IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF OHIO, Plaintiff, v. JANET YELLEN, in her official capacity as Secretary of the Treasury, *et al.*, Defendants.	Case No. 1:21-cv-00181-DRC District Judge Douglas R. Cole

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Through the American Rescue Plan Act, Congress has generously provided nearly $200 billion to mitigate the fiscal impacts of the pandemic on States and the District of Columbia. 42 U.S.C. § 802. Congress also gave States wide flexibility to use those funds while specifying that the federal money could not be used to directly or indirectly offset a reduction in net tax revenue resulting from certain changes in state law. *Id.* § 802(c)(2)(A). No one disputes the obvious existence of that condition, and the nature of that condition is clear from the statute's text. Moreover, the Treasury Department has now promulgated a lengthy and detailed Interim Final Rule. Indeed, Ohio has certified that it will comply with the Act and Treasury regulations, and Ohio has accepted its first tranche of several billion dollars. The State nonetheless continues to press its claim that the offset provision is unconstitutional. That claim fails for multiple reasons.

As an initial matter, recoupment proceedings, should they ever occur, would be the proper context for addressing Ohio's challenge to this grant condition. Ohio also lacks standing: (1) the uncertainty-as-injury theory that this Court found "just barely" demonstrated standing at the preliminary-injunction stage is now moot, *Ohio v. Yellen*, 2021 WL 1903908, at *8 (S.D. Ohio May 12, 2021); and (2) no other theory that Ohio posits meets the State's burden, *id*. In any event, Ohio's claims fail on the merits. The offset provision is not, and never was, ambiguous. And even under the novel, heightened standard Ohio seeks to impose, the State itself agreed to comply with the Rule, which removes any possible doubt. Ohio's coercion and commandeering arguments fare no better and should be rejected for the reasons Defendants previously explained. Not only should Ohio's final-judgment motion be denied, but its case should be dismissed for lack of standing and failure to state a claim.

ARGUMENT

I. OHIO FAILS TO ESTABLISH JURISDICTION.

In seeking judgment, Ohio must adduce actual evidence to support standing for each claim it presses. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). It has not done so. The State's scattershot standing arguments—some raised for the first time on reply and none grounded in evidence—cannot distract from two fundamental flaws: (1) the uncertainty-as-injury theory that this Court found "just barely" demonstrated standing at the preliminary-injunction stage is now moot, *Ohio*, 2021 WL 1903908, at *8; and (2) no other theory that Ohio posits meets the State's burden, *id.* Neither the pleading nor the evidence presented for judgment demonstrates standing. Instead, recoupment proceedings, should they ever occur, would be the proper context for addressing a State's challenge to this grant condition. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985). Unless and until that happens, Ohio cannot overcome the standing, mootness, and ripeness problems with its current claims. At the very least, it has not met its burden on this record.

A. Any Supposed Harm Stemming from Uncertainty Is Moot, Does Not Appear in the Complaint, and Lacks Factual Support in the Record.

Ohio does not respond to Defendants' argument that the one theory of injury-in-fact this Court accepted at the preliminary-injunction stage (uncertainty over whether to accept funds) is now moot. Ohio essentially concedes as much. *See* Combined Reply in Supp. of Perm. Inj. & Decl. J., & Mem. Opp. Dismissal 2, ECF No. 49 ("Ohio Reply") ("Ohio no longer has to decide whether to accept the offer . . . ."). That point is not in dispute, as Ohio has taken the funds. Murnieks Decl. ¶ 3 & Ex. 2, ECF No. 38-1.

Instead, Ohio pivots to a new purported harm. Ohio asserts that its officials must make spending, budgeting, tax policy, and interpretation decisions "without any clarity regarding which decisions violate the [offset provision]." Ohio Reply 3. That assertion appears nowhere in the complaint (even though, presumably, such supposed uncertainty

must have been present when Ohio brought this case). The State's pleading contains just one short paragraph on standing, Compl. ¶ 12, ECF No. 1, and just one conclusory mention of ambiguity, *id.* ¶ 43. This Court recognized this sparsity when it observed that Ohio only "seems to invoke" the uncertainty-whether-to-certify theory in the complaint and that such a theory "just barely" qualified at the preliminary-injunction stage. *Ohio*, 2021 WL 1903908, at *8 (citing Compl. ¶ 12).

