IN THE UNITED DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
(Eastern Division)

STATE OF TENNESSEE, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Defendants.

No. 1:17-cv-01040-STA-egb

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants' motion to dismiss seems to miss the entire point of Plaintiffs' complaint and the allegations contained therein. Plaintiffs' complaint alleges that the federal mandates that Plaintiffs expend State funds to cover refugees through Medicaid and other programs[1] violate the Constitution's Spending Clause and the Tenth Amendment by commandeering State funds and coercing the State to expend funds to support and maintain a federal program. This interferes with Plaintiffs' duty and right to appropriate State funds. It is irrelevant to this suit whether the federal government would withhold all Medicaid funds if Tennessee enacted a plan that did not cover refugees as (1) the mere threat to withhold the funding is impermissible coercion; and (2) Defendants assert that any attempt by Plaintiffs to withhold funding would violate the Constitution. Finally, Plaintiffs do not seek to have a Medicaid plan reviewed to see if it complies with the federal Medicaid requirements. Plaintiffs readily admit—and Defendants agree—that refusal to expend State funds to support refugee medical assistance would violate current federal statutes and regulations. Plaintiffs, instead, seek to have the Medicaid requirements reviewed to determine if they comply with the Constitution. This reviewal is well within the purview of the district court.

Plaintiffs' complaint presents an "as applied" challenge to the manner in which the federal refugee resettlement program and provisions of the Medicaid Act are being applied to Tennessee after its attempted withdrawal from the refugee resettlement program. Federal Medicaid dollars are being used to coerce the State of Tennessee into expanding the Medicaid program to support the resettlement of refugees. This allows the federal government to "solve" the problem of refugee resettlement by passing the costs of its work onto States, like Tennessee. The federal government

[1] Defendants' brief completely ignores the allegations of all significant expenditures besides Medicaid from State funds necessary to support the federal refugee program. (Pls.' Compl. ¶ 47).

does this by giving refugees preferred status and eligibility for Medicaid over other immigrants. Unlike almost all other immigrants, there is no requirement that refugees make a showing of self-sufficiency. Instead, refugees are mandated by the federal government to be immediately eligible for Medicaid and other welfare services.

Defendants go beyond the four corners of Plaintiffs' complaint to suggest that the federal government conserves State funds because refugees are limited to seven years of Medicaid. But Plaintiffs' complaint, the allegations of which must be accepted as true, alleges that the resettlement of refugees costs the State $31 million per year. Even still, any such potential saving does not give the federal government the right to unconstitutionally commandeer State funds. The Supreme Court's decision in *NFIB v. Sebelius* squarely governs the issue here. Throughout the years, through expansion of both the Medicaid program and the refugee resettlement program, the federal government has increased the financial burden refugees place on the States. The Supreme Court already determined that forcing States to acquiesce to expansion of joint federal-State programs with coercive threats of withholding federal Medicaid funds violates the Spending Clause and the Tenth Amendment. Therefore, Defendants' motion to dismiss should be denied.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION TO HEAR CONSTITUTIONAL CHALLENGES TO STATUTES.

A. Plaintiffs Have Standing To Protect The Rights Of The General Assembly And State of Tennessee.

Article III of the Constitution requires plaintiffs to have standing to sue as part of the case-or-controversy limitation on federal jurisdiction. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). Plaintiffs satisfy the standing requirement when they allege "injury in the form of invasion of a legally protected interest that is concrete and particularized

and actual or imminent." *Id*. (internal quotation marks omitted). This injury "also must be fairly traceable to the challenged action and redressable by a favorable ruling." *Id*. (internal quotation marks omitted). Only one party need have standing to satisfy Article III. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *ACLU v. Grayson Cty.*, 591 F.3d 837, 843 (6th Cir. 2010) ("The presence of one party with standing is sufficient."); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535 (6th Cir. 2011) (same) (overruled in part on other grounds).

1. The State Legislators Have Standing To Protect The Rights Of The General Assembly.

"[A] State is a political corporate body [that] can act only through agents [.]" *Poindexter v. Greenhow*, 114 U.S. 270, 288 (1885). Thus, to vindicate its interests, "a State must be able to designate agents to represent it in federal court." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013). "[S]tate law may provide for [] officials to speak for the State in federal court." *Id*. When a legislative body "as a whole has standing . . . [it] can designate a member to act on its behalf." *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976).

In *American Telephone*, a U.S. House of Representatives subcommittee issued a subpoena requiring a telephone company to turn over records in an investigation of warrantless wiretaps issued by the FBI. 551 F.2d 384, 385-86 (D.C. Cir. 1976). The Justice Department filed suit against the telephone company seeking to enjoin it from turning over the records. *Id*. at 388. A member of the House of Representatives intervened as a defendant on his own behalf and on behalf of the Committee and House. *Id*. at 391. The district court ruled against the defendants and the congressman appealed. *Id*. at 388, 391. The court held that the congressman had standing to appeal

because "[i]t [was] clear that the House as a whole ha[d] standing . . . and [could] designate a member to act on its behalf." *Id*. at 391.

Likewise, in *Karcher v. May*, the New Jersey Attorney General announced that he would not defend a statute enacted by the New Jersey Legislature. 484 U.S. 72, 75 (1987). The Speaker of the New Jersey General Assembly and the President of the New Jersey Senate then intervened on behalf of the legislature as named defendants only in their official capacities as Speaker and President. *Id*. at 75-76. The district court and appellate court ruled against the defendants and, subsequently, the defendants lost their positions as Speaker and President. *Id*. at 77. They then sought review by the Supreme Court. *Id*. The Supreme Court held that the legislators no longer had standing *only* because they no longer held the official positions in which they intervened. *Id*. As the legislators intervened solely in their official capacities as Speaker and President, the authority to pursue the lawsuit belonged to their successors in office, who were individual legislators. *Id*.

The Supreme Court reaffirmed its holding that individual legislators have standing in their official capacities to sue on behalf of the legislative body in *Hollingsworth*. There, the Court stated that authorized State officers in their official capacities have standing. *Id*. at 2665; *see also id*. at 2666 ("We recognized that a legislator authorized by state law to represent the State's interest may satisfy standing requirements . . . .").

