice, *see, e.g.*, 2-ER-83 (explaining that the Offset Provision "is, by any measure, a modest restriction on an otherwise generous outlay of federal funds" and "restricts only the use of Rescue Plan funds to offset reductions in net tax revenue, not every form of tax reduction").

Although the district court in *Ohio* also suggested that the Offset Provision was problematic because Congress did not identify its "outer contours," 2021 WL 2712220, at *15, Arizona sensibly does not defend that reasoning, which is foreclosed by controlling precedents. In *Bennett v. Kentucky Department of Education*—which addressed a requirement that federal education funds be used to supplement, rather than supplant, state spending—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 statute. 470 U.S. at 669. "Moreover," the Supreme Court observed, the fact that the program was "an ongoing,

cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." *Id.* 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).

Accordingly, this Court—like every other court of appeals to address the issue—has rejected an ambiguity-based challenge to the grant conditions established by the Religious Land Use and Institutionalized Persons Act (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). This Court acknowledged that the application of that standard in every circumstance would be "perhaps unpredictable" but explained that the Constitution does not require Congress "to list every factual instance in which a state will fail to comply with a condition." *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002). It recognized that funding "conditions 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 with [the conditions].'" *Id.* (quoting *Pennhurst*, 451 U.S. at 24-25).

Other courts of appeals embraced the same reasoning in decisions upholding RLUIPA, explaining that Spending Clause legislation does not "'require[] a level of specificity beyond that applicable to other legislation,'" *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005), and that Congress need not "delineate every instance in which a State may or may not comply with the least restrictive means test," *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003); *see also id.* at 607 ("[T]he exact nature of the conditions may be 'largely indeterminate,' provided that the existence of the conditions is clear, such that States have notice that compliance with the conditions is required."); *Van 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, 1307 (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.").

Arizona criticizes this Court's decision in *Mayweathers*, but its critique is misplaced. In upholding RLUIPA, this Court explained that "Congress is not required to list every factual instance in which a state will fail to comply with a condition," because

"[s]uch specificity would prove too onerous, and perhaps, impossible," but that "Congress must … make the *existence* of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." 314 F.3d at 1067 (emphasis added). This Court concluded that RLUIPA met that requirement. So does the Offset Provision. As the district court correctly recognized, "Congress has done at least as much" in the Offset Provision "as it did in RLUIPA," by "ma[king] the existence of the condition upon which [a State] could accept funds 'explicitly obvious.'" 2021 WL 3089103, at *4 (quoting *Mayweathers*, 314 F.3d at 1067). That a State may be "unsure of 'every factual instance' of possible noncompliance does not amount to a violation of Congress' duty." *Id.*

In any event, neither RLUIPA nor the Offset Provision can plausibly be likened to a hypothetical mystery condition that lies behind "Door Number 2." Br. 5. Rather, the Offset Provision—like RLUIPA—gives States "clear notice of the *fundamental contours* of the proposed deal." Br. 58. Nothing more is required of Congress.

Arizona argues that the statute does not address certain details such as exactly which expenditures of Fiscal Recovery Funds will be considered to indirectly offset a reduction in a State's net tax revenue, what baseline the Treasury Department will use to determine whether a State has suffered a "reduction" in net tax revenue, and whether an expenditure of Fiscal Recovery Funds in one year may be considered to offset a reduction in net tax revenue in a subsequent year. Br. 51-52. But such details do not prevent a State from understanding the "fundamental contours" of the bargain that

Congress offered, Br. 58 (emphasis omitted), and in any event they were addressed in the Treasury Department regulations that were published before Arizona certified that it would comply with the funding conditions and accepted the Fiscal Recovery Funds.

Moreover, if additional questions arise about particular uses of Fiscal Recovery Funds, States are free to ask the Treasury Department for additional guidance. Like the grant program at issue in *Bennett*, the program at issue here is "an ongoing, cooperative program," and grant recipients have the "opportunity to seek clarification of the program requirements" from the agency charged with administering it. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 669.[5]

D. Arizona's Challenge To The Treasury Department's Regulations Is Not Before The Court And Is Also Meritless

Arizona's complaint did not challenge the Treasury Department regulations that implement Section 802. To the extent that Arizona now purports to challenge those regulations, its arguments are not properly before this Court. In any event, its challenge is also meritless.

[5] 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).

It is well settled that Congress can assign agencies responsibility to implement federal spending programs. *See, e.g.*, *Blum v. Bacon*, 457 U.S. 132, 141 (1982) (giving deference to regulation establishing conditions on funding under the Aid to Families with Dependent Children program); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-892 (1984) (applying regulations implementing conditions on education funds); *City & Cty. of San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (explaining that the Court accords "substantial deference to the interpretation adopted by the agency charged with administering" the federal statute's conditions on grants for airport improvement).[6]

Congress expressly authorized the Treasury Secretary "to issue such regulations as may be necessary or appropriate to carry out" Section 802. 42 U.S.C. § 802(f). As Arizona notes (Br. 63), the *Ohio* district court interpreted this express rulemaking authority to exclude the Offset Provision in Section 802(c). But the court's rationale was

[6] *See also, e.g.*, *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 778-791 (D.C. Cir. 2012) (applying regulations implementing the IDEA); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019) (applying Medicaid regulations); *Baptist Mem'l Hosp. - Golden Triangle, Inc. v. Azar*, 956 F.3d 689, 692-693 (5th Cir. 2020) (same); *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"); *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).

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.

unsound and would virtually nullify Congress's express grant of rulemaking authority to the Treasury Department. Contrary to the *Ohio* court's reasoning, the fact that the Offset Provision affects "'billions of dollars in spending each year,'" *Ohio*, 2021 WL 2712220, at *19, is not a basis to exclude that provision from the agency's rulemaking authority: Section 802 in its entirety implicates nearly $200 billion in grant funding for States, yet there is no doubt that Congress authorized the Secretary to issue regulations that implement Section 802. It is likewise immaterial that the Offset Provision touches on "a core State function, the power to tax." *Id.* It is common ground that Congress cannot dictate state tax policy, and the Offset Provision does not do so. The provision leaves States free to structure their tax laws as they choose; it simply prevents them from using Fiscal Recovery Funds to offset a reduction in their net tax revenue caused by a tax cut.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

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

STATEMENT OF RELATED CASES

I am unaware of any related case pending in this Court.

/s/ Daniel Winik
Daniel Winik

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) No. 21-16227

I am the attorney or self-represented party.

This brief contains 7,112 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Daniel Winik* **Date** October 5, 2021

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.

…