Ohio points to only two facts as supposedly allowing the Court to *infer* the injury it now propounds: the text of the offset provision and the allegation that Ohio "had no choice but to accept the money being offered." Ohio Reply 6-8. But those facts have nothing to do with whether its legislature has been unable to make decisions on tax and spending policy. And even if this "inference of standing" were plausible, *id.* at 6, it is a "long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record," *FW PBS v. City of Dallas*, 493 U.S. 215, 231 (1990). In essence, Ohio asks the Court to *assume* that it is injured by the supposed ambiguity of the conditions on the funds it has accepted. But Article III requires Ohio to allege—and, for final judgment, to establish with evidence—an actual injury arising from the statutory ambiguity it claims. *See Fednav, Ltd. v. Chester*, 547 F.3d 607, 617 (6th Cir. 2008) (Courts "simply will not strain to construe the complaint to say [indirectly] what it very simply could have said directly.").

The paucity of Ohio's evidence of an ongoing lack of clarity also seemingly ignores the Rule's details about how Treasury will implement the offset provision. Defs' Combined Mot. to Dismiss & Opp'n to Ohio's Mot. for Final J. 2–4, ECF No. 45 ("Defs.' Opp'n"). The State has not challenged the Rule, nor does it take issue with Defendants' summary of it. *Id.* at 5–6. Indeed, Ohio does not dispute that it accepted its funding after understanding full well that the Rule specifies how its Fiscal Recovery Funds may or may not be spent, including the operation of the offset provision. Murnieks Decl. Ex. 2. These developments further demonstrate how unsupported an uncertainty-as-injury theory is

at this stage. Ohio has more than sufficient "information necessary to understand the deal" it has accepted, *Ohio*, 2021 WL 1903908, at *8, as well as every opportunity to suggest changes in the public comment period on the Rule, ask the agency questions, and raise arguments in any potential recoupment proceeding.[1]

Ohio's cited cases are inapposite. *See* Ohio Reply 2–4. As Defendants explained, those cases about States' standalone sovereign interests are distinct from a State's willing participation in a federal program. Defs.' PI Opp'n 11–12, 26 & n.4, ECF No. 29 (distinguishing *Barnes v. E-Systems*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers), *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016)). They are not relevant here, where the offset provision does not prohibit or interfere with any state prerogative and merely restricts the use of new federal funds. Nor can the State's argument be reconciled with *Massachusetts v. Mellon*, which made clear that Article III jurisdiction is not satisfied by raising "abstract questions . . . of sovereignty." 262 U.S. 447, 483 (1923). And the State continues to err in stretching the principle that some constitutional violations cause per se irreparable harm to cover *all* alleged constitutional violations. *Compare* Ohio Reply 2 (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)), *with* Defs.' PI Opp'n 25–26, *and Tiger Lily LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 499 F. Supp. 3d 538, 550–51 (W.D. Tenn. 2020) (distinguishing *Obama for America* and collecting cases "expressly limit[ing] the types of constitutional claims that may constitute irreparable injury"). Ohio's two new cases involv-

[1] This is not, as Ohio argues, a "heads-I-win-tails-you-lose approach" to standing. Ohio Reply 4. Rather, it remains Defendants' position that Ohio has not established standing. Even if a State might be uncertain about some future applications of a funding condition, it should proceed in the normal course—engaging with the implementing agency, adhering to regulatory guidance, seeking a different bargain through the political process, or eventually bringing an as-applied challenge in court—rather than seeking to prematurely invalidate a federal statute in court.

ing alleged informational injuries (stemming from a failure to provide statutorily required information to a party) also have no applicability here. Ohio Reply 1–2, 7 (citing *FEC v. Akins*, 524 U.S. 11, 21 (1998), and *Ohio v. Raimondo*, 848 F. App'x 187 (6th Cir. 2021) (per curiam)). Nor does its new case about the absolute right to procedural due process. *Id.* at 2 (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)). These cases instead underscore the novelty of Ohio's claims and (shifting) theories of standing.

Two final points on this new standing theory. First, although the State is correct that "standing need not rest on the exact same injury at all stages of the case," this is beside the point. Ohio Reply 5. The State cannot rely on a theory that is absent from the record or on one that is discernible, just barely, by way of inference. *White v. United States*, 601 F.3d 545, 551–52 (6th Cir. 2010) ("[S]tanding cannot be inferred . . . from averments in the pleadings, but rather must affirmatively appear in the record" from "sufficient factual matter" in "the complaint."). Second, Ohio's willing certification and receipt of funds are not injuries at all. Ohio concedes that, "of course, a State might reasonably determine that the costs of accepting an unconstitutionally ambiguous condition are worth the benefits." Ohio Reply 13. That is exactly what Ohio apparently has done, alleged ambiguity included. It should not be permitted to unilaterally revise that bargain immediately after acceptance and long before any theoretical recoupment dispute is sufficiently imminent to support standing or ripeness. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *Ohio*, 2021 WL 1903908, at *8.

B. Ohio Cannot Establish Standing on Any of the Alternative Theories It Now Presses.

The State argues, without citation, that because the Court found standing at the preliminary-injunction stage for the ambiguity claim, "the State has standing to bring *all* of its claims." Ohio Reply 8–9. This is incorrect. *Ohio*, 2021 WL 1903908, at *11 n.8 ("[S]tanding is not dispensed in gross." (quoting *Town of Chester, N.Y. v. Laroe Ests., Inc.*,

137 S. Ct. 1645, 1650 (2017))). Indeed, Ohio also lacks a logical or evidentiary basis for any of the other standing theories for which it now grasps.

First, Ohio argues that it is harmed by the statute's and the Rule's reporting requirements. Ohio Reply 3–4. This argument, raised only on reply in Ohio's fourth substantive brief in this case, should not be entertained. *See Million v. Warrant Cnty.*, 440 F. Supp. 3d 859, 871 n.2 (S.D. Ohio 2020) (Cole, J.) ("Typically, a party cannot raise new arguments on reply."), *aff'd*, No. 20-3312, 2021 WL 1289605 (6th Cir. Apr. 7, 2021). In any event, Ohio does not challenge the statutory provision requiring a "detailed accounting" or the Rule. 42 U.S.C. § 802(d)(2). And even if the purportedly ambiguous word "indirectly"—as in "indirectly offset a reduction in net tax revenue"— were struck from the statute, the reporting provisions would still be in force. *See* Tr. of Prelim. Inj. Hearing at. 26:5–13 (Ohio agreeing that the Court could enter "limited relief," like enjoining just "the indirectly clause"). That makes sense because Treasury must still monitor whether the State "directly" offsets a reduction in net tax revenue even if "indirectly" is invalidated.

Second, the State argues that "the prospect of future enforcement is now sufficiently 'imminent' to constitute an injury in fact." Ohio Reply 4 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014)). But this Court correctly held that stated harms premised on potential recoupment do not "suffice" because they are "too remote." *Ohio*, 2021 WL 1903908, at *7–8. That remains true. Although Ohio at last acknowledges *Driehaus*'s applicability to this pre-enforcement challenge, the State utterly fails to engage with—let alone satisfy—its controlling test. Even now, with the benefit of the Rule, Ohio has failed to plausibly allege any way in which the State intends to misuse Fiscal Recovery Funds or any credible threat of enforcement against it. Both are required for pre-enforcement standing, *Driehaus*, 573 U.S. at 159, and both are entirely lacking here, *accord Missouri v. Yellen*, No. 4:21-cv-376, 2021 WL 1889867, at *3–5 (E.D. Mo. May 11, 2021), *appeal filed*, No. 21-2118 (8th Cir. May 18, 2021). Rather than demonstrate otherwise, Ohio attacks a straw man by asserting that Defendants' position would foreclose declaratory and injunctive

relief in all Spending Clause litigation. Ohio Reply 4, 19–20. Not so. Spending Clause legislation may be challenged where potential enforcement is sufficiently imminent.[2]