Here, after the General Assembly passed Senate Joint Resolution 467 ("SJR 467"), which authorized the Speaker of the Senate and the Speaker of the House to "commence a civil action" challenging the refugee resettlement program, Senator Stevens and Representative Weaver were appointed by the Speaker of the Senate and the Speaker of the House, respectively, to represent each body in this lawsuit. (Ex. A: Stevens Decl. ¶ 3; Ex. B: Weaver Decl. ¶ 3). The General

Assembly "as a whole has standing" so it "can designate [Senator Stevens and Representative Weaver] to act on its behalf." *Am. Tel.*, 551 F.2d at 391; *infra* Part I.A.2.

2. The General Assembly Has Standing To Ensure It Can Properly Exercise Its Authority Under The State and Federal Constitutions.

There is a clear distinction in the Supreme Court and across the Circuits between instances where legislatures have standing to sue on behalf of the legislative institution and instances where legislatures do not. This distinction boils down to pure numbers. Legislators have standing to sue on behalf of the legislative body where 51% of the members of the legislative body vote to authorize the lawsuit. Here, an overwhelming majority of both the Tennessee Senate and the Tennessee House of Representatives voted to pass SJR 467, which authorized this action. Tennessee General Assembly, SJR 0467, available at http://www.capitol.tn.gov/Bills/109/Bill/SJR0467.pdf (last accessed July 14, 2017) (attached at Exhibit C).

In *Arizona State Legislature*, the Arizona Legislature challenged an amendment to the State constitution that removed redistricting authority from the Legislature and vested the authority in an independent body. 135 S. Ct. at 2660-61. In holding that the Arizona Legislature had standing, the Court emphasized that, since the Plaintiff-Legislature had a sufficient number of votes to defeat or enact a provision impacted by the constitutional amendment, the Arizona Legislature suffered sufficient harm to their legislative authority to assert Article III standing. *Id*. at 2665. In reaching this decision, the Court noted that "[the Arizona Legislature] commenced [the] action after authorizing votes in both of its chambers." *Id*. at 2664.

In reaching this decision, the Supreme Court analyzed two prior cases, *Coleman v. Miller*, 307 U.S. 433 (1939) and *Raines v. Byrd*, 521 U.S. 811 (1997). In *Coleman*, the Kansas Legislature filed an action after the Kansas Senate had a tie vote and the Kansas Lieutenant Governor cast the

deciding vote that passed a proposed constitutional amendment. *Coleman*, 307 U.S. at 435. Twenty-one (twenty who voted against the amendment and one who voted for the amendment) of forty Kansas Senators filed suit challenging the ability of the Lieutenant Governor to cast the deciding vote and the defendants attempted to dismiss the suit for lack of standing. *Id*. at 438. The Supreme Court held that the challenging majority of the Kansas Senators had standing because there was a sufficient number of Senators "whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment." *Id*. at 446; *see also id.* at 438 ("[T]he plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.").

In contrast, in *Raines*, six members of Congress attempted to challenge the constitutionality of an Act passed by Congress. *Raines*, 521 U.S. at 814. The Court held that the six members of Congress lacked standing because "their votes were given full effect. They simply lost that vote." *Id*. at 824.

Here, both bodies of the General Assembly passed SJR 467 authorizing suit and alleging deprivation and nullification of their legislative power. For example, Plaintiffs allege throughout their complaint that the federal refugee resettlement program and the mandates to fund programs and healthcare for refugees through Medicaid completely nullify the General Assembly's votes to appropriate State funds as is its right and obligation under the Tennessee Constitution. (Pls.' Compl. ¶¶ 7, 8, 9, 30, 33, 34, 36, 44, 47, 48; *see also* Ex. A: Stevens Decl. ¶ 2; Ex. B: Weaver Decl. ¶ 2). In fact, the underlying cause of action itself—the Tenth Amendment to the United States

Constitution—indicates that the Defendants are infringing on the State's sovereignty and nullifying the power of the State.

The distinction between *Coleman* and *Raines* is having the number of "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act" instead of just "six *individual Members* of Congress." *Ariz. State Legis.*, 135 S. Ct. at 2665, 2664 (emphasis in original). Defendants somehow attempt to analogize this case with *Raines*, rather than *Arizona State Legislature* and *Coleman*. But this attempt defies logic. This case is virtually identical to *Arizona State Legislature* where the legislative body had standing. Here, sixty-nine of ninety-four representatives and twenty-nine of thirty-three senators voted to pass SJR 467. Tennessee General Assembly, SJR0467 Bill History, available at http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SJR0467&ga=109 (last accessed July 14, 2017) (attached as Exhibit D). Tennessee "commenced this action after authorizing votes in both of its chambers." *Ariz. State Legis.*, 135 S. Ct. at 2664. These sixty-nine representatives and twenty-nine senators have a sufficient number of votes to defeat or enact legislation—including legislation on the appropriation of State funds—in the State of Tennessee. *Id*. at 2665.

Defendants cite only three cases to support their suggestion that the General Assembly lacks standing: (1) *Arizona Legislature*, where the legislative body voted to initiate the lawsuit and the legislative body *had standing*; *id*. at 2664; (2) *Raines*, where only six members initiated the lawsuit on their own and the individual legislators did not have standing; *Raines*, 521 U.S. at 824; and (3) *Kerr v. Hickenlooper*, where only five of one hundred General Assembly members initiated the lawsuit on their own and the individual legislators did not have standing. 824 F.3d 1207, 1215-16 (10th Cir. 2016). These cases all stand for the proposition that the General Assembly has

standing in this action because it was initiated by a passing vote of both houses of the General Assembly, not just a handful of individual legislators. *Compare also American Telephone*, 551 F.2d at 391 ("On August 26, 1976, the House of Representatives passed H. Res. 1420, authorizing Chairman Moss's intervention on behalf of the Committee and the House . . . It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.") *and United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 68 (D.D.C. 2015) (holding that, "because the House occupies a unique role in the appropriations process prescribed by the Constitution," the House of Representatives, as an institution, has standing to sue when it alleges that the federal government has usurped its authority to appropriate funds) *with Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001) ("For legislators to have standing as legislators, then, they must possess votes sufficient to have either defeated or approved the measure at issue.") *and Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) ("there is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure").

