NO. 19-1137

IN THE

Supreme Court of the United States

TENNESSEE GENERAL ASSEMBLY, ET AL.,
Petitioners,

v.

U.S. DEPARTMENT OF STATE, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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The federal government does not contest that: (1) Tennessee validly withdrew from the federal refugee resettlement program, (2) the federal government continues to operate that program in Tennessee and to shift the program's Medicaid costs to the State, (3) the program costs Tennessee tens of millions annually in Medicaid funding, and (4) if Tennessee stops paying its portion of Medicaid costs for refugees the federal government has placed in the State, it could lose *all* its Medicaid funding. That scenario is the mirror image of the federal government's scheme in *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012) (*NFIB*), and it makes no legal difference that Tennessee withdrew from the program after the federal government broke its reimbursement promise rather than refusing to participate from the get-go. This Court should grant the petition and affirm that the federal government's actions violate the Constitution and basic federalism principles.

Regarding standing, the Tennessee General Assembly's loss of its appropriation power is a concrete and particularized injury, unique to the General Assembly. That is sufficient to establish standing. See *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). The federal government says that loss is illusory because the General Assembly "can [still] pass appropriation bills, which can allocate or not allocate funds as it wishes." Br. in Opp'n ("Opp.") 15–16. But that elides the point; if the Assembly appropriates $30 million for Covid prevention instead of the federal refugee resettlement program, Pet. 9, it risks losing 20% of the State budget, *id.* at 10. That choice—the same one the plaintiff states faced in *NFIB*—is no choice at all.

On the merits, the federal government says that *NFIB* is irrelevant because Tennessee is legally obligated to pay for refugee Medicaid costs regardless of the State's program participation. Opp. 23 (citing *Graham* v. *Richardson*, 403 U.S. 365, 374–78 (1971)). But the State is not asking to be excused from providing Medicaid benefits to refugees generally; the General Assembly objects to paying for refugees that the federal government *chooses* to place in Tennessee by continuing a formal program from which the State has withdrawn. And the federal government's failure to reimburse the State—coupled with its promulgation of a rule that allows it to circumvent a state's withdrawal from the program by appointing a proxy administrator, 45 C.F.R. 400.301(c)—is as drastic a program change as was the proposed Medicaid expansion this Court rejected in *NFIB*.

The federal government's remaining arguments are equally inapposite. Certiorari is warranted.

ARGUMENT

I. The General Assembly has standing.

As the petition explains, the General Assembly is in a comparable position to the Arizona Legislature in the independent redistricting litigation. Had the State's withdrawal from the refugee program been honored, the General Assembly had sufficient votes to enact a budget that did not include Medicaid funding for that program. Yet by authorizing the program's continuation in Tennessee, the federal government *forced* Tennessee to make such an appropriation under threat of losing all Medicaid funding, an unsustainable 20% hit to the state budget. Pet. 13–14. Lower courts recognize that invalidating legislative

authority creates standing. Pet. 14–15 (citing *United States House of Representatives* v. *Burwell*, 130 F. Supp. 3d 53, 72–73 (D.D.C. 2015), *Baird* v. *Norton*, 266 F.3d 408, 412 (6th Cir. 2001), and *Texas* v. *United States*, 809 F.3d 134, 155–61 (5th Cir. 2015)).

The federal government's initial response is that the General Assembly has lost nothing because it can still appropriate funds as it wishes. Opp. 15–16. But that's a false choice, not a real one. If the General Assembly desires to shift refugee-program Medicaid funding to Covid prevention, the State loses 20% of its revenue. It is not possible to say that "no legislative authority has been usurped." Contra Opp. 16.

The federal government then levies two attacks against the General Assembly's institutional injury to its ability to craft a balanced budget. Opp. 17. First, the federal government asserts that the court of appeals "suggested that petitioners have forfeited that argument by failing to raise it 'substantially' before oral argument." *Id.* (quoting Pet. App. 26a n.11). But the court of appeals said nothing about forfeiture; it merely pointed out that the Assembly "fleshed out its standing argument" by discussing the balanced-budget problem. Pet. App. 26a n.11. And parties need only preserve issues; they "are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). The federal government cannot (and does not) dispute that the General Assembly preserved the standing issue, so there has been no forfeiture.

Second, the federal government says that the General Assembly's alleged loss of its ability to craft a balanced budget lacks merit because the problem of refugee Medicaid costs "is purely abstract and speculative." Opp. 17–18. Not so.

As the petition explains, a single year of refugee program costs exceeded $30 million in 2015. Pet. 9. That may be a rounding error for the federal government, but it's real money to Tennessee, totaling roughly .1% of the annual State budget. Tennessee Fiscal Year 2015–16 Budget, available at https://bit.ly/3imBma0. And the federal government has the power to dramatically increase that amount at the drop of a hat. While the federal government claims such an increase is "unlikely" given 8 U.S.C. 1522(a)(2)'s requirement that the federal government consult quarterly with a state government about refugee placements, the General Assembly does not benefit from that requirement. When a state withdraws from the program and the federal government appoints a non-governmental organization to oversee the program, it is the NGO—not the state—that participates in the consultation. And even if Tennessee still had the right to consult, it lacks the power to point to budget constraints and say "only this many," or "none at all, thank you."

