No. 18-5478

In the United States Court of Appeals for the Sixth Circuit

STATE OF TENNESSEE, by and through the Tennessee General Assembly; TENNESSEE GENERAL ASSEMBLY; SENATOR JOHN STEVENS, individually and in his official capacity as Member of the Tennessee Senate for the 24th Senatorial District; AND REPRESENTATIVE TERRI LYNN WEAVER, individually and in her official capacity as Member of the Tennessee House of Representatives for the 40th House District,

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF STATE; MICHAEL J. POMPEO, in his official capacity as United States Secretary of State; BUREAU OF POPULATION, REFUGEES, AND MIGRATION; CAROL THOMPSON O'CONNELL, in her official capacity as Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; OFFICE OF REFUGEE RESETTLEMENT; AND E. SCOTT LLOYD, in his official capacity as Director of the Office of Refugee Resettlement,

Defendants – Appellees.

On Appeal from the United States District Court
For the Western District of Tennessee at Jackson (Anderson, C.J.)
Civil Action No. 1:17-cv-01040-STA-egb

BRIEF OF PLAINTIFF-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 6 Cir. R. 26.1, Plaintiffs state that none of them is a subsidiary or affiliate of a publicly owned corporation and that there are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

Rules

Other

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents important questions of law arising under the Spending Clause of the United States Constitution and the Tenth Amendment.

It is respectfully submitted that argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

INTRODUCTION

Immigration is a federal issue. Unfortunately, the federal government has commandeered state resources as a means of implementing certain federal immigration policies related to its Refugee Resettlement Program. Despite duly withdrawing from this program, the State of Tennessee has continued to be the site for placement of refugees by the federal government, and the State has been compelled by federal law to provide benefits to each of these resettled individuals. If it does not provide benefits, the State of Tennessee is subject to being deprived of *all* of its federal Medicaid funding.

Plaintiffs have sued Defendants because the federal government's mandate to the State that it fund the Refugee Resettlement Program violates the Spending Clause of the U.S. Constitution as well as the Tenth Amendment. The District Court, however, dismissed this suit by first holding that it lacked subject matter jurisdiction and further holding that Plaintiffs' complaint failed to state a claim upon which relief could be granted. Because Plaintiffs respectfully contend that the District Court erred in both of these respects, they ask this Court to reverse the

decision and judgment of the District Court and to remand for further proceedings.

STATEMENT OF JURISDICTION

Plaintiffs filed this action in the United States District Court for the Western District of Tennessee on March 13, 2017. (Complaint, RE 1, Page ID # 1-15.) The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. Included in the complaint were claims for declaratory and injunctive relief. (*Id.*, RE 1, Page ID #6, 14.)

Defendants moved to dismiss Plaintiffs' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Motion to Dismiss, RE 24, Page ID # 169-171). Plaintiffs responded in opposition on July 14, 2017. (Response in Opposition to Motion to Dismiss, RE 38, Page ID # 909-949). A reply and sur-reply also followed. (Reply, RE 39, Page ID # 970-992; Sur-reply, RE 40, Page ID # 993-1000).

By order entered March 19, 2018, the District Court granted Defendants' motion to dismiss. (Order, RE 45, Page ID # 1119-1161.) The District Court likewise entered its final judgment on March 19, 2018. (Judgment, RE 46, Page ID #1162.) No discovery was taken in the District Court, nor was an evidentiary hearing or oral argument held.

Plaintiffs timely filed a notice of appeal to this Court on May 10, 2018. (Notice of Appeal, RE 47, Page ID #1163-1165.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C § 1291. This is an appeal is from a final order and judgment that disposed of all parties' claims.

STATEMENT OF THE ISSUES

I. Did the District Court err in its opinion of March 19, 2018, by holding that it lacked subject matter jurisdiction on the grounds that (1) none of the plaintiffs possessed standing, thereby effectively holding that the Tennessee Attorney General has sole authority over whether the General Assembly can sue to vindicate its own rights and powers; (2) plaintiffs' claims were not ripe because the State of Tennessee has not yet defied federal law; and (3) review by the District Court was precluded by 42 U.S.C. § 1316?

II. Did the District Court err in its opinion of March 19, 2018, by holding that Plaintiffs' complaint did not state a claim upon which relief can be granted, even though it is alleged that the State of Tennessee is compelled to fund the federal Refugee Resettlement Program in order to avoid losing all of its federal Medicaid dollars?

