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 a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether both chambers of a state legislature, acting together, have institutional standing to sue the federal government when the federal government commandeers state funds for a federal program.

2. Whether the federal government can constitutionally coerce a state to pay for a federal program from which the state has withdrawn by threatening to cut all the state's Medicaid funding.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI

[1] *Amicus* files this brief with all parties' written consent, with more than 10 days' written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

STATEMENT OF THE CASE

Tennessee's General Assembly has sued the federal government to challenge the latter's placing of refugees in Tennessee without providing funds for the refugees' impositions on the state's Medicaid program. *Amicus* IRLI adopts the facts as stated by the General Assembly. *See* Pet. at 4-11. In summary, refugees impose upwards of $30 million annually on Tennessee's budget, which the General Assembly must balance. TENN. CONST. art. 2, § 24.

SUMMARY OF ARGUMENT

Based on legislator-standing cases and extreme instances of legislature-standing cases — both inapposite here — the United States Court of Appeals for the Sixth Circuit held the General Assembly to a heightened level of injury (such as nullification of power) to establish standing, when an identifiable trifle of unauthorized interference should suffice (Section I.A). Furthermore, the Sixth Circuit failed to adopt the General Assembly's merits views, as the standing inquiry requires (Section I.B), and required a nexus, which the standing inquiry does not require, between the General Assembly's injury and the allegedly unlawful federal action (Section I.C). To the extent that the rights of the state and the rights of its legislature differ, moreover, the legislature has third-party standing to raise the rights of the state (Section I.D). Although the second question presented raises merits issues that the Sixth Circuit did not resolve, this Court nonetheless has discretion to grant the writ for both questions, given the overlap of issues, the

district court's decision on the merits, and the close relationship of the second question presented to a prior decision of this Court (Section II). Finally, because this case implicates all the issues of legislative standing outlined above, this litigation presents an ideal vehicle for the Court to evaluate what degree of unconstitutional federal interference is required for legislatures to have institutional standing to challenge such interference (Section III).

ARGUMENT

I. THE GENERAL ASSEMBLY HAS INSTITUTIONAL STANDING.

Consistent with this Court's standing analysis, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992), the Sixth Circuit required that the General Assembly allege injury in fact, caused by the defendants, and redressable by a court:

> To have standing, the General Assembly must have alleged that it has suffered an actual or imminent injury that is traceable to the defendant and redressable by the court.

Pet. App. 22a (interior quotation marks omitted). After that initial clarity, however, the Sixth Circuit got lost in "the complicated question of when a legislative body, or a group of legislators from that body, has standing to sue." *Id.* 14a. Standing here is not complicated.

A. The Sixth Circuit overstated the quantum and quality of harm needed for legislative standing.

This case concerns the standing of legislatures as institutions, not legislators as individual members of legislatures. Accordingly, legislator-standing cases like *Raines v. Byrd*, 521 U.S. 811, 829 (1997), are irrelevant here. Instead, as this Court has acknowledged, even one house of a bicameral legislature "has an obvious institutional interest in the *manner* in which it goes about its business." *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 n.6 (2019) (emphasis in original). The issue here is the quantum and quality of impact on legislative business that the standing inquiry of Article III deems a cognizable injury in fact.

As shown in Section I.D, *infra*, the Sixth Circuit erred in drawing a distinction between the rights of the state versus the rights of the state's legislature on the facts and law of this case. Even so, in a case where the rights of an absent third party warrant more judicial scrutiny or constitutional protection than the rights of the plaintiff, the plaintiff still has its own rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the

> Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted). As relevant here, even if left to its own — perhaps lesser — "right to be free of arbitrary or irrational [government] actions," *id.*, the General Assembly can nonetheless show that the challenged federal actions violate the Spending Clause and injure the General Assembly in the process.

The Sixth Circuit held the General Assembly to a heightened showing of injury perhaps appropriate for the legislator-standing cases — including strong verbs such as nullify, disrupt, interfere, curtail, and threaten. Pet. App. 23a-24a. But those limits do not apply when federal action, taken without any constitutional authority, makes it more difficult for state, local, or private actors to do their business. For purposes of Article III, **a**n "identifiable trifle" of such difficulty suffices. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973). The challenged federal actions here make it more difficult for the General Assembly to balance its budget, as the Tennessee Constitution requires. TENN. CONST. art. 2, § 24.

Amicus IRLI respectfully submits it is an obvious harm to place additional line items not under the

General Assembly's control into the budget that the General Assembly must balance. *Cf. Bethune-Hill*, 139 S.Ct. at 1955 (party asserting federal jurisdiction "bears the burden of doing more than simply alleging a nonobvious harm") (interior quotation marks omitted). But any distinction between the obvious or nonobvious nature of the harm is irrelevant because the General Assembly submitted evidence to establish its harm (for example, an additional $30-plus million annually to balance). While a 100-piece jigsaw puzzle may or may not be easier than a 101-piece jigsaw puzzle, dollars are fungible and comparable. It is obviously easier (that is, less work) to balance a budget of X dollars than to balance a budget with $30 million more than X. That extra work is the only "trifle" that the General Assembly needs to satisfy Article III. The fact that some decisions about legislative standing involved nullification of legislative rights does not mean that a legislature needs nullification in order the challenge unlawful federal interference with the manner in which the legislature acts.

Indeed, even *private citizens* can assert the Tenth Amendment, if they otherwise satisfy Article III's requirements. *Bond v. United States*, 564 U.S. 211, 217 (2011). This Court should not allow the Sixth Circuit to lower the state legislatures within its jurisdiction to a status lower than that of any private litigant. Whether states and their legislatures deserve more than private litigants is possible. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (states "entitled to special solicitude in our standing analysis"). That they deserve less is not.

B. The Sixth Circuit failed to adopt the General Assembly's merits views to analyze standing.

The Sixth Circuit also quibbles with the General Assembly's merits case, Pet. App. 26a, as part of the standing inquiry. Put simply, that "confuses standing with the merits." *Initiative & Referendum Institute v. Walker,* 450 F.3d 1082, 1092 (10th Cir. 2006) (*en banc*); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.,* 33 F.3d 294, 298 (3d Cir. 1994); *cf. Cantrell v. City of Long Beach,* 241 F.3d 674, 682 (9th Cir. 2001). But "'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *McConnell v. FEC,* 540 U.S. 93, 227 (2003) (internal quotation marks omitted); *Southern Cal. Edison Co. v. F.E.R.C.,* 502 F.3d 176, 180 (D.C. Cir. 2007) ("in reviewing the standing question, the court… must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims"); accord *Tyler v. Cuomo,* 236 F.3d 1124, 1133 (9th Cir. 2000). Otherwise, every losing plaintiff would lose for lack of standing.

C. The standing inquiry does not include a nexus requirement.

While "standing is not dispensed in gross" so that standing to challenge one government action would automatically provide standing to challenge other, discrete government actions, *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996), standing doctrine has no nexus requirement outside taxpayer standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59,

78-81 (1978); *Sierra Club v. Morton,* 405 U.S. 727, 737 (1972); *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006). Thus, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *Cuno,* 547 U.S. at 353 & n.5 (interior quotations omitted). In its decision below, the Sixth Circuit improperly tied the General Assembly to *legislative* rights, without asking whether the Federal Government's violations of the Spending Clause injured the General Assembly.

For example, in *Duke Power*, plaintiffs could use aesthetic injury from a new nuclear power plant (for example, that algae blooms were caused by the release of hot water into cooling ponds) to support a *takings challenge* to damage caps on catastrophic *future* nuclear accidents. Provided an Article III case or controversy exists on *any* basis related to the allegedly unlawful government action, Article III is satisfied. Here, the Federal Government not only invaded the State of Tennessee's sovereignty but also made the General Assembly's institutional tasks more difficult in the process. Just as the *Duke Power* plaintiffs could bring a Takings Clause claim by asserting aesthetic injuries, the General Assembly can bring a Spending Clause claim by asserting its institutional injuries.

D. Although the state and its legislature have the same right here, the General Assembly would have third-party standing to assert the state's rights if the two differed.

The Sixth Circuit drew a distinction between an act that "injures state sovereignty" and one that injures "legislative sovereignty," Pet. App. 25a (emphasis and interior quotation marks omitted), but that distinction has no meaning here. Alternatively, even if the distinction had meaning, the General Assembly would have third-party standing to raise Tennessee's interests.

At the outset, *amicus* IRLI has doubts that federal courts should question a state legislature's authority to litigate on behalf of its state. While a federal court can and often should refuse non-governmental actors — such as the private proponents of ballot initiatives — the right to litigate on behalf of states, *see* Pet. App. 30a (collecting cases), the question of a legislature's ability to defend state interests should be a question of state law that only states may answer. While this Court rejected the Virginia House of Delegates' authority to litigate on behalf of Virginia in *Bethune-Hill*, 139 S.Ct. at 1952, that case is distinguishable because the Virginia House of Delegates is only one house of Virginia's bicameral legislature. As such, the House of Delegates had less of a claim to represent an entire branch of state government, as the General Assembly does here.