In any event, Article III standing requirements do not require the General Assembly to show the federal government's unconstitutional coercion costs billions or even millions of dollars. "[A]n identifiable trifle," such as a $1.50 tax or $5.00 fine, "is enough for standing to fight out a question of principle." *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

The federal government makes two final standing arguments. It tries to distinguish the Fifth Circuit's decision in *Texas* v. *United States* on the ground that the case involved state, not legislative standing. Opp. 20. The General Assembly highlighted that fact in its petition, Pet. 15, and it is a distinction without a

difference. In *Texas*, the state established its standing due to monetary loss; here, the Tennessee General Assembly establishes its standing due to loss of appropriation authority and the ability to balance the State budget.

Finally, the federal government says that the General Assembly lacks standing because its alleged injury is not redressable. Opp. 20 (citing *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016)). At best, says the government, Tennessee could obtain a judicial decision "prevent[ing] the federal government from withholding, or threatening to withhold, its share of Medicaid funding if Tennessee declined to expend funds to provide coverage to eligible refugees." Opp. 21. And that, says the government, would not eliminate the State's obligation to pay for refugee Medicaid costs under *Graham*. *Id.*

But the federal government ignores 45 C.F.R. 400.301(c), which essentially created and embodies the federalism problem here. By 1991, the federal government had eliminated altogether its promised reimbursement of state refugee-resettlement Medicaid costs. In 1992, as reflected in the 1992 Reauthorization of the Refugee Resettlement Act Senate Report (S. Rpt. 102-316), Congress acknowledged the stoppage of federal reimbursement payments and that "[s]ome smaller states indicate that they may eliminate their refugee programs entirely with such a cut." The problem? Program elimination would "reduce the number of refugees admitted for resettlement at a time when continued commitments were necessary to Vietnamese political prisoners, Amerasian children, Soviet Jews, and others. The prospect of these cuts has jeopardized the current refugee program." *Id.*

To save the program, the federal government promulgated Rule 400.301 in 1994, allowing the government to appoint an NGO replacement for a withdrawing state. That designation is permissive, not mandatory. 45 C.F.R. 400.301(c). Yet once the federal government selects an NGO to continue the program in a state, that state's fiscal obligation continues indefinitely.

There is an important distinction between a formal refugee resettlement program deliberately designed to bring new arrivals to a state versus refugees who are placed in one state and later choose to relocate themselves. In the latter scenario, there is no 10th Amendment violation; in the former there is. So, an appropriate judicial remedy here could be barring the appointment of an NGO, the entity that enables the federal government to force Tennessee's program participation. That would redress the General Assembly's injuries and satisfy *Spokeo*.

II. This Court's *NFIB* decision is controlling.

Once the federal government's standing objections are explained, the government's merits arguments unravel quickly. The government's only substantive point is that because states are always required to pay Medicaid expenses for refugees, it is not the refugee resettlement program that is causing the General Assembly's harm, but rather this Court's *Graham* ruling. Opp. 23–26. But as just explained, that's not accurate. In the absence of the program, Tennessee would only be incurring the Medicaid cost for the limited number of refugees who resettle themselves in the State outside of the refugee program.

But under the federal program—which the federal government continues to impose on withdrawn Tennessee by virtue of Rule 400.301(c)—the State is responsible not just for voluntarily resettled refugees, but *all* refugees the federal government decides to settle in Tennessee. That's a distinction that *does* make a difference. And it is a dispositive one.

III. The federal government's vehicle objections are unfounded.

The federal government's attacks on the vehicle also lack merit.

The fact that Tennessee has not suspended the required refugee Medicaid payments does not mean this suit is unripe. Contra Opp. 26–27. In *NFIB*, this Court did not require the plaintiff states to jeopardize their Medicaid funding to raise their legal challenge. The federal government says this case is different because the problem is not a revised federal program but this Court's longstanding decision in *Graham*. *Id.* at 27–28. But as already explained, the problem here does not flow from *Graham* but from the federal government's breach of its funding promise, imposition of the refugee program despite Tennessee's withdrawal, and threat to cut all Medicaid funding.

And the General Assembly need not propose a Medicaid plan amendment to obtain relief. Contra Opp. 28 (citing 42 U.S.C. 1316). As the General Assembly pointed out in the petition, if Tennessee stops paying for its share of refugee Medicaid costs, its Medicaid program will be out of compliance with federal requirements. Pet. 22. There is no disagreement about this and thus no plan amendment to seek. No vehicle issue prevents this Court from deciding the two jurisprudentially significant issues presented.

IV. The federal government's coercive policy must be stopped.

When Tennessee opted out of the federal refugee resettlement program, the federal government immediately increased the State's resettlement numbers by more than 75%. Br. of Amicus Curiae Center for Immigration Studies 7. After the federal government raised the refugee quota, several other states also attempted to withdraw and saw no reduction in their resettlement numbers. *Id.* If the federal government had kept its promise to make states whole, this would not be a problem. Br. for Amici Curiae The Eagle Form and The Tennessee Eagle Forum 6–14. But the exact opposite has been true, shifting billions of dollars to state and local governments via this unfunded mandate. Br. of Amicus Curiae Center for Immigration Studies 4–7.

The federal government's commandeering of state funds for federal purposes establishes both that the General Assembly has standing and that the federal government's actions violate *NFIB*. Br. Amicus Curiae of Immigration Reform law Institute 3–11; Br. for Amici Curiae The Eagle Form and The Tennessee Eagle Forum 14–17. And if the Court does not address this violation of the federal-state balance, it is inevitable that the federal government will continue finding ways to commandeer state funds to pay for federal programs in the future.

In sum, the federal refugee resettlement program in withdrawn states is an unfair and inefficient imposition of the federal government on state and local government, one that is contrary to this Court's rulings and the Constitution. The petition should be granted.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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