STATEMENT OF THE CASE

Plaintiffs in this case are the State of Tennessee, the Tennessee General Assembly, and two individual legislators—Senator John Stevens and Representative Terri Lynn Weaver. (Complaint ¶¶ 6-9, RE 1, Page ID # 3-5.) They have sued alleging that the federal government's implementation of the Refugee Resettlement Act, 8 U.S.C. § 1521 *et seq.*, exceeds the limits set on the federal government's powers by the Spending Clause of the United States Constitution and the Tenth Amendment. (*See, e.g., id.* ¶¶ 1, 3; RE 1, Page ID # 2.) Defendants are the federal departments, agencies, and officers responsible for implementation and management of the federal refugee resettlement program. (*Id.* ¶¶ 10-17; RE 1, Page ID # 5-6.)

In 1980, Congress enacted the Refugee Resettlement Act ("Act"). (*Id.* ¶ 21, RE 1, Page ID # 7.) Since the program's inception, proponents, supporters, and even drafters of the Act have recognized the significant financial impact the resettlement of refugees imposes on state budgets. (*Id.*) Senator Ted Kennedy, the leading sponsor of the Act, emphasized that the purpose for revamping refugee resettlement law was "to assure full and adequate *federal* support for refugee resettlement programs by

authorizing permanent funding for state, local[,] and volunteer agency projects." (*Id.* ¶ 22, RE 1, Page ID # 7 (quoting Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev., no. 1/2, Spring-Summer 1981 at 141, 142 (emphasis added).) Furthermore, Congress recognized that, "[b]ecause the admission of refugees is a federal decision and lies outside normal immigration procedures, the federal government has a clear responsibility to assist communities in resettling refugees and helping them to become self-supporting." (*Id.* ¶ 23, RE 1, Page ID # 7 (citing Kennedy at 151).) Congress thus crafted the Act with the intention that "[s]tate and local agencies . . . not be taxed for programs they did not initiate and *for which they were not responsible*" and instead that the federal government alone should be "responsible" for funding its own program. (*Id.* ¶ 24, RE 1, Page ID # 7 (citing Kennedy at 151 (emphasis added).)

During debate leading up to passage of the Act, Senator Kennedy outlined three categories of assistance—cash, medical, and social services—explaining that "[t]hese three types of Federal assistance 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." (*Id.* ¶ 25, RE 1, Page ID # 7-8 (quoting 125 Cong. Rec. 23234 (Sept. 6, 1979).) The Act, as passed by Congress, authorized thirty-six months of full reimbursement to a state for the cost of each refugee resettled and participating in certain benefit programs. (*Id.* ¶ 26, RE 1, Page ID # 8.) States received a 100% reimbursement of their costs under the Aid to Families with Dependent Children and Medicaid programs with respect to each participating refugee. (*Id.*) Additionally, the federal government provided separate financial assistance for refugees not eligible for benefits under these programs. (*Id.*)

Federal funds initially supported the federal government's refugee resettlement program, but eventually federal reimbursements to the states were reduced and, by 1991, eliminated entirely. States thereby became responsible for costs of the program. (*Id.* ¶ 27, RE 1, Page ID # 8.) Reports to Congress from the United States Government Accountability Office and Office of Refugee Resettlement ("ORR") have acknowledged that costs of the federal refugee resettlement program

have been transferred from the federal government to the states. (*Id.* ¶ 28, RE 1, Page ID # 8.)

As alleged in Plaintiffs' complaint, the State of Tennessee spent over $31 million state dollars in 2015 to support the federal refugee resettlement program. (*Id.* ¶ 29, RE 1, Page ID # 8.) Furthermore, to avoid spending federal funds set aside for refugee medical assistance and to shift more of the program costs onto the states, federal regulations mandate that state refugee resettlement offices first determine if a refugee is eligible for Medicaid. Consequently, states, like Tennessee, are forced to pay a significant portion of these costs from state tax dollars. (*Id.* ¶ 30, RE 1, Page ID # 8-9 (citing 45 C.F.R. § 400.94).) It is only after the refugee resettlement agency determines that a refugee is not eligible for Medicaid under state plans that the agencies determine eligibility for the fully federally funded Refugee Medical Assistance program. (*Id.*, RE 1, Page ID # 8-9 (citing 45 C.F.R. § 400.94(d).)