Defendants do not—*because they cannot*—cite a single case where a legislative body voted to initiate suit and a court held that the legislative body lacked standing. Their claim that the General Assembly lacks standing is without any supporting legal authority because there is a clear mandate from the Supreme Court that a legislative body has standing to initiate a suit to protect its legislative rights and federal usurpation of its authority to appropriate funds. Thus, Defendants' argument is without merit and Plaintiffs' complaint should not be dismissed.

3. The General Assembly May Bring Suit On Behalf Of The State.

Just as the Tennessee General Assembly possesses standing to bring suit in its own name, so, too, does it have the legal right to bring suit in the name of the State of Tennessee. In fact, the

Supreme Court has recognized that an official other than an attorney general may sue on a state's behalf. "To vindicate . . . [an] interest . . . , a *State* must be able to designate agents to represent it in federal court. That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court." *Hollingsworth*, 133 S. Ct. at 2664 (2013) (citing *Poindexter*, 114 U.S. at 288) (emphasis added); *cf. United States v. Windsor*, 133 S. Ct. 2675, 2687-88 (2013) (prudential standing requirements satisfied by presence of U.S. House's Bipartisan Legal Advisory Group, even though both the government and the challengers to a federal statute agreed it was unconstitutional). There can be no legitimate dispute that the State of Tennessee—like the General Assembly, Sen. Stevens, and Rep. Weaver more specifically—has sustained a constitutional injury by the requirement that it provide refugees access to State Medicaid dollars in the form of TennCare. *See Windsor*, 133 S. Ct. at 2686 (requirement to provide tax refund was "a stake sufficient for Article III jurisdiction"). Given that decisions about taxing and spending are primarily legislative ones, it is also appropriate that this action be undertaken by the General Assembly in the State's name.

Notably, in Tennessee, the Attorney General is not an executive branch official; he is instead a member of the judicial branch, and nothing in the Tennessee constitution explicitly mandates that the Attorney General be vested with the exclusive duty to litigate in the name of the State, particularly when that litigation is brought in federal, as opposed to state, court. *See* Tenn. Const. art. VI, § 5 ("An Attorney General and Reporter for the State shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years"). Thus, efforts to read into his position obligations akin to those of the United States Attorney General risk running afoul of Tennessee's particular constitutional design. In a similar vein, Defendants assume that the

Tennessee Constitution's separation of powers clause, *see* Tenn. Const. art. II, § 2,[2] demands that only its Attorney General appear in court and litigate for the State, but this is to read that clause too expansively. *See Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) ("While the doctrine of separation of powers is fundamental to our form of government, it is not absolute."). Flexibility rather rigidity should be in no way surprising because it is also how the separation of powers functions at the federal level. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (rejecting idea that "the Constitution requires that the three branches of Government operate with absolute independence") (internal quotation marks and citation omitted); *Anderson v. Dunn*, 19 U.S. 204, 220-24 (1821) ("The different departments of the government could not be divided in this exact, artificial manner. They all run into each other.").

The absolutist reading of Tennessee's separation of powers clause urged by Defendants is particularly inapt in the present case because it is the State legislature's ability to raise and spend money as deemed best by the people's elected representatives that is primarily implicated by the federal refugee resettlement program.[3] *See* Tenn. Const. art. II, § 24. That is, it is a legislative power—a constitutionally-specified power of the Tennessee General Assembly—that is primarily diminished, and thus it is a legislative attribute of Tennessee's state sovereignty that is to be vindicated by this lawsuit. There is then nothing in allowing the General Assembly to sue the federal government in the name of the State to protect a core legislative power that is tantamount

[2] The same or similar language appears in numerous other State Constitutions. *See United States v. Mardis*, 670 F. Supp. 2d 696, 699 n.3 (W.D. Tenn. 2009) (collecting examples).

[3] Accepting Defendants' reading would also call into question the constitutional legitimacy of many aspects of Tennessee state government, including its use of administrative agencies, which share attributes of more than one branch of government and which are not expressly provided for in the State's constitution.

to an assumption of any of the Tennessee Attorney General's inherent functions to enforce the law.[4]

Furthermore, SJR 467 fully empowers the General Assembly to bring this lawsuit on behalf of the State in light of the Attorney General's affirmative decision not to do so. Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee, Letter to Chief Clerks of the General Assembly, (July 5, 2016) (attached as Exhibit G). As discussed above, SJR 467 was passed by majorities in each house of the General Assembly and returned by Governor Haslam without a veto, thereby making it effective pursuant to Section 18 of Article III of the Tennessee Constitution.[5] When the Attorney General declined to bring suit, he delegated his authority to litigate for the State to the General Assembly, as provided for in SJR 467. As a result, the General Assembly stands before this Court having been fully authorized by a duly enacted joint resolution

[4] On the one hand, Defendants appear to argue that the General Assembly lacks proper statutory authorization to sue in the name of the State, but then, on the other hand, they also argue that, under the State Constitution, the Tennessee Attorney General is the sole officer who can represent the "State of Tennessee" in civil litigation. Defendants cite a handful of Tennessee court decisions, but none of these cases actually answer the question presented here. And, certainly none of the cases cited involved an instance in which the General Assembly was suing to vindicate its legislative rights vis-à-vis the federal government.

[5] The Proposed Intervenors argue that SJR 467 is a nullity, given the absence of a signature from Governor Haslam. This reading would create a new understanding of Tennessee constitutional law whereby joint resolutions must be signed, even though Tennessee governors have routinely allowed bills to become law without a signature. Therefore, it ignores the fact that the State Constitution provides that joint resolutions shall "likewise" be presented to the governor in the same manner as "bills" and that joint resolutions become effective or are vetoed in "like manner" as "bills." Tenn. Const. art. III, § 18. Moreover, in the sole case cited for support of this proposition, *Gilbreath v. Willett*, 148 Tenn. 92, 251 S.W.2d 910 (1922), the joint resolution at issue was (unlike in the instant case) never presented to the governor for signature or veto. *Gilbreath*, 251 S.W.2d at 911. Thus, the joint resolution plainly failed to adhere to the process set out in Constitution. It is presentment to the governor followed by a signature or permitting of it to become effective without a signature that makes a joint resolution valid; the presence of his signature is not a requirement so long as it was presented and not vetoed. *See* Tenn. Const. art III, § 18.

and the Tennessee Attorney General to represent the State's interests. It would be inappropriate to assume that the State's Attorney General made such a delegation if he could not lawfully do so.

As a general rule, federal courts must be "wary of determining an issue of [state] constitutional and common law where unnecessary" and thus must be reluctant "to wade into the debate regarding the parameters of . . . [a state] Attorney General's litigation authority." *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). As such, if the Court harbors any doubts about the effectiveness of SJR 467 or the Attorney General's letter delegating litigation authority, or if the Court has any other reservations about the ability of the General Assembly to pursue this matter in the name of the State of Tennessee, Plaintiffs respectfully request that those questions be certified to the Supreme Court of Tennessee under Rule 23 of that court. *See* Tenn. Sup. Ct. R. 23, § 1 ("The Supreme Court may, at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee, . . . when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee."); *see, e.g., Eiswert v. United States*, 619 F. App'x 483, 484 (6th Cir. 2015) ("Because we find that Tennessee case law in this area is unsettled, as a matter of comity and respect for our colleagues on the Supreme Court of Tennessee, we *sua sponte* certify the question . . . pursuant to Rule 23[.]").

B. Plaintiffs' Claim Is Ripe For Review Because This Case Presents A Concrete Legal Issue And Plaintiffs' Would Suffer Significant Hardship From Delay.

To determine if a case is ripe for review, a court should consider: "(1) is the claim 'fit[] . . . for judicial decision' in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is 'the hardship to the parties of withholding court consideration'?" *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (quoting *Abbott*

Labs. v. Gardner, 387 U.S. 136, 149 (1967)). Both of these factors demonstrate that this case is ripe for review.

First, Plaintiffs' claim is fit for a judicial decision. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). Defendants suggest that Plaintiffs' suit is not ripe because "Tennessee has not submitted a Medicaid State plan amendment detailing changes it intends to make" and, thus, "the Government has been unable to consider, respond to, or render a final decision about the permissibility of any proposed changes in the State's provision of medical assistance to refugees." (Defs.' Mem. of Law 21, ECF 24-1). But this argument falls flat.

Plaintiffs are under a clear, unequivocal mandate from the federal government that Tennessee must provide Medicaid to otherwise eligible refugees. 45 C.F.R. § 400.94(b)-(c) ("A State that provides Medicaid to medically needy individuals in the State under its State plan must determine a refugee applicant's eligibility for Medicaid as medically needy . . . . A State must provide medical assistance under the Medicaid and SCHIP programs to all refugees eligible under its State plans."). If Tennessee does not provide medical assistance under Medicaid to all otherwise eligible refugees under the Tennessee Medicaid program (TennCare), the federal government shall—or unequivocally will—"make no further payments to such State." 42 U.S.C. § 1396c. At the very least, as even Defendants admit in their brief, the federal government **will** withhold a "limited portion of a State's Federal Medicaid funds where the State's plan (or its administration thereof) does not conform to federal requirements." (Defs.' Mem. of Law 22). But this assertion

is irrelevant as Plaintiffs still have "a gun to [their] head." *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012).

In *NFIB*, a case dealing with the *exact same* threat of withholding Medicaid funds under 42 U.S.C. § 1396c at issue here, the Supreme Court held that the mere "*threatened* loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option . . . ." 567 U.S. at 582 (emphasis added); *see also id*. at 582 n.12 ("[T]he size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. 'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500."). The Supreme Court has already determined that the "gun" in 42 U.S.C. § 1396c pointed at Plaintiffs' head is a sufficient threat and that Plaintiffs need not wait to see if the federal government decides to shoot. *Id*. at 581-82; *see also Florida v. United States HHS*, 780 F. Supp. 2d 1256, 1265 (N.D. Fla. 2011) (case challenging the constitutionality of Medicaid provisions under the Tenth Amendment brought in district court without going through any plan approval process), *aff'd in part, rev'd in part sub nom. NFIB*, 567 U.S. 519.

Similarly, in *Arizona State Legislature*,[6] a constitutional amendment removed redistricting authority from the Arizona Legislature and gave it to an independent board. 135 S. Ct. at 2661. The defendants attempted to argue that the injury to the Arizona Legislature was too speculative as the Legislature had not attempted to pass and submit a redistricting plan, even though such a plan would be violative of the new amendment to the Arizona constitution. *Id*. at 2663. The Court rejected this argument, holding that the Arizona Legislature need not pass a proposal to establish its injury, especially when such an act would violate the Arizona constitution. *Id*. at 2663-64; *see*

[6] The Court in *Arizona State Legislature* discussed the speculative injury issue as one of standing; however, "[a]lthough standing and ripeness are considered separate issues, in practice they involve overlapping inquiries." *Kardules v. City of Columbus*, 95 F.3d 1335, 1343 (6th Cir. 1996).

also Sporhase v. Nebraska, 458 U.S. 941, 944 n.2 (1982) (holding that failure to submit an application that "would not have been granted" does not deprive plaintiffs of standing).

Here, the Tennessee General Assembly is not required to pass a law or submit a proposal that would be invalid and rejected under the current law. The Article III case or controversy requirement does not require the General Assembly to break the law as it stands now or attempt to break the law as it stands now to challenge the constitutionality of the federal government's actions. *Id*.

Defendants obliterate any possible argument they may have had concerning ripeness in their circular and contradictory motion. On the one hand, they suggest that Plaintiffs' claim is not ripe because, should Tennessee no longer provide State funds to refugee's medical care, the federal government "may not" withhold all Medicaid funds. (Defs.' Mem. of Law 22). On the other hand, Defendants assert that "[n]o State can claim a reservation of power under the Tenth Amendment to withhold Medicaid funding for refugees, merely because of their refugee status, when doing so would be forbidden by the Equal Protection Clause." (Defs. Mem. of Law 31). Defendants cannot at one time assert that it is unclear what would happen should Tennessee stop funding the refugee program then, just a few pages later, inform Plaintiffs that they have "[n]o . . . [a]uthority" to keep their State funds and that any attempt to do so is violative of the Equal Protection Clause. (*Id*. ¶¶ 28, 29-30). If there was any doubt in the clearly worded statutory mandates before Defendants' motion, Defendants cure any issue related to ripeness by making it clear that any attempt by Plaintiffs stop funding the refugee resettlement program would be futile.

Second, Plaintiffs face significant hardship. Plaintiffs allege the undermining of our two-sovereign structure of government; a loss so fundamental that its deprivation causes all other liberties to suffer. *NFIB*, 567 U.S. at 577; *c.f. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Furthermore, the refugee resettlement program imposes a hardship on Plaintiffs by expending State funds, costing Tennessee approximately $31 million *per year*. (Pls.' Compl. ¶ 29); *Abbott Labs.*, 387 U.S. at 152 (holding that the cost of destroying old and printing new labels and promotional materials constituted a hardship).

Plaintiffs also "risk serious . . . civil penalties" for refusing to cover portions of the refugee resettlement program. As already discussed, 42 U.S.C. § 1396c threatens to withhold all federal Medicaid funds, nearly $7 billion per year and approximately 20% of the State's yearly budget. In addition to this, Plaintiffs face expected lawsuits as Defendants take the position that Plaintiffs will violate the Equal Protection Clause should they not fund the federal program through Medicaid. (Defs. Mem. of Law 28-30). The inevitability of such suits against Plaintiffs is abundantly clear as outside, unaffected parties are already seeking to litigate as intervening defendants in this action. (Motion to Intervene, ECF 25).

Thus, Plaintiffs' claim is ripe.

C. Plaintiffs' Suit Is Not Precluded As The Medicaid Statute Is Inapplicable.

The federal statute cited by Defendants to argue that this suit is precluded, 42 U.S.C. § 1316, governs the process *only* for a "[d]etermination of conformity [of a State Medicaid plan] with requirements for approval." This provision is inapplicable here. Plaintiffs do not seek to have a plan approved because such an attempt would be futile. Plaintiffs freely and readily admit that what they seek violates the current requirements. Thus, a statute on the "[d]etermination of conformity" is completely irrelevant here. Plaintiffs do not seek a determination of whether their proposal conforms toMedicaid requirements; they seek a determination of whether the Medicaid and refugee resettlement requirements conform with the Constitution. As detailed in Part I.B

supra, Plaintiffs are not required to go through a lengthy administrative process when what they seek clearly conflicts with the current law and the current law conflicts with the Constitution.

Defendants suggest that *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), supports their assertion that Plaintiffs' claim is precluded, but just the opposite is true. In *Thunder Basin*, the Court found the plaintiff's claims precluded under the Mine Act only because "its claims turn[ed] on a question of *statutory interpretation* that [could] be meaningfully reviewed under the Mine Act." *Id*. at 216 (emphasis added). Here, there is no question of statutory interpretation. The only question is one of constitutional interpretation: do provisions of the Medicaid statutes violate the Spending Clause and Tenth Amendment as applied to Tennessee? This is squarely within the purview of the district court. *Florida*, 780 F. Supp. 2d at 1265 (case challenging the constitutionality of Medicaid provisions under the Tenth Amendment brought in district court).

Therefore, because Plaintiffs have standing, because Plaintiffs' claim is ripe, and because Plaintiffs are in the proper forum, this Court has subject matter jurisdiction over Plaintiffs' claim and Defendants' motion to dismiss should be denied.

II. PLAINTIFFS PLAUSIBLY ALLEGE THAT THE REFUGEE RESETTLEMENT PROGRAM VIOLATES THE CONSTITUTION.

Plaintiffs' complaint presents an "as applied" challenge to the manner in which the federal government has utilized its power pursuant to the Constitution's Spending Clause to compel non-consenting States, like Tennessee, to fund federal activities under the refugee resettlement program. Defendants' characterization of the complaint as a facial challenge is incorrect, and thus the burden for Plaintiffs is far less onerous than that required in a facial challenge. *Women's Medical Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997). Instead of establishing unconstitutionality under every conceivable set of circumstances, as with a facial challenge, Plaintiffs must only establish "that application . . . in the particular context" violates the

Constitution. *Id.* (quoting *Ada v. Guam Soc'y of Obstetricians and Gynecologists*, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting)). Because Plaintiffs' complaint very plausibly and clearly alleges as-applied violations by Defendants of the Constitution's Spending Clause and Tenth Amendment through a commandeering of State funds to finance a federal refugee program, Defendants' motion to dismiss should be denied.

A. The Spending Clause And Tenth Amendment Work Together To Protect States From Being Commandeered Into Supporting Federal Government Programs.

Under the United States Constitution, both the federal government and the governments of the several States are sovereign entities. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (describing "dual sovereignty"). While the federal government possesses only those powers expressly enumerated in the Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. "As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). This division between the powers of the federal and State governments is not a trifling technicality, but rather "was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

Because "the Framers rejected the concept of a central government that would act upon and through the States," *Printz v. United States*, 521 U.S. 898, 920 (1997), the Constitution prohibits using States as mere instrumentalities of the federal government. *See New York v. United*

States, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); *cf. Medellin v. Texas*, 552 U.S. 491, 532 (2008) (President's foreign affairs powers could not support "a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws"). More specifically, this means that the federal government may not give a "command to the States to promulgate and enforce laws and regulations," *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982), nor may it "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

The Supreme Court has likewise invalidated laws that had the effect of commandeering the States to do the work of the federal government. First, in *New York v. United States*, the Supreme Court held that Congress could not compel States to make "a 'choice' of either accepting ownership of [radioactive] waste [sites] or regulating [them] according to the instructions of Congress." 505 U.S. at 176. Neither option was something Congress could compel a State to accept, and thus forcing a State to "choose" between them amounted to an unconstitutional "'commandeer[ing]' of state governments into the service of federal regulatory purposes[.]" *Id.* Several years later, in *Printz v. United States*, the Supreme Court again struck down a law for commandeering the States into federal service. Here, the Court invalidated a provision of federal law that required state law enforcement officers to conduct firearms background checks for gun purchases. 521 U.S. at 922-25. As the Court noted in *Printz*, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress

can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id.* at 930.

Unconstitutional commandeering may also be found where the federal government uses its Spending Clause powers to coerce a State into taking certain actions. "[I]n some circumstances the financial inducement offered by Congress [to the States] might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Notably, the Supreme Court found that financial pressure had turned into compulsion in *NFIB v. Sebelius*. In that case, several States challenged the Medicaid expansion provision of the Affordable Care Act. 567 U.S. at 575-76. The Supreme Court noted that originally Medicaid covered "only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled." 567 U.S. at 575 (citing 42 U.S.C. § 1396a(a)(10)). The Affordable Care Act, however, expanded this to include coverage for "all individuals under the age of 65 with incomes below 133 percent of the federal poverty line." *Id.* at 576 (quoting 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)). The Court concluded that requiring States to cover this new class of individuals, or risk losing all federal Medicaid funding, crossed the line into unconstitutional coercion. As the Court said, the ACA effected a "shift in kind, not merely degree" whereby Medicaid "is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage." *Id.* at 583. Accordingly, the Court held the expanded coverage provision unconstitutional because "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582.

Just as in *NFIB*, the present case involves federal Medicaid dollars being used by the federal government as leverage to coerce certain actions from the States in support of a federal goal. Whereas *NFIB* concerned the coerced expansion of Medicaid obligations to new populations, here the issue is a mandate for States to use Medicaid to cover refugee populations and thereby help the federal government settle them in the United States, even though similarly situated persons admitted through normal immigration procedures would not be Medicaid eligible. If Tennessee does not comply with the federal government's requirements, it risks losing all of its federal Medicaid dollars, which account for approximately twenty percent of the State budget. State financing of the refugee resettlement program is not what was intended by Congress when it passed the law. *See, e.g.*, 125 Cong. Rec. 23234 (Sept. 6, 1979) (statement of Sen. Kennedy). Nevertheless, refugee resettlement has largely become a state-funded effort. Thus, as with the background search provision in *Printz*, through the refugee resettlement program the federal government passes on the costs of its own work to the States while taking credit for addressing the problem of settling refugees.

The State of Tennessee has been forced, against its will, to finance refugee resettlement that is otherwise directed and controlled by the federal government all so that the State will not lose its federal Medicaid funding. Given that the Supreme Court in *NFIB* found that the threatened loss of only ten percent of a State's budget was too coercive to be constitutional, the actions of the federal government here, which jeopardize twenty percent of all State revenues, are all the more subject to invalidation by this Court.

B. Contrary To Defendants' Argument, The Federal Government Is In Fact Requiring That The States Fund The Refugee Resettlement Program.

Attempting to escape the fact that the refugee resettlement program is funded by the States, Defendants erroneously lump refugees in with other lawfully present aliens and then assert that all

of them are the responsibility of a State's Medicaid program. This argument ignores the fact that the federal government has conferred *preferential* treatment on refugees, which leaves them situated more favorably than immigrants admitted through regular means. Generally, "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," 8 U.S.C. § 1601(1), and thus other categories of lawful immigrants to the United States are required to make certain showings as to their financial self-sufficiency as a condition to immigrating. *See* 8 U.S.C. § 1182 (a)(4)(A) ("Any alien who . . . is likely at any time to become a public charge is inadmissible."); *see also id.* § 1601(1)(A) ("[A]liens within the Nation's borders [should] not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."). In contrast, the Refugee Resettlement Act imposes no such self-sufficiency requirement and mandates that refugees be deemed eligible for enrollment in Medicaid immediately upon arrival and for a period of up to seven years thereafter. 45 C.F.R. § 400.94(c) ("A State must provide medical assistance under the Medicaid and SCHIP programs to all refugees eligible under its State plans."); *see* 8 U.S.C. § 1612(a)(2)(A)(i) (establishing seven-year limit).

As such, it is improper to say that refugees are simply another part of the lawfully present immigrant population for which states would otherwise be responsible. To the contrary, refugee populations are an economically disadvantaged population who are admitted to the country without regard to their economic status and who are allowed to immediately access welfare benefits. If the refugee resettlement program were terminated along with refugees' favored status under federal welfare laws, it would mean refugees would not be eligible for admission without regard to their economic condition, and moreover they would not be eligible for Medicaid until they had lived in the United States for five years, just like most other types of immigrants. 8 U.S.C.

§ 1613(a). Defendants' special treatment of refugees may very well serve a legitimate federal goal, but it is just that: a *federal* goal. The federal government cannot constitutionally force "state governments to absorb the financial burden of implementing a federal . . . program" while the federal government takes "credit for 'solving' problems." *Printz*, 521 U.S. at 930.

C. Plaintiffs Here Merely Seek To Have The Federal Government Absorb The Costs That It Is Currently Passing On To States Like Tennessee.

1. This Lawsuit Does Not Seek To Interfere With The Federal Government's Powers, Nor Does It Seek To Discriminate Against Any Person.

Contrary to Defendants' contention, Plaintiffs are not claiming any authority to regulate immigration or to discriminate against refugees or any other category of immigrants. Such arguments are mere strawmen. In fact, Plaintiffs do not dispute that there are lawful means by which the federal government could in fact settle refugees within the State of Tennessee. (*See* Pls.' Compl. *Prayer for Relief* ¶ 2). This suit does contend, however, that the Constitution prohibits the federal government from commandeering *State funds* to support the *federal government* in its implementation of *federal* immigration and naturalization law. (*See, e.g.*, *id.* ¶¶ 45-48, 56-59).

The fact that the Constitution grants the federal government authority over immigration and naturalization, U.S. Const. art. I, § 8, cl. 4, does not mean that it may thereby evade the Constitution's other limits, particularly federalism limits, on the exercise of the government's enumerated powers. *See, e.g., College Savings Bank v. Florida Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-70 (1999) (Article I power to regulate commerce could not support abrogation of State sovereign immunity); *see also City of Boerne v. Flores*, 521 U.S. 507, 516, 522 (1997) (Fourteenth Amendment grants to federal government no substantive, non-remedial power over the States). Defendants wrongly suggest otherwise. (Defs.' Mem. of Law 29-30). The government's position is contradicted by established precedent, which makes it clear that a grant

of authority to the federal government under Article I does not confer authority to ignore other restrictions imposed by the Constitution. *See, e.g., New York*, 505 U.S. at 156-57 ("[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment."); *see Printz*, 521 U.S. at 923-24 (law passed to regulate commerce is not "proper" under Necessary and Proper Clause if it "violates the principle of state sovereignty"). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate." *New York*, 505 U.S. at 178. And, of course, even Congress's power under the Spending Clause does not entitle it to attach whatever strings it chooses to the funds its sends the States. *NFIB*, 567 U.S. at 581-82; *see South Dakota*, 483 U.S. at 211.

Furthermore, Plaintiffs expressly reject Defendants' argument that they are seeking to discriminate against refugees in violation of the Equal Protection Clause, U.S. Const. amend. XIV, § 1. As discussed above, the fact that federal law waives the self-sufficiency requirement for refugees and makes them eligible for enrollment in Medicaid immediately upon arrival, means they receive more favorable treatment from the law, not less. 45 C.F.R. § 400.94(c); *see* 8 U.S.C. § 1612(a)(2)(A)(i) (establishing seven-year limit). As such, *Graham v. Richardson*, 403 U.S. 365 (1971) and related cases cited by Defendants have no applicability to the relief requested in this action. In *Graham*, the Supreme Court held that two States could not restrict eligibility by lawfully present aliens to otherwise generally available public assistance. 403 U.S. at 375-76. Here, by contrast, it is the preferential treatment of refugees by the federal government that presents the problem because current federal law makes access to public assistance more readily available to refugees—and it makes the States pay for it.

If the federal government merely contended that refugees were entitled to the *same* rights as other persons, including other immigrants, this suit would not be necessary. The federal government, however, has decreed that refugees receive *greater* rights to access benefits than other immigrants, *e.g.*, 45 C.F.R. § 400.94, a decision that strains the resources of numerous States, including Tennessee. (*See* Pls.' Comp. ¶¶ 32-35). Equal treatment of refugees would be acceptable to Plaintiffs; it is the special treatment of refugees mandated, but not actually funded, by the federal government that gives rise to this litigation. Thus, Defendants' contention that Plaintiffs seek to discriminate against refugees in violation of the Equal Protection Clause is simply wrong and fails to establish that this suit should be dismissed for failure to state a claim.

2. Defendants Incorrectly And Improperly Argue That The Refugee Resettlement Act Conserves State Funds.

Because of the manner in which the federal government has implemented the refugee resettlement program, the State of Tennessee must support a federal initiative from which it withdrew in 2008. Defendants argue that, in the final accounting, the State of Tennessee is better off financially because refugees admitted under this program are limited to seven years of Medicaid. This assertion is misplaced for several reasons. First, this is but a hypothetical and speculative contention for which Defendants have offered no actual evidentiary support. Even if Defendants had offered any such evidence, however, it could not be considered here because their motion to dismiss is made under Rule 12(b)(6), which requires, of course, that the Court limit its consideration to the factual allegations of the plaintiff's complaint, "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (internal quotation marks and citation omitted). Nothing in Plaintiffs' complaint indicates that Tennessee's state budget is ultimately better off because, absent the challenged

federal actions, the refugees at issue would later be qualified to enroll in and then receive more Medicaid benefits from the State of Tennessee than they do currently. In fact, the need for Medicaid assistance should be less likely, not more, if the federal government imposed the same self-sufficiency requirement on refugees that it did on regular immigrants. *See* 8 U.S.C. § 1182 (a)(4)(A).

Moreover, this case is broader than suggested by Defendants. This suit actually concerns not simply the specific funds spent on the refugee resettlement program, but the billions of dollars received by the State in Medicaid funding, which represent approximately twenty percent of the State's budget and which the federal government threatens to revoke if Tennessee does not support the resettlement of refugees. (*See* Pls.' Comp. ¶¶ 34-35, 43-46). There can be no serious question that Tennessee would be worse off if it lost the roughly twenty percent of the State budget that comes from the federal government through Medicaid.

Additionally, Defendants cite no authority to support their contention that the federal government may unconstitutionally deprive a State of its funds so long as the State receives a larger sum in the long run than it would have otherwise. Indeed, this would be like saying the government could legitimately deprive a person of her liberty or property without due process of law provided a large sum of money is later paid. Such an argument is startling because it fails to account for the dignitary harm that comes from being deprived of constitutional protections. *See, e.g., Ellison v. Balinski*, 625 F.3d 953, 959-60 (6th Cir. 2010) (recognizing that an "intangible injury to . . . [a] constitutional and dignitary interest" is actionable). The federal government is required to respect the dignity of States as independent sovereign entities just like it must respect the dignity of individuals. *See, e.g., Alden v. Maine*, 527 U.S. 706, 715 (1999) ("[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not

the full authority, of sovereignty."); *cf. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 297 (4th Cir. 2001) ("[A State's] dignity interest does not fade into oblivion merely because a State's law is enacted to comport with a federal invitation to regulate within certain parameters and with federal agency approval."). Defendants' unsubstantiated conjecture about a purely hypothetical benefit to the State at some point in the future fails to account for this dignitary injury and thus should be rejected.

D. This Case Falls Squarely Within And Is Controlled By *NFIB v. Sebelius*.

Finally, Defendants incorrectly assert that this case does not fall within the ambit of *NFIB v. Sebelius*. The gravamen of Defendants' argument is that the provision of Medicaid services to refugees is a modification of Medicaid eligibility, and that it is not a surprising or new development in the Medicaid program. In reality, though, this case presents a paradigmatic example of the federal government attempting to commandeer State resources in the same manner as that held unconstitutional in *NFIB*.

As an initial matter, Defendants' contention that the refugee resettlement program is not a "new program" fails to take account of how the federal government has substantially altered the program over time, ultimately leading to Tennessee's withdrawal from the program less than a decade ago and the federal government's subsequent use of contractors to continue the program—at State expense. Plaintiffs' complaint explains this history. (Pls.' Comp. ¶¶ 38-41). As originally passed, the Refugee Resettlement Act relied on federal funding. (*Id.* ¶ 23-26). Senator Ted Kennedy, leading sponsor of the Act, described the "three types of Federal assistance [that] are 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." 125 Cong. Rec. 23234 (Sept. 6,

1979) (statement of Sen. Kennedy). The federal contribution was gradually reduced and by 1991 eliminated entirely, thereby making the States responsible for funding the program. (Pls.' Compl. ¶¶ 27-28). In 2007, Tennessee decided to withdraw from the resettlement program pursuant to 45 C.F.R. § 400.301 and notified the federal government of its intent to withdraw effective June 30, 2008. (*Id.* ¶ 32). Nevertheless, the federal government continues to resettle refugees in Tennessee with the aid of private contractors. (*Id.* ¶¶ 33, 38-40). These refugees then are eligible to enroll in TennCare at State expense. (*Id.* ¶ 36-37). Consequently, the State of Tennessee must finance the costs of Medicaid for thousands of refugees each year or risk losing all of its federal Medicaid dollars, even though it has withdrawn from the resettlement program. (*Id.* ¶¶ 35, 42).