In the end, Ohio admits that this "is not a dispute about the [offset provision's] application to discrete cases." *Id.* at 16. That concession only underscores that Ohio brought its novel constitutional claims in an unusual posture: after a condition solely on the use of new federal funds was enacted, but before implementation (let alone enforcement) by the relevant agency and even before acceptance of the funds by Ohio. The State (and this Court) are unable to identify any case supporting standing for good reason. *Ohio*, 2021 WL 1903908, at *9.[3] Ohio's pre-enforcement, facial attack on a federal statute departed at the outset from the "preferred route" of as-applied challenges. *Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (en banc). That is precisely what this Court should await—should it ever even occur—before finding justiciable Ohio's constitutional attack on a duly-enacted federal statute. *Warshak*, 532 F.3d at 529; *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

II. OHIO FAILS TO STATE A CLAIM AND CANNOT SUCCEED ON THE MERITS.

Ohio's complaint should be dismissed for failure to state a claim. The offset provision is neither unconstitutionally ambiguous nor unconstitutionally coercive or commandeering.

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[2] On this point, Ohio also cites a concurrence, but even that decision proves Defendants' (and the Court's) point. In *City of Pontiac*, Judge Sutton agreed that the plaintiff's injury "turns on whether the threatened harm is real and imminent." *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 278 (6th Cir. 2009) (Sutton, J., concurring). Here, it is neither.

[3] Unlike the Spending Clause cases the State invokes, the Rescue Plan impacts no *preexisting* federal funding or state action. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–85 (2012) ["*NFIB*"] (States stood to lose existing Medicaid funding); *South Dakota v. Dole*, 483 U.S. 203 (1987) (States stood to lose existing highway funding). The offset provision's impacts, if any, are confined to the new funding, so the Court should not take any "comfort on the justiciability front" from those cases. *Ohio*, 2021 WL 1903908, at *10.

A. The Offset Provision Is Not Ambiguous.

1. Ohio bases its ambiguity argument almost wholly on the contention that agency regulations have no role to play in implementing a statutory funding condition. Unless the statute itself specifies every detail of how the condition applies to any potential use of funds, Ohio suggests, it must be unconstitutional. That is incorrect.

As Ohio concedes, a long line of Supreme Court and Sixth Circuit precedent has established that "agency interpretations of Spending Clause conditions may be entitled to deference." Ohio Reply 11 (citing *Blum v. Bacon*, 457 U.S. 132, 141 (1982)); *e.g.*, *Harris v. Olszewski*, 442 F.3d 456, 467–68 (6th Cir. 2006); *Westside Mothers v. Olszewski*, 454 F.3d 532, 543–44 (6th Cir. 2006); *City of Cleveland v. Ohio*, 508 F.3d 827, 843 (6th Cir. 2007); *United States v. Miami Univ.*, 294 F.3d 797, 814–15 (6th Cir. 2002); *Snider v. Creasy*, 728 F.2d 369, 371–73 (6th Cir. 1984); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891–92 (1984); *Baptist Mem'l Hosp. – Golden Triangle, Inc. v. Azar*, 956 F.3d 689, 692–93 (5th Cir. 2020); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 778 (D.C. Cir. 2012)). Indeed, Ohio emphasizes that "no one disputes that proposition." Ohio Reply 11.[4]

That line of precedent forecloses Ohio's contention that Congress cannot delegate to agencies the authority to fill gaps in Spending Clause legislation. If Ohio were right that a statute itself must make the terms of the condition unambiguous, then agencies would never be entitled to *Chevron* deference in implementing such legislation, because there would be nothing in the statute for the agency to interpret. "*Chevron* deference 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019) (some quotation marks omitted). It would thus be unremarkable, for instance,

[4] Defendants are not asking the Court to give deference to the Rule because Ohio has not challenged the Rule. Defendants raise this point only to illustrate that regulations can play a role in defining the scope of a condition. Ohio's discussions of the major-questions doctrine and *Chevron* deference are thus inapposite. Ohio Reply 12–13.

if Spending Clause legislation providing grants for state and local bridge construction left potential terms regarding safety, materials, and contracting to the federal grantmaking agency.

Implementing regulations are, of course, subject to the Administrative Procedure Act and the other typical constraints; for example, an agency regulation would be unauthorized and unenforceable if it were contrary to the statute's plain text. As Defendants previously noted, in *Virginia Department of Education v. Riley*, the court found the agency's position untenable "under even ordinary standards of statutory construction." 106 F.3d 559, 563 (4th Cir. 1997) (en banc) (declaring that "it could not be clearer from the face of the statute" that the agency's interpretation was incorrect). But unlike *Riley*, this suit is not a challenge to Treasury's statutory interpretation; it is a constitutional challenge to the statute itself. And it rests on the false premise that the details of a funding program must be established by statute alone.

Ohio's assertion that Congress did not give the Treasury Department "the power to set rules governing state tax policy," Ohio Reply 12, misunderstands the Rule. The Rule does no such thing. Rather, the Rule establishes a framework for ensuring that Fiscal Recovery Funds are used only for the purposes authorized by the statute, and not to offset a reduction in a State's net tax revenue. The statute expressly delegates authority to the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" the section of the Act that sets forth the permissible and impermissible uses of Fiscal Recovery Funds. 42 U.S.C. § 802(f). And "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Put simply, agency regulations must have a role to play in implementing Spending Clause conditions and Ohio's argument to the contrary is incorrect. The only remaining

question is what degree of specificity must be supplied by the statute itself. For the reasons Defendants have previously explained, it is sufficient for Congress to unambiguously state the *existence* of a condition in the statute. Defs.' Opp'n 12; Defs.' PI Opp'n 23; *see, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24–25 (1981); *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005). Ohio makes no argument that the offset provision does not meet this standard, only that this standard is incorrect. *See* Ohio Reply 11–12.

But the Court need not address whether that degree of specificity would be sufficient because Congress has done far more here. The offset provision tells States that they cannot use Fiscal Recovery Funds "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." 42 U.S.C. § 802(c)(2)(A). The text of the statute thus specifies not only the existence but the nature of the condition on the use of Fiscal Recovery Funds. If Congress can permissibly delegate to agencies the authority to fill interstices in the implementation of funding conditions—and it can, as explained above—then it could certainly leave to the Treasury Department the fine details of specifying how to calculate "a reduction in . . . net tax revenue," how to determine whether such a reduction "result[s] from a change in law, regulation, or administrative interpretation," and what it means to "use" Fiscal Recovery Funds "to either directly or indirectly offset" such a reduction. In specifying those details, the Treasury Department is not creating a condition not present in the statute itself; it is simply explaining—as agencies routinely do with legislation of all sorts—how the provision Congress enacted is to be implemented. The agency is also seeking input from States through public comment on the Rule.

2. In determining whether the offset provision is ambiguous, the Court may look not only to the statute but also to the Rule. Ohio certified and accepted Fiscal Recovery

Funds in full awareness of the Rule. And the Rule leaves no ambiguity at all in the application of the offset provision. It explains, for example, how tax changes are to be scored and the benchmark against which "net" changes are to be calculated, both issues the Court previously identified as gaps in the statutory text. *See* Defs.' Opp'n 14–15 (citing 86 Fed. Reg. at 26,786, 26,808–09); *Ohio*, 2021 WL 1903908, at *12. As to the Court's biggest concern—the meaning of "indirect[] offset"—the Rule answers that question as well. *See Ohio*, 2021 WL 1903908, at *12. The Rule requires that States demonstrate how they covered the costs of any tax cuts from sources other than Fiscal Recovery Funds, such as by raising other sources of revenue, cutting spending in certain areas, or using revenue derived from increased economic growth. 86 Fed. Reg. at 26,807. Only if a State cannot demonstrate how it paid for its tax cuts without using Fiscal Recovery Funds will Treasury consider that amount to have been directly or indirectly offset with Fiscal Recovery Funds, and thus potentially subject to recoupment. *Id.*; *see also id.* at 26,810 (explaining, for example, that "prevent[ing] recipient governments from using Fiscal Recovery Funds to supplant State or territory funding in the eligible use areas, and then us[ing] those State or territory funds to offset tax cuts," "ensure[s] that Fiscal Recovery Funds are not used to 'indirectly' offset revenue reductions due to covered changes").