Though some states still voluntarily participate in the refugee resettlement program to place refugees, a growing number of them are exercising their right under the relevant regulations to withdraw. (*Id.* ¶ 31, RE 1, Page ID # 9.) At one time, the State of Tennessee voluntarily

participated in the refugee resettlement program. (*Id.* ¶ 32, RE 1, Page ID # 9.) In 2007, however, due to mounting program costs that were not covered by the federal government, Tennessee elected to withdraw from the program pursuant to 45 C.F.R. § 400.301. (*Id.*) Accordingly, by letter dated October 29, 2007, the State of Tennessee notified ORR of its intent to withdraw from the refugee resettlement program effective June 30, 2008. (*Id.*)

Nevertheless, the federal government has—through various regulations and statutes—coerced the State to continue funding the refugee resettlement program by threatening it with the loss of federal Medicaid funding. (*Id.* ¶ 33, RE 1, Page ID # 9.) Furthermore, the federal government has bypassed the decisions of Tennessee's elected representatives and mobilized a private agency to assume control and direction of the refugee resettlement program in the state. (*Id.*) As a result, the federal government nullified Tennessee's decision to withdraw from an ostensibly voluntary federal program and thereby commandeered state funds to support a federal initiative. (*Id.*)

In Tennessee, the Medicaid program, known as TennCare, is jointly funded by Tennessee and the federal government. (*Id.* ¶ 34, RE 1, Page

ID # 9.) In 2016, the federal contribution to TennCare amounted to nearly $7 billion (estimated $6,858,799,000.00), which represented approximately 20% of Tennessee's total overall budget for the fiscal year. (*Id.* ¶ 35, RE 1, Page ID # 10.) From 2008, when Tennessee withdrew from the refugee resettlement program, until 2016, the federal contribution to Medicaid ranged from over $4 billion ($4,566,651,300.00) to nearly $7 billion and has represented 17% to 21% of Tennessee's budget. (*Id.*) During that same time, the federal government has resettled more than 13,000 refugees within Tennessee. (*Id.*)

Under 8 U.S.C. §§ 1612 and 1641, the State of Tennessee must provide TennCare to help fund the refugee program or risk losing the federal contribution to TennCare. (*Id.* ¶ 36, RE 1, Page ID # 10.) Unlike the vast majority of immigrants, those individuals deemed "refugees" under federal law may apply for Medicaid programs immediately upon arrival to the United States. (*Id.* ¶ 37, RE 1, Page ID # 10.) Thus, when a refugee enrolls in Medicaid, the federal government shifts a substantial part of the costs of the federal refugee resettlement program onto the states, including those states (like Tennessee) that have withdrawn from the program. (*Id.*)

In Tennessee, the federal government has appointed a private organization, Catholic Charities of Tennessee, to continue the refugee resettlement program—even though federal regulations specifically permitted ORR to discontinue resettlement of refugees in the state rather than continue resettlement through use of a private designee. (*Id.* ¶ 38, RE 1, Page ID # 10.) Catholic Charities of Tennessee subsequently established an entity referred to as the Tennessee Office for Refugees ("TOR") whose primary purpose was and is to replace the state and continue the federal refugee resettlement program in Tennessee. (*Id.* ¶ 39, RE 1, Page ID # 10-11.) TOR is federally contracted to disburse federal funds to local resettlement offices, monitor the resettlement of refugees by local resettlement agencies operating in the state, and establish policies and procedures for the local resettlement agencies consistent with directives from ORR. (*Id.* ¶ 40, RE 1, Page ID # 11.)

According to TOR's *State of Tennessee Refugee Services Plan and Refugee Program Policy and Procedures Manual*, an "eight month subsidy" for federal refugee medical assistance is only available to refugees ineligible for or denied enrollment into TennCare. (*Id.* ¶ 41, RE

1, Page ID # 11.) As a result, the State is forced to expend substantial amounts of state taxpayer money to fund the resettlement program. (*Id.*)

If Tennessee refuses to expend state funds to provide these refugee services through Medicaid, it is subject to a loss under 42 U.S.C. § 1396c of nearly $7 billion, representing 20% of its total state budget. (*Id.* ¶ 42, RE 1, Page ID # 11.) Thus, operation of the federal refugee resettlement program commandeers state funds with the threatened loss of nearly $7 billion—money that is needed to fund services that are critical to the health and welfare of countless Tennesseans. (*Id.* ¶ 44, RE 1, Page ID # 11.) The conditions set by the federal government that compel the State of Tennessee to permit individuals in the refugee resettlement program access to Medicaid are not germane to the operation or functioning of the state's Medicaid program as a whole. (*Id.* ¶ 45, RE 1, Page ID # 12.) The effect of the federal government's actions is to deprive Tennessee of its sovereignty and regulate it in its sovereign capacity. (*Id.* ¶ 46, RE 1, Page ID # 12.) The refugee resettlement program also commandeers other state funds and instrumentalities through health and welfