No. 22-880

# In the Supreme Court of the United States

OHIO, PETITIONER

*v.*

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

The American Rescue Plan Act of 2021, Pub. L. No. 117-2, Tit. IX, Subtit. M, 135 Stat. 223 (42 U.S.C. 802 *et seq.*) 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) and (b)(3)(A) (Supp. III 2021). The Act gives States considerable flexibility in using the funds for multiple general purposes but provides as a corollary 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. 42 U.S.C. 802(c)(2)(A) (Supp. III 2021) (the offset provision). Shortly after the Act's passage, petitioner Ohio sued the Secretary of the Treasury, seeking to enjoin the Secretary from enforcing the offset provision in a manner that would "amount[] to a prohibition on tax cuts." Pet. App. 2a. After the district court granted Ohio's requested injunction, the court of appeals vacated the injunction for lack of Article III jurisdiction, reasoning that Ohio had premised its asserted injury on a "broad" reading of the offset provision that the Treasury Department has now "repeatedly disavowed" in its regulations. *Id.* at 17a. The question presented is:

Whether federal courts have Article III jurisdiction over Ohio's suit seeking to enjoin the Secretary of the Treasury from enforcing a hypothetical interpretation of the offset provision that the Treasury Department has disavowed.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Constitution, statutes, and regulations:

Miscellaneous: Page

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 53 F.4th 983. The opinion and order of the district court entering a permanent injunction (Pet. App. 25a-78a) is reported at 547 F. Supp. 3d 713. The opinion and order of the district court denying a preliminary injunction (Pet. App. 79a-116a) is reported at 539 F. Supp. 3d 802.

## JURISDICTION

The judgment of the court of appeals was entered on November 18, 2022. Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 17, 2023. The petition for a writ of certiorari was filed on March 10, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, Tit. IX, Subtit. M, 135 Stat. 223 (42 U.S.C. 802 *et seq.*), Congress established a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. 802.[1] The Fund provided nearly $200 billion in new federal grants to help States and the District of Columbia "mitigate the fiscal effects" of the COVID-19 pandemic. 42 U.S.C. 802(a)(1); see 42 U.S.C. 802(b)(3)(A).

Section 802(c) establishes parameters for States' "Use of funds." 42 U.S.C. 802(c)(1) (emphasis omitted). Section 802(c)(1) provides that States may use fiscal recovery funds to cover broadly defined categories of costs incurred through December 31, 2024, including: providing assistance to households, businesses, and industries affected by the pandemic; providing premium pay to workers performing essential work during the pandemic; paying for state government services to the extent of revenue losses due to the pandemic; and making necessary investments in water, sewer, or broadband infrastructure. *Ibid.*

As a corollary, in order to ensure that States use the funds for the general purposes that Congress specified, Section 802(c)(2) establishes two "restriction[s] on [the] use" of fiscal recovery funds. 42 U.S.C. 802(c)(2) (emphasis omitted). One is that a State may not deposit the fiscal recovery funds "into any pension fund." 42 U.S.C. 802(c)(2)(B). The other, the provision at issue here, provides that:

> A State or territory shall not use the funds provided under this section * * * to either directly or

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[1] All references to 42 U.S.C. 802 are to the most up to date version found in Supp. III 2021.

> 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.

42 U.S.C. 802(c)(2)(A). 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).

A State can receive its grant of fiscal recovery funds after certifying to the Treasury Department that it "requires the payment * * * to carry out the activities specified in" Section 802(c) and "will use any payment * * * in compliance with" that provision. 42 U.S.C. 802(d)(1). If a State does not use its fiscal recovery funds in compliance with Section 802(c), the Treasury Department may require the State to repay "an amount equal to the amount of funds used in violation of" Section 802(c). 42 U.S.C. 802(e). "[I]n the case of a violation of" the offset provision, the Treasury Department may require a State to repay the lesser of "the amount of the applicable reduction to net tax revenue attributable to such violation" and the total amount of fiscal recovery funds the State received. 42 U.S.C. 802(e)(1); see 42 U.S.C. 802(e)(2).

2. Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802. 42 U.S.C. 802(f). In May 2021, the Department published an interim final rule implementing Section 802, including the offset provision. *Coronavirus State and Local Fiscal Recovery*

*Funds*, 86 Fed. Reg. 26,786 (May 17, 2021); see *id.* at 26,807-26,811, 26,823. In January 2022, the Department issued a final rule, which is substantially the same as the interim final rule in its implementation of the offset provision. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338 (Jan. 27, 2022); see *id.* at 4423-4429, 4452-4453.

The regulations set forth the circumstances in which the Treasury Department will consider a State "to have used funds to offset a reduction in net tax revenue." 31 C.F.R. 35.8(b). Specifically, the regulations explain that a State will be considered to have used funds to offset a reduction in net tax revenue if: (1) the State implements a change in law that it either assesses has had or predicts will have the effect of reducing net tax revenue; (2) the reduction caused by the change is more than de minimis, meaning it exceeds one percent of the State's 2019 net tax revenue, adjusted for inflation; (3) the State reports a reduction in its net tax revenue relative to its inflation-adjusted 2019 net tax revenue; and (4) that reduction is greater than the sum of other changes to the State's net tax revenue. *Ibid.*

Those "other changes" to net tax revenue that can permissibly offset tax cuts include changes resulting from "the effects of macroeconomic growth" and certain "[r]eductions in spending." 31 C.F.R. 35.8(b)(4) (emphasis omitted). Thus, for example, a State does not trigger any recoupment action under the offset provision if it cuts taxes but maintains its prior level of net tax revenue due to macroeconomic growth. 31 C.F.R. 35.8(b)(4)(i). The same is true if a State cuts taxes but maintains its prior level of net tax revenue by reducing expenditures of state funds in a "[d]epartment[], agenc[y], or authorit[y]" where it is not spending fiscal

recovery funds. 31 C.F.R. 35.8(b)(4)(ii)(A); see 87 Fed. Reg. at 4427 ("Covered spending cuts") (emphasis omitted). In short, the Act and regulations do not provide for recoupment if a State cuts taxes but can afford to offset the tax cut with its own funds rather than with the fiscal recovery funds that Congress determined are to be used for specified purposes in light of the COVID-19 pandemic.

3. Ohio filed this suit six days after Congress enacted the ARPA but before the Treasury Department had issued its interim final rule. Pet. App. 6a. Ohio's complaint alleged that the offset provision is unconstitutional on three grounds. First, Ohio claimed that the provision is unconstitutionally coercive because the federal government's "generous aid package" allegedly "left Ohio with 'no real choice' but to accept the funds." *Ibid.* (citation omitted). Second, Ohio asserted that the offset provision "violates the Spending Clause because it 'is ambiguous regarding what precisely constitutes a change in tax policy that "indirectly" offsets a loss in revenue.'" *Ibid.* (citation omitted). Third, Ohio claimed that the offset provision "violate[s] the Tenth Amendment by 'commandeer[ing] state taxing authority.'" *Id.* at 6a-7a (citation omitted; second set of brackets in original).

The district court denied Ohio's motion for a preliminary injunction. Pet. App. 79a-116a. Although the court determined that Ohio had shown a likelihood of success on the merits, *id.* at 106a, it found that a preliminary injunction would not prevent any irreparable harm to Ohio, *id.* at 114a. Ohio then certified to the Treasury Department, under 42 U.S.C. 802(d), that it would use its fiscal recovery funds in accordance with Section 802 and the Department's implementing

regulations and guidance. Pet. App. 120a-121a. The Department accordingly allotted Ohio approximately $5.4 billion in fiscal recovery funds, *id.* at 117a-118a, and Ohio has now received those funds, see Direct Payment Summary, USASpending.gov, *Direct Payment Summary*, https://www.usaspending.gov/award/ASST_NON_SLFRP0130_2001.