Second, *Bethune-Hill* is unsound because it erroneously relied on authority dismissing a petition brought by a federal prosecutor without the

permission of relevant officials with the Department of Justice. *Id.* But the federal constitution does not even require the states to have separated powers: "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (citing *Dreyer v. People of State of Illinois*, 187 U.S. 71, 84 (1902)). Indeed — as *Bethune-Hill* itself acknowledged — states *can* authorize legislatures to represent the state. *Bethune-Hill*, 139 S.Ct. at 1952.

Relatedly, the question of whether a state *has* authorized its legislature to represent the state is best left to the state. If Tennessee's Attorney General believes that this suit is unauthorized, he could seek a writ of mandamus or prohibition in state court. In federal courts, however, state authorization should be a political question that these courts avoid as they do other attempts to enforce *state* law against *states*:

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law.... On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (emphasis in original). Tennessee's General Assembly has filed a suit in federal court, and no one from Tennessee's government has complained. That should be enough to allow a state legislature to proceed.

In any event, accepting the General Assembly's merits views (Section I.B, *supra*) and rejecting a nexus requirement (Section I.C, *supra*) eliminates the Sixth Circuit's distinction between a state and its legislature on the facts and law of this case. Indeed, it is not clear that there is a distinction between the state's right and the legislature's rights here. In some cases, a third parties' rights implicate higher degrees of judicial scrutiny or constitutional protection, so third-party standing matters. *See Arlington Heights* 429 U.S. at 263. Here, the reviewing court will evaluate whether the challenged federal actions exceed federal power, which is a pure question of law, with no elevated scrutiny based on the plaintiff's identity. Instead, as relevant here, the state and its legislature have the same Tenth Amendment right: namely, the right to be free of unconstitutional federal action. It is of no Article III importance that the relief requested would save Tennessee tens of millions of dollars per year but would only save the General Assembly the extra burden of balancing annual budgets without an unconstitutionally imposed federal cost. Article III requires only that the relief redress the injury in fact.

Though no relevant difference exists between the rights of Tennessee and the General Assembly here, the General Assembly also has *third-party* standing to raise Tennessee's rights under the predominantly prudential three-part test for third-party standing. *See Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (requiring the plaintiff to have its own Article III standing, a relationship with the rights holder, and that some hindrance keeps the rights holder from asserting its own rights). As indicated, the General

Assembly has its own — perhaps lesser — Article III injury, *see* Section I.A, *supra*, thus meeting the only *constitutional* requirement, *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989), with the other two requirements being merely prudential. *Id.* The other two conditions are also met. The Attorney General both authorized this suit by the General Assembly and was hindered in bringing it himself by his view that the suit lacked merit.

Significantly, third-party standing is not the same thing as the assigned or delegated standing that the Sixth Circuit addressed. In *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 285 (2008), this Court addressed Article III standing for assignment-for-collection agreements, but both the majority and the dissent acknowledged that they did not consider the assignee's *third-party standing* to assert the assignor's rights. *Compare Sprint*, 554 U.S. at 289-90 (third-party standing not relevant because assignee had first party standing) *with id.* at 298 (third-party standing not relevant because assignee had no independent Article III injury) (Roberts, C.J., dissenting). While *amicus* IRLI respectfully submits that there is no relevant difference for purposes of Article III standing between the General Assembly and Tennessee, the General Assembly has third-party standing to assert Tennessee's rights.

II. THIS COURT HAS DISCRETION TO GRANT THE WRIT ON BOTH QUESTIONS PRESENTED.

The district court reached the merits, Pet. App. 91a, but the Sixth Circuit, having held that the General Assembly lacked standing, did not. The

General Assembly argues that this Court should reach the merits because the issues flow largely from *Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519 (2012). Pet. 18-20. The second question presented arguably is a merits issue, and this Court often would send such issues back to the lower courts upon reversing on a threshold question: "we are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That said, appellate courts have discretion to consider what matters to take up on appeal. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Under the circumstances, this Court has the discretion to consider both questions presented.

III. THIS LITIGATION IS AN IDEAL VEHICLE TO CLARIFY LEGISLATIVE STANDING.

Because it implicates all the addressed in Section I, *supra*, this litigation presents an ideal vehicle to resolve the important question of when state legislatures have standing to challenge federal action that restricts the *manner* in which a legislature functions. Unlike *Bethune-Hill*, 139 S.Ct. at 1952, this case involves the entire legislature and addresses federal interference with the ongoing work of the General Assembly.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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