No. 19-1137

In the
Supreme Court of the United States

TENNESSEE, BY AND THROUGH THE TENNESSEE GENERAL ASSEMBLY, ET AL.,
Petitioners,

v.

DEPARTMENT OF STATE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* THE EAGLE FORUM AND THE TENNESSEE EAGLE FORUM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Eagle Forum is a national organization founded in 1972, by Mrs. Phyllis Schlafly. Its network of state-based chapters share the mission of mobilizing and mentoring grassroots conservative activists to impact public policy at all levels of government; from Congress to state legislatures, to local commissions and boards.

Tennessee Eagle Forum was established as a state chapter in the late 1970's. Mrs. Bobbie Patray has led the chapter as president since 1987. She has provided thirty-three years of advocacy to members of the Tennessee General Assembly and on-the-scene mentoring to countless individuals and organizations during this time.

Eagle Forum's state chapters are well known to their respective state legislatures. Amici's very first nationwide mobilization is credited with defeating the proposed Equal Rights Amendment which was accomplished by effectively pressuring state legislatures to stop or rescind passage of the ERA. Amici's advocacy in state legislatures on a wide range of issues has increased significantly since that first victory. Amici's advocacy continues to be grounded in upholding constitutional principles including rights

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[1] Written notice of intent to file an *amicus curiae* brief in support of Petitioners was provided to counsel of record for each party at least 10 days prior to the filing deadline for *amicus curiae* briefs in this case. Counsel of record for each party provided consent for the filing of this amicus curiae brief. No person or entity other than counsel for amici authored any part of this brief or contributed money to fund the preparation or submission of this brief.

and protections for individual liberty. Amici's activism, particularly at the state level, often involves the constitutional boundaries between state and federal governments.

Tennessee Eagle Forum was the first state chapter to question legislators about their authority to appropriate state funds when they are being forced by the federal government to spend some of that state revenue to support a federal program in which the state no longer participates. This is the issue which forms the basis of Petitioners' Writ for Certiorari. In keeping with its work to educate and connect the public to the legislative process, Tennessee Eagle Forum has used its weekly legislative update to highlight the efforts of the Tennessee General Assembly to address this issue through the judicial process.

SUMMARY OF ARGUMENT

The Court in *National Federation of Independent Business v. Sebelius,* 567 U.S. 519 (2012), exhorted states to assert their sovereign status against the federal government when necessary, "[t]he States are separate and independent sovereigns. Sometimes they have to act like it." *Id.* at 579. This is precisely the spirit of the action taken by the Tennessee General Assembly.

When Congress proposed the Refugee Act, it understood that they were creating a fiscal burden for states because states would be legally required to enroll Medicaid eligible refugees into the entitlement program at the state's expense. 8 U.S.C. §§ 1522(e)(1), (4); 45 C.F.R. § 400.94(b)-(c). This is why the Act's plain

language provides for reimbursing state Medicaid costs for eligible refugees for three years. In addition, the Act's legislative history establishes a "clear indication" of Congress' intent to make reimbursement of state costs a priority in administering the Act. *The Refugee Act of 1979*, S. Rpt. No. 96-256 at 11 (1979); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

The U.S. Department of Health and Human Services (HHS) and the Office of Refuge Resettlement (ORR), despite explicit directions from Congress and a recognition that the Refugee Act of 1980 created a fiscal burden for the states, eliminated all reimbursement to states for refugee Medicaid costs, thereby shifting to the states, costs that were supposed to be the responsibility of the federal government. The unconstitutional cost shifting, *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. at 577-78, was made even more onerous when HHS/ORR promulgated a new regulation which permitted states to withdraw from the refugee program but remain liable for the cost that was supposed to be covered by the federal government. 59 Fed. Reg. 41417, 4121 (1994).

Administration of the Refugee Act is in conflict with Congress' explicit directions for state reimbursement and forces *all* state legislators in the Tennessee General Assembly to violate their Constitutional duties to appropriate state funds and balance the state budget. Congress may not undermine a "necessary attribute [of] an independent sovereign government" *Coyle v. Smith,* 221 U.S. 559, 575 (1911), including the power to "appropriate its own public funds," when this

power has not been delegated to the federal government. *Id.* at 565. To permit otherwise is a direct affront to the framework of dual sovereignty set forth in the Constitution. *Printz v. U.S.*, 521 U.S. 898, 920 (1997).

Absent a grant of standing, Tennessee's legislature will be denied a venue to stop the federal government's interference in the execution of its exclusive power and duties relative to the handling of state funds. The Court has no power to control the budgetary challenge facing Petitioners from the deadly and economically devastating March tornadoes and COVID pandemic. However, the "siphon[ing] of state funds - at any time and in any amount" by the federal government, "to help pay for a federal program from which Tennessee has withdrawn," is well within the Court's discretion to address. Petition for a Writ of Certiorari, *Tennessee General Assembly v. U.S. Department of State*, No.19-1137 at 2 (March 13, 2020). Petitioners' Writ of Certiorari should be granted.

ARGUMENT

I. Restoring a Constitutionally Defensible Relationship Between the Federal Government and the Tennessee Legislature Requires Granting the Petition for Certiorari

Long before the federal government reneged on its promise to reimburse 100% of state Medicaid costs for new refugees and instead, shifted the cost to states, it was predicted that Congress' Spending power would put the Refugee Act on a collision course with the Tenth Amendment. Kenneth D. Basch, *Federal*

Responsibilities for Resettling Refugees, 24 Wash.U.J.Urb. & Contemp. L. 151 (1983); David Knudson, *Federal Refugee Resettlement Policy: Asserting the States' Tenth Amendment Defense,* 8 Hastings Con.Law Quarterly 878 (1981).

Congress' plenary power to admit aliens, including refugees, is undisputed. But "[o]nce an alien has entered the country, however, this constitutional power loses force" Basch, *supra* at 181, and Congress' Spending power becomes essential to meeting the objectives of the Act. Presumably, "... refugee resettlement programs are exercises of Congress' Spending power and are thus subject to the limits of that power." *Id.* at 182.

Congress may use its Spending power to encourage or induce states to adopt federal policies, but it cannot go so far as to try and compel states to use their limited resources to fund federal programs. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 577-78 (2012).

Once the promised reimbursement for Medicaid expenditures was stopped and the costs shifted to the state, the "federal-state balance" was breached. *SWANCC v. Army Corps of Engineers*, 531 U.S. 159,173 (2001). Even after Tennessee officially withdrew from the refugee resettlement program the federally forced state expenditures didn't stop and any remnant of a Constitutionally defensible relationship between the federal government and the Tennessee General Assembly was extinguished. In *Sebelius,* the Court exhorted states to assert their sovereign status against the federal government when necessary. *Id.* at 579. Petitioners have done precisely what the Court

advised. Heeding the Court will prove meaningless unless Petitioner's Writ of Certiorari is granted.

To date, the federal program costs continue to bypass the legislature's appropriations process and be imposed on the state's budget. *All* state legislators continue to be forced to violate their Constitutional duties to appropriate state funds and balance the state's budget, and as such, suffer an institutional injury. Petition for a Writ of Certiorari, *Tennessee General Assembly v. U.S. Department of State,* No.19-1137 at 16-17 (March 13, 2020).

A. The plain language of the Refugee Act of 1980 and its legislative history establish a clear record of Congress' intent to reimburse the first three years of state Medicaid costs for newly resettled refugees.

The Refugee Act of 1980 states unambiguously that states would be reimbursed 100% of their cost of Medicaid for three years for newly resettled refugees. 8 U.S.C. §§ 1522(e)(1), (4). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain,* 503 U.S. 249, 253-254 (1992).

If the Court is not persuaded by the explicit language of the statute, any question regarding state cost reimbursement is confirmed by the Act's legislative record. "First, this Court has repeated with

some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" *Toibb v. Radloff,* 501 U.S. 157, 162 (1991).