After further briefing, the district court entered a permanent injunction barring the Treasury Department from enforcing the offset provision against Ohio. Pet. App. 25a-78a. While the court acknowledged "that legitimate questions could be raised as to whether [Ohio's] injury was 'concrete and particularized,'" it found that "Ohio's injury cleared the standing hurdle, if barely." *Id.* at 39a. The court also concluded that the case was not moot despite the Treasury Department's interim final rule implementing the statutory offset provision, reasoning that the provision's alleged ambiguity still "cast a pall over legislators' abilities to contemplate * * * tax changes." *Id.* at 43a. Addressing the merits, the court ruled that the offset provision's text is "unconstitutionally ambiguous," *id.* 76a; see *id.* at 49a-63a, and that "even assuming Congress" can vest in an agency the authority to implement ambiguous Spending Clause conditions, "it did not do so here." *Id.* at 71a-72a. The court reached the latter conclusion despite Congress's statement that "[t]he Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. 802(f).

4. The court of appeals unanimously reversed the district court's judgment and vacated the injunction for lack of jurisdiction. Pet. App. 1a-24a. The court "conclude[d] that, irrespective of whether Ohio established its initial standing to sue, its challenge is now moot." *Id.*

at 14a. The court explained that Ohio's challenge to the offset provision could "remain[] live" only if Ohio could show the prospect of "an[] imminent recoupment action." *Id.* at 16a. And "in this regard," the court determined, "Ohio [had] c[o]me up short." *Id.* at 17a. The court noted that while Ohio's "steadfast contention" in the district court "was that Treasury *could* read the Offset Provision in a broad way—as barring *any* tax cut during ARPA's covered period," the Treasury Department has "repeatedly disavowed Ohio's * * * reading of the statute" in its regulations. *Ibid.* Accordingly, the court held that the Department had "established [that] there is no 'reasonable possibility' it will adopt Ohio's broad view of the Offset Provision," *id.* at 18a (citation omitted), and thus "no reason to believe that Treasury will initiate recoupment against any policy that Ohio has shown, with evidence, it intends to pursue," *id.* at 19a.

The court of appeals then rejected Ohio's alternative theories for jurisdiction. First, the court explained that any injury stemming from ambiguity in "the initial offer" of funds no longer exists following Ohio's acceptance of the funds. Pet. App. 19a; see *id.* at 21a. Second, the court made clear that the offset provision did not "'arguably proscribe[]' [Ohio's] desired tax policies" because "Treasury has repeatedly and credibly disavowed" any intention to "take enforcement actions based on tax cuts *per se*." *Id.* at 20a (citing *Missouri* v. *Yellen*, 39 F.4th 1063, 1069 (8th Cir. 2022), cert. denied, 143 S. Ct. 734 (2023)). Third, the court determined that the offset provision did not "interfere[] with [Ohio's] sovereign authority" because "Ohio never established any particular conduct it wishes to pursue but against which Treasury may credibly take action." *Ibid.* Finally, the court concluded that Ohio had failed to establish jurisdiction

based on its alleged costs of complying with the offset provision, both because the statutory reporting requirement (42 U.S.C. 802(d)(2)) is independent of the offset provision, Pet. App. 21a-23a, and because Ohio had never offered evidence supporting its "vague claim" that "it has been 'forced to reallocate resources to ensuring compliance" with the provision, *id.* at 23a.

**ARGUMENT**

Ohio renews its contention (Pet. 16) that Article III jurisdiction exists based on its asserted "imminent-recoupment, sovereign-authority, and compliance-cost injuries." But the court of appeals correctly rejected each of those theories. To the extent the decision below conflicts with a decision from the Eleventh Circuit, that shallow conflict on a threshold jurisdictional issue does not warrant this Court's review at this time. Indeed, the government has petitioned for rehearing en banc of the Eleventh Circuit's panel decision, and that petition remains pending as of the filing of this brief in opposition. This case would also be an exceedingly poor vehicle for addressing the merits of Ohio's constitutional challenge to the offset provision (Pet. 31-35) because Article III jurisdiction is lacking, and the court of appeals did not reach the merits in this case. This Court recently denied a similar petition that arose in a similar posture, see *Missouri* v. *Yellen*, 143 S. Ct. 734 (2023) (No. 22-352), and should do the same here.

1. The court of appeals correctly held that Ohio failed to establish ongoing Article III jurisdiction over this suit.

a. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes" and "do not issue advisory opinions." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). As the court of appeals

explained, Ohio's asserted injury at the outset of its suit—"that it was 'ponder[ing]' whether to accept its ARPA funds under a cloud of uncertainty"—no longer exists, because "Ohio accepted the funds nonetheless." Pet. App. 15a (citation omitted). Thus, to keep its suit alive, Ohio would have had to establish "some ongoing or imminent future injury." *Ibid.*

It failed to do so. When a plaintiff seeks to challenge the "threatened enforcement of a law," it must establish "'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) (citation omitted). But here, Ohio has presented "no evidence" of a credible threat that the Treasury Department "will initiate recoupment against any policy that Ohio * * * intends to pursue." Pet. App. 19a. Ohio's contrary contention rests on an unduly broad interpretation of the offset provision, under which "*any* tax cut during ARPA's covered period" would be barred. *Id.* at 17a. The Treasury Department, however, has "repeatedly disavowed" that "reading of the statute," including in its interim final rule and final rule. *Ibid.* And the text of the offset provision itself forecloses such a broad interpretation, as it simply restricts States from "us[ing]" the pandemic-related federal funds in a particular manner, 42 U.S.C. 802(c)(2)—not from cutting taxes.

Because there is "no 'reasonable possibility' [that the Treasury Department] will adopt Ohio's broad view of the Offset Provision," Ohio would have to establish an imminent risk of recoupment under the Department's *actual* interpretation and implementation of the provision. Pet. App. 18a (citation omitted). Namely, it would

have to show that it had enacted (or imminently would enact) a tax cut that "would (1) result in a reduction in its net tax revenue, and (2) that Ohio would then offset such a reduction with ARPA funds, or (3) fail to identify a permissible source of offsetting funds from a state spending cut, state tax increases in some other area, or macroeconomic growth." *Id.* at 19a; see 86 Fed. Reg. 26,807; 87 Fed. Reg. 4426. But Ohio offered "no evidence" that it would "pursue that course of conduct." Pet. App. 19a.

b. Ohio's two other arguments for jurisdiction fare no better. First, Ohio asserts (Pet. 16) an injury to its sovereign authority. But "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). And even if a State could somehow suffer a sovereign injury based on a federal-funding condition it voluntarily accepts, Ohio is suffering no such injury here, given that Ohio has made no showing that the offset provision (as correctly understood) is restricting the State from pursuing "any particular conduct it wishes to pursue." Pet. App. 20a.

Second, Ohio relies (Pet. 21) on a "compliance-cost injur[y]." To the extent that asserted injury stems from the separate (and entirely reasonable) statutory requirement that States receiving fiscal recovery funds provide "periodic reports" to the Treasury Department on their uses of those funds, 42 U.S.C. 802(d)(2), the injury is unrelated to the provision at issue in this suit. Thus, "even if enforcement of *the Offset Provision* were enjoined, Ohio still would have to" meet its reporting obligations under Section 802(d). Pet. App. 22a. Ohio's asserted injury, therefore, is not fairly traceable to the

offset provision. See *California* v. *Texas*, 141 S. Ct. 2104, 2119-2120 (2021).

To the extent Ohio asserts injury from being "forced to reallocate resources" toward complying with the offset provision, Ohio neither alleged nor substantiated that injury. Pet. App. 23a (citation omitted). As the court of appeals held, Ohio "put forth no 'specific facts' by 'affidavit or other evidence' about what, if any, particular resources it has reallocated to ensure compliance with the Offset Provision." *Id.* at 23a-24a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). And in any event, Ohio could not claim a legally cognizable injury based on its reallocation of resources toward the routine administrative task of ensuring compliance with conditions on the use of federal funds it has voluntarily accepted—in this case totaling more than $5 billion.