Simply declaring, as Defendants do, that the State of Tennessee has long provided welfare benefits to immigrants ignores the realities by which the federal government has effectively amended the Refugee Resettlement Act to such a point that it is unrecognizable from the legislation as enacted by Congress in 1980. *See* Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev., no. 1/2, Spring-Summer 1981 at 141, 142 (Sen. Ted Kennedy writing that the program would "assure full and adequate *federal* support for refugee resettlement programs by authorizing permanent funding for state, local and volunteer agency projects") (emphasis added). Only the most cynical of observers could say that a State should not be surprised that the Refugee Resettlement Act has been turned on its head from one where the federal government fully funds it to one that is financed by the States lest they lose all of their Medicaid funding.[7] (Pls.' Compl. ¶¶ 27-28, 42).

[7] The main case discussed by the Proposed Intervenors in this regard did not involve such a change in circumstances that ultimately effected a change of kind rather than merely degree. *Mayhew v. Burwell*, 772 F.3d 80, 91-92 (1st Cir. 2014).

Attention must also be given to the increasing number of refugees admitted in recent years, particularly since 2007 and 2008. "Before the Refugee Act of 1980, refugee admission policy was reactive and piecemeal as it grew in response to humanitarian crises and ethnic conflicts. The result was an assortment of laws and regulations[.]" USCIS Policy Manual, Vol. 7, Part L, Chapter 1.B (June 28, 2017) (background of refugee adjustment), available at https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartL-Chapter1.html (last accessed July 14, 2017) (attached as Exhibit E). One such piece of legislation was the Vietnam Humanitarian Assistance and Evacuation Act of 1975, P.L. 94-24, 89 Stat. 89, which appropriated $405,000,000 to assist refugees from Cambodia and Vietnam. The Refugee Act of 1980 was intended to follow this same path by making the federal government financially responsible for refugee resettlement, but financial responsibility was an obligation the federal government would eventually abandon. Resettlement of refugees has nonetheless continued—sometimes very aggressively. According to the U.S. Department of State's own data, the years of 2002 and 2003 were a low point in the number of refugees admitted, but those numbers then took a general trajectory upwards. *See* "Arrivals by State and Nationality as of June 30, 2017" (FY 1975 through 30 June 2017), U.S. Dept. of State (2017), available at http://www.wrapsnet.org/admissions-and-arrivals/ (last accessed July 14, 2017) (attached as Exhibit F). In 2016, that number was the highest it had been in over fifteen years. *Id.* Thus, at a time of rapidly increasing healthcare costs, the federal government is also increasing the number of refugees it brings to this country at the expense of the States. And, it is pursuing this program in Tennessee (and elsewhere) by ignoring the State's decision to withdraw from the program and using private contractors instead—another unforeseeable development. The result is a far different picture than that presented at the time of

the Refugee Resettlement Act in 1980 or any time before then when Tennessee, along with other States, began participation in Medicaid.

Furthermore, "[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *New York*, 505 U.S. at 182. Nor does "prior support for [an] Act estop [a State] from asserting the Act's unconstitutionality." *Id.* at 183. Thus, Tennessee's prior participation is not dispositive of whether the program is unconstitutional. The fact that the refugee resettlement program has morphed, particularly since 2008, into something different than what was enacted makes this all the more true.

Ultimately, Plaintiffs' complaint plausibly describes a program that is "new" and "surprising" under *NFIB*, especially with respect to the federal government's actions since Tennessee's withdrawal. Therefore, Defendants' purported contradiction of these factual allegations in the complaint cannot be presented on a Rule 12(b)(6) motion and, even still, have no basis in fact.

Citing pre-*NFIB* case law, Defendants also assert that this case is not proper because the federal government has not yet decided to punish the State of Tennessee—a repetition of their argument under Rule 12(b)(1). The Supreme Court in *NFIB*, however, saw no problem in hearing—*and sustaining*—a challenge to the Affordable Care Act's Medicaid expansion provision prior to any enforcement action by the federal government. 567 U.S. at 583-85. Just as in *NFIB*, the instant challenge is also amenable to judicial review.

Furthermore, since Tennessee has not yet defunded the refugee resettlement program, no action to deprive the State of Medicaid funds could be taken. Notably, Defendants' brief acknowledges that the federal government could indeed decide to exercise its power under 42 U.S.C. § 1396c to withhold *all Medicaid funding* if the State did defund the program, and yet

Defendants contend that this threatened loss of twenty percent of the entire State budget is somehow not coercive. (*See* Defs.' Mem. of Law 35). Such an argument rests on Defendants' representation that the federal government might potentially be so kind as to not withhold all of the Medicaid funding that it could and that the amount ultimately withheld might not be "coercive" under *NFIB*. (*Id.*). This possibility is too slender a reed to rest upon in making State budgetary decisions.

In reality, Plaintiffs are pursuing the sensible course. Unlike the federal government, the State of Tennessee must balance its budget. Tenn. Const. art. II, § 24. Possessing the constitutional responsibility to be a prudent steward of the State's revenue and of its programs, including TennCare, the General Assembly here seeks a determination of its obligations prior to passing legislation that might be deemed a violation of federal law and result in an enforcement action by the federal government. Passing a budget that fails to fund the refugee resettlement program only to be ordered later by a court to support it would cause innumerable issues and inject unnecessary confusion into multiple cycles of the State's budgetary and appropriations process. Instead, Plaintiffs here seek to have these questions settled before enacting a budget that potentially endangers billions of dollars in federal receipts. Indeed, a declaratory judgment is beneficial and proper when "it will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Grand Trunk Western R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984) (quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)); *see, e.g.*, *Plough, Inc. v. Allergan, Inc.*, 741 F. Supp. 144, 147-48 (W.D. Tenn. 1990) (plaintiff could pursue declaratory judgment where it risked being sued for ongoing marketing activities). A judicial answer to the constitutional questions raised by Plaintiffs' complaint would settle the issues

between the parties and obviate the uncertainty currently faced by the State. Thus, Plaintiffs are here properly before the Court, and Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request that the Court grant oral argument of Defendants' motion to dismiss because this action and the arguments of the parties present complex issues of constitutional law that implicate important questions of public policy for the finances of the State of Tennessee.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Kate Oliveri
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