Ohio once again identifies only two supposed ambiguities in the Rule. Reply 14–16. As an initial matter, those concerns are beside the point here because Ohio has not challenged the Rule. But even if they were relevant, neither makes a difference. Ohio first suggests that the Rule is ambiguous as to how Treasury will determine whether a spending cut that a State uses to offset a net-tax-revenue reduction in one year is "subsequently replaced" with Fiscal Recovery Funds. But the Rule is clear: if a State says that it is offsetting a $100 million reduction in tax revenue (arising from a tax cut) by cutting $100 million in spending on sewer infrastructure, and proceeds spend $100 million in Fiscal Recovery Funds on sewer infrastructure in the next reporting year to backfill the prior year's spending cut, then the State has "subsequently replaced" the spending cut

with Fiscal Recovery Funds. 86 Fed. Reg. at 26,810. Ohio's second point—questioning the Rule's determination of a baseline from which to measure revenue cuts, and its carve-out for de minimis reductions in tax revenue—speaks only to whether the Rule is consistent with the statute, not whether it is ambiguous. Ohio's ambiguity challenge should fail.

B. The Rescue Plan Is Not Coercive or Commandeering.

Ohio's novel coercion and commandeering claims should be dismissed. As Defendants have explained, *NFIB* involved the threatened loss of *preexisting* Medicaid funding if States declined the new conditions; that loss drove the Court's coercion analysis. *NFIB*, 567 U.S. at 575–85 (plurality); Defs.' PI Opp'n 18–20; *supra* Section I.B., *supra*. Here, the offset provision only impacts the use of entirely new funding, an approach to Spending Clause legislation that even the *NFIB* dissent blessed. 567 U.S. at 687–88 (joint dissent) ("Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion."). After all, "[t]hreat of loss, not hope of gain, is the essence of economic coercion." *United States v. Butler*, 297 U.S. 1, 81 (1936) (Stone, J., dissenting). Ohio attempts to gloss over that fundamental and dispositive difference with three main arguments, but none is availing. In the end, the coercion analysis, which in the Spending Clause context is the same as the Tenth Amendment commandeering analysis, does not apply to the offset provision and, even if it did, Ohio's arguments fail. Defs.' Opp'n 20–21.

First, Ohio again argues that both the Rescue Plan and the Rule are merely drafted to *look* like conditions on the use of funds, but do so much more that they cannot be treated as such. Ohio Reply 17. There is no basis for that assertion. Ohio identifies, without having challenged in its complaint, only the statute and the Rule's requirement that States provide Treasury an accounting to ascertain the uses of federal funds. That requirement is simple, allowed under the Spending Clause, and indeed expected "to safe-

guard its own treasury." *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937). It also happens to be particularly permissive here because States can use their own estimation models and can even use the federal funds themselves to pay for any administrative costs of reporting. 86 Fed. Reg. at 26,809, 26,822.

Next, Ohio's contention that the Rescue Plan is coercive because the State might be influenced by *other* States' decisions whether to accept the funds is unsupported. Ohio Reply 16–18. This approach to coercion would be contrary to precedent, turn on the actions of nonparties (here, States), and presume that every Spending Clause statute offering funds to the 50 States was coercive. *See* Defs.' Opp'n 21. The Supreme Court has instead made clear that "Congress may use its spending power to create incentives for States to act in accordance with federal policies." *NFIB*, 567 U.S. at 577.

Lastly, Ohio continues to misunderstand Defendants' position and the governing law regarding its sovereignty argument. The State does not acknowledge or engage with the precedent demonstrating that "Congress can use [its Spending Clause] power to implement federal policy it could not impose directly under its enumerated powers." *NFIB*, 567 U.S. at 578; *see* Defs.' Opp'n 22–23. The offset provision does not dictate anything more than one impermissible use of new federal funds. "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).

CONCLUSION

For the reasons explained above, Ohio's final-judgment motion should be denied and this case should be dismissed.

DATED: June 11, 2021

Respectfully submitted,

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