2. Ohio asserts (Pet. 16-25) a circuit conflict over the justiciability of challenges to the offset provision, but any such conflict does not warrant this Court's review.

a. Ohio errs (Pet. 16-18) in suggesting a conflict between the decision below and decisions from the Eighth and Ninth Circuits.

i. In *Missouri* v. *Yellen*, 39 F.4th 1063 (2022), cert. denied, 143 S. Ct. 734 (2023), the Eighth Circuit found no Article III jurisdiction over a case similar to the one here. *Id.* at 1070. Just like the Sixth Circuit in this case, the Eighth Circuit rejected a State's effort to "enjoin a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without alleging any concrete, imminent injury from the Secretary's actual interpretation." *Ibid.* Indeed, the Sixth Circuit here expressly endorsed the Eighth Circuit's decision in *Missouri*. See Pet. App. 20a (citing 39 F.4th

at 1069). Accordingly, both the outcome and reasoning in *Missouri* are consistent with the decision below.

Ohio observes (Pet. 24) that whereas the Eighth Circuit viewed the jurisdictional issue "through a standing lens," the Sixth Circuit considered it "in terms of mootness." But under either doctrine, the result here is the same: no Article III jurisdiction. See, *e.g.*, *TransUnion*, 141 S. Ct. at 2204; *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). That would be true even if the government bore the burden of proving mootness, see Pet. 24-25, because both the statutory text and the Treasury Department's regulations unequivocally foreclose the "broad" reading of the statute upon which Ohio's claimed injury rests, Pet. App. 17a.

ii. Nor does the decision below conflict with the Ninth Circuit's decision in *Arizona* v. *Yellen*, 34 F.4th 841 (2022). That case arose at the pleading stage, and the Ninth Circuit emphasized that it was required to "take Arizona's allegations to be true." *Id.* at 853. In that posture, the court accepted Arizona's allegations about "what the Offset Provision means and how it may be enforced," *ibid.* without considering the Treasury Department's regulations disavowing a broad interpretation of the offset provision, see *id.* at 853 n.2; Pet. 17 (admitting that the Ninth Circuit "never addressed" the Treasury Department's regulations). And the Ninth Circuit held that Arizona's allegations, viewed in a vacuum, sufficed to survive a motion to dismiss. *Arizona*, 34 F.4th at 853.

In contrast to *Arizona*, this case arose on an appeal from a permanent injunction, so Ohio could not rest on "'mere allegations'" but instead had to "'set forth' by affidavit or other evidence 'specific facts'" to support "federal jurisdiction." *Lujan*, 504 U.S. at 561 (citation

omitted). The Sixth Circuit accordingly asked whether Ohio had presented "concrete evidence" that the Treasury Department "might imminently pursue a recoupment action in response to [Ohio's] behavior past, present, or future." Pet. App. 17a. And given the Department's regulations "repeatedly disavow[ing] Ohio's" unduly broad interpretation, the court concluded that no such evidence existed. *Ibid.* Unlike in *Arizona*, then, the procedural posture here meant that the Sixth Circuit had to consider the Department's regulations and could not simply accept Ohio's allegations about "what the Offset Provision means and how it may be enforced." 34 F.4th at 853. Accordingly, as Ohio itself appears to ultimately concede, the decision below does not conflict with the Ninth Circuit's decision in *Arizona*. See Pet. 23 (noting that courts in the Ninth Circuit would "perhaps" have jurisdiction to hear a case like this one); see also *Missouri*, *supra*, No. 22-352 (Jan. 17, 2023) (denying certiorari where Missouri had asserted a similar conflict with *Arizona*).

b. Ohio also asserts (Pet. 18-21) an *intra*-circuit conflict between the decision below and the Sixth Circuit's decision in *Kentucky* v. *Yellen*, 54 F.4th 325 (2022), even though *Kentucky* was issued on the same day and authored by the same judge as the decision below. But as an initial matter, any intra-circuit conflict can be addressed by the Sixth Circuit itself and would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[2]

In any event, the decision below does not conflict with *Kentucky*. In *Kentucky*, the Sixth Circuit held that

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[2] The Sixth Circuit recently denied the government's petition for rehearing en banc in *Kentucky*, over a four-judge dissent. *Kentucky* v. *Yellen*, No. 21-6108, 2023 WL 3221058 (May 3, 2023).