The Refugee Act's legislative history is emphatic regarding Congress' intent to reimburse state Medicaid costs for newly resettled refugees. Members of Congress well understood that bringing refugees to the U.S. was as much about humanitarian objectives as it was about money and real estate; that is, who would pay for what and where refugees would be placed once they arrived. Congress *had* to take state financial concerns seriously and commit to reimbursing states as a priority because the Act created a fiscal catch-22 for states regarding entitlement programs like Medicaid. If states agreed to resettle refugees, they would have no choice but to enroll eligible refugees into *state-funded* Medicaid programs which refugees access immediately upon arrival. 8 U.S.C. § 1522(e)(1), (4); 45 C.F.R. § 400.94(b)-(c).

The Senate proposed two years of refugee cash and medical assistance attached to state cash and Medicaid entitlement programs "… provided through a 100 percent reimbursement to the States for all refugees who do not qualify for the regular AFDC-Medicaid programs. For those who do qualify for the regular programs, the funds cover the State's portion of payment for these services." *The Refugee Act of 1979*, S. Rpt. No. 96-256 at 11 (1979).

One Senator predicted that the new program could, like other federal programs, become fiscally detrimental for the states if the promise wasn't kept. This is precisely where Tennessee finds itself today:

> The final concern I have has to do with the issue of the withdrawal of the Federal Government from the system after 2 years and the States' bearing the full financial burden. We hear that in our travels at the State level. People of the States are very frustrated at the Federal Government beginning a program, whatever it may be, with the State in full participation and then suddenly withdrawing and saying, 'Here you are.' What response have you had from the State governments, Governors, mayors and municipality officials with regard to that issue?

Id. at 12.

The 1979 House Report was specific that the "underlying purpose" of federal medical and cash assistance for refugees was to "… insure that state and local governments are not adversely impacted by Federal decisions to admit refugees." *The Refugee Act of 1979*, H. Rpt. No. 96-608 at 180 (1979).

To that end, bill co-sponsor Representative Elizabeth Holtzman, pushed to reimburse 4 full years of state cost as opposed to the Senate's proposed two-year limit:

> In my judgment, it is essential that we continue to receive the full support of State governments for our refugee programs; I believe that we would jeopardize that support and cooperation if

> we were to transfer the resettlement burden to the States after the refugees have been in the country for only 2 short years. While most refugees are quickly integrated into American society, some adjustment problems do occur in the first few years and I do not believe we should require States to respond to these residual problems with their own resources. In short, full reimbursement for a 4-year period represents, in the committee's judgment, a proper allocation of Federal and State responsibilities for the care and resettlement of refugees.

125 *Cong. Rec.* 35815 (Dec.13, 1979)

A conference committee reconciled the issue of federal assistance settling on three years of federal support. According to the Act's leading sponsor Senator Ted Kennedy, the duration of federal support was "the widest difference between the Senate and House versions." In his paper tracing the legislative history of the 1980 Act, Kennedy confirms that reimbursement to states was a key consideration driving the newly created program:

> The widest difference between the Senate and House versions of the Act was on domestic resettlement assistance. Because the admission of refugees is a federal decision and lies outside normal immigration procedures, the federal government has a clear responsibility to assist communities in resettling refugees and helping them to become self-supporting. The basic issues here [in conference committee] were the length of time of federal responsibility and the

> method of its administration. State and local agencies were insistent that federal assistance must continue long enough to assure that local citizens will not be taxed for programs they did not initiate and for which they were not responsible.

Edward M. Kennedy, *Refugee Act of 1980,* 15 International Migration Rev., No.1/2, (Spring-Summer 1981), 141, 151.

Buffering the financial impact on states was critical to gaining state cooperation which is why making reimbursement to the states for state entitlement program expenditures was an explicit priority in administering the Act.

B. Congress created the U.S. Office of Refugee Resettlement and provided specific directions to reimburse state Medicaid costs which were not followed by the agency interpreting the statute and applying its regulations.

The Refugee Act created the U.S. Office of Refugee Resettlement (ORR), a new agency with a Director position within the U.S. Department of Health and Human Services (HHS). 8 U.S.C. § 1521(a). Congress instructed ORR's Director to reimburse states 100% for three years of their Medicaid cost for newly arriving refugees. 8 U.S.C. §§ 1522(e)(1), (4). Initially HHS/ORR followed the directions laid out by Congress.

To serve the priority to reimburse states when Congress reduced its appropriations for refugee assistance, HHS/ORR began reducing the federal

subsidy only for refugees ineligible for entitlement programs as a means to "… reduce total refugee welfare costs while continuing to relieve States of refugee cash and medical assistance costs during a refugee's first 36 months in this country." 47 Fed. Reg. 10841, 10842 (March 12, 1982). Without question HHS/ORR understood that a fiscal catch-22 for states was built into the Refugee Act and that it was "Congress' intent that States and local governments 'will not be unduly burdened by Federal decisions to admit refugees.'" *Id.*

While HHS/ORR sharply curtailed federal assistance to states for refugees who were not eligible for Medicaid – i.e. "costs which the States are under no legal obligation to incur", it affirmed its obligation to follow directions from Congress to cover costs for refugees who were in the Medicaid program since these are costs the state is legally obligated to cover but which the federal government promised to pay:

> … the Department's specific policy decisions reflected in these regulations were very much influenced by the recognition of continued responsibility to the States. It is for this reason that the rules continue to provide for 100% reimbursement for State cash and medical assistance costs during a full 36 month period with respect to refugees and entrants who qualify for benefits under jointly administered Federal/State programs such as AFDC and Medicaid ….
>
> Thus, the rules continue to reflect a Federal willingness to accept responsibility for costs of

> assistance actually incurred by States on behalf of refugees during their first three years in this country. The Federal reimbursement to States which is discontinued under these rules after an 18 month period **only relates to assistance costs which the States are under no legal obligation to incur** in the absence of coverage under the federally funded RCA [refugee cash assistance] and RMA [refugee medical assistance] programs ….
>
> Thus, it does not transfer costs to the States or localities.

Id. at 10844 (emphasis added).

In a drastic repudiation of Congress' commitment to states, however, HHS/ORR eliminated all reimbursement to states for Medicaid eligible refugees and as documented in federal reports, shifted these costs to the states.[2] Subsequent promulgation of the withdrawal rule compounded the cost shift by enabling it to continue even after a state withdrew from the program. 59 Fed.Reg. 41417, 4121 (1994). Neither the cost shift nor the withdrawal rule are within the scope of the regulatory authority intended by the enabling legislation. *SWANCC v. Army Corps of Engineers*, 531 U.S. 159,172-73 (2001).

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[2] U.S. Gen. Accounting Office, GAO-HRD-91-51, *Refugee Resettlement: Federal Support to the States Has Declined* (1990); Office of Refugee Resettlement, *Report to Congress* at 20 (January 31, 1993).

In *SWANCC* the Court rejected the Army Corp of Engineers' use of their migratory bird rule to broaden its regulatory authority over isolated waters under the Clean Water Act. The Court held that the Corps' application of the bird rule for this purpose, was not supported by the statute's language, its legislative history (which respondent "admit[ted]… is somewhat ambiguous"), *Id.* at 168 n.3, or a "clear indication" of Congress' intent. *Id.* at 172.

The Court did not reach the question of whether the Commerce Clause could fill the jurisdictional gap for the Corps, but intimated that the Corps would have fared no better because under a Commerce Clause analysis the "significant constitutional questions raised by [the Corps'] application of their regulations" intruded on areas of traditional state authority. *Id.*

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Id. at 172-173 (internal citations omitted).

The statutory language of the Refugee Act and the legislative history are consistent and establish a clear record on which the Court can rely as to the issue of reimbursing the state Medicaid cost. This more than reasonable interpretation of the Refugee Act offers a way for the Court to "cure" the problem caused by HHS/ORR's actions which infringe on Petitioners' power to "appropriate its own public funds," *Coyle v. Smith*, 221 U.S. 559, 565 (1911), without having to wade into the constitutional status of the Refugee Act itself. See, *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

C. Forcing state legislators to expend state resources outside of the normal appropriations process directly interferes with their duties to the state and to their constituents.

Congress may not commandeer a state's legislative process, *New York v. U.S.*, 505 U.S. 144, 161 (1992) or impair "necessary attributes as an independent sovereign government" which have not been delegated to the federal government, *Coyle v. Smith*, 221 U.S. at 575, including the power to "appropriate its own public funds" for a purpose within the explicit authority of a state's legislature *Id.* at 565. It may not force a state to administer a federal program, *Printz v. U.S.*, 521 U.S. 898, 930 (1997), or fund a federal program, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577-78.

States are supposed to be able to reject an offer of federal funds and the conditions attached to the money. But the HHS/ORR withdrawal rule promulgated *after* all promised reimbursement to the states was

eliminated, enables an end-run around what Congress intended in the Refugee Act. "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system …. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds." *Id*. at 578.

That "legitimate choice" is not available to the Tennessee General Assembly. Whichever option Tennessee chooses—administer the federal refugee program and absorb the shifted federal costs, withdraw and continue to be forced to absorb the shifted federal costs, or refuse to enroll Medicaid eligible refugees and jeopardize 20% of the state budget, the rules attached to the resettlement program and Medicaid create the "compulsion" rejected by *Sebelius*. *Id.* at 577. If the federal government cannot compel a state to fund federal programs, then a state should not be forced to divert funding from essential and traditional state government services in order to operationalize a federal program from which the state has withdrawn. Tennessee's legislature is constitutionally bound to provide for the public's health, safety and general welfare. These Tenth Amendment powers are impermissibly threatened by federally coerced spending for the refugee resettlement program, especially at a time when the needs of Tennessee's citizens are dire.

This false choice violates a core principle of dual sovereignty, "a legal system unprecedented in form and design, establishing two orders of government, each

with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Printz v. U.S.*, 521 U.S. at 920. The limits on Congress' Spending power must apply equally to Petitioners' case if the Constitutional federal-state balance is to be restored. *SWANCC v. Army Corps of Engineers*, 531 U.S at 173.

Coincident with the COVID-19 pandemic, a series of seven deadly tornadoes ripped through 100 miles of Tennessee counties resulting in 25 deaths, hundreds of homes and businesses and schools destroyed, and the Governor declaring a state of emergency. On the heels of this extreme tragedy, another state of emergency was declared due to the climbing numbers of coronavirus victims. All of this has worsened the situation for Tennessee's fifteen distressed counties which fall within the top 10 percent of economically distressed counties in the U.S.

Prior to adjourning prematurely to help contain the spread of COVID-19, the General Assembly passed a bare-bones, mission critical budget which lowered the growth rate of the current fiscal year and projected a decreased growth rate for the upcoming fiscal year. Skyrocketing unemployment claims (over 200,000 at the beginning of April), and other necessary measures to address the COVID pandemic on top of the tornado crisis, have brought unanticipated state expenses and state revenue shortfalls. The cost and timeline for the State's recovery remains undetermined. It is also unknown how many more Tennesseans may become Medicaid-eligible as a result of these twin crises.

The federal refugee program is only temporarily suspended. Once restarted, it will again impose burdensome costs on the state budget from refugee entrants who rely heavily on the Medicaid entitlement program. The challenge for Tennessee's General Assembly to effectively meet the fiscal, health and safety needs across the State will impact the current and next year's budget which begins on July 1, 2020. The legislature's task of managing these budgets is compounded by the different start dates of the state and federal fiscal years with the federal government being able to "siphon state funds—at any time and in any amount—to help pay for a federal program from which Tennessee has withdrawn." Petition for a Writ of Certiorari, *Tennessee General Assembly v. U.S. Department of State,* No.19-1137 at 2 (March 13, 2020).

There is no room in the Constitution's framework to permit the federal government or its agencies to take state funds without the express consent of the state's appropriating body. The Court confirmed this limit when it held that a federal action which interferes with the state's control over its own budget is not permissible. It is incumbent on this Court to protect the legitimacy of dual sovereignty under which Congress' Spending power is exercised.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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