Tennessee's challenge to the offset provision was justiciable because Tennessee had submitted "uncontroverted evidence" of compliance costs, including a declaration by a state official explaining the expenditures of "time and money" that the State would incur to ensure that it would comply with the offset provision. 54 F.4th at 342. Here, the court of appeals did not question the availability of a similar compliance-costs injury as a legal matter; it simply held that, unlike Tennessee, "Ohio put forth no 'specific facts' by 'affidavit or other evidence' about what, if any, particular resources it has reallocated to ensure compliance with the Offset Provision." Pet. App. 23a-24a (citation omitted). Thus, even accepting the Sixth Circuit's determination that Tennessee established jurisdiction to challenge the offset provision, that determination is consistent with the decision below.

c. Ohio additionally asserts a conflict between the decision below and the Eleventh Circuit's decision in *West Virginia* v. *U.S. Department of the Treasury*, 59 F.4th 1124 (2023). There, the Eleventh Circuit held that States had standing to challenge the offset provision because the provision's alleged "ambiguity" injures "the States' sovereign interests," and because the States face "the threat of a recoupment proceeding." *Id.* at 1136-1137. The court also held that the Treasury Department's "decision to disclaim a broad reading of the offset provision" did not "moot[] the States'" claims. *Id.* at 1139. In so doing, the Eleventh Circuit "disagree[d] with" some of the Sixth Circuit's "reasoning" in the decision below. *Ibid.*

The government respectfully submits that the panel decision in *West Virginia* is incorrect and has asked the Eleventh Circuit to rehear the case en banc. See *West Virginia*, *supra*, No. 22-10168 (filed Mar. 6, 2023). As

explained above, to establish Article III jurisdiction over a challenge to the offset provision, a State would have to show "an intention to" violate the provision and a "credible threat" of a recoupment action thereunder, based on the Treasury Department's actual interpretation of the provision in its regulations. *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted). The Eleventh Circuit thus erred in suggesting that Article III jurisdiction existed unless the Treasury Department "disclaimed an intention to enforce the allegedly unconstitutional provision *at all*." *West Virginia*, 59 F.4th at 1140 (emphasis added).

In any event, the Eleventh Circuit's disagreement with the Sixth Circuit on the threshold jurisdictional issue here does not warrant this Court's review. Contrary to Ohio's submission (Pet. 25), that disagreement does not implicate broader issues of "the States' standing to sue the federal government." Rather, it affects only facial challenges to statutory conditions on the granting of federal funds directly to a State under a federal program where (as here) no credible threat of enforcement of the conditions against the State currently exists. The fact that this issue has never arisen in any prior litigation over statutory funding conditions—despite the ubiquity of such conditions in federal funding programs—confirms its limited significance.

3. Finally, Ohio errs in suggesting (Pet. 31-35) that the Court should grant the petition in order to address the merits of its challenge to the offset provision. For the reasons already discussed, there is no Article III case or controversy, so this Court would lack jurisdiction to reach the merits. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Even if the Court believed it had jurisdiction, the Court ordinarily does

not decide merits questions "in the first instance" where, as here, the court of appeals resolved the case on threshold grounds. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citation omitted); see, *e.g.*, *City of Austin* v. *Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022). The Court should therefore await a case in which the court of appeals resolved the merits of a challenge to the offset provision. Indeed, the court of appeals made clear that its jurisdictional holding did not "permanently deprive Ohio of the opportunity to challenge" that provision, and that Ohio could "reassert its merits arguments" if "a future, justiciable dispute" ever arose. Pet. App. 24a. Accordingly, the Court should deny Ohio's petition, just as it did with Missouri's petition arising from a jurisdictional holding. See *Missouri*, No. 22-352 (Jan. 17, 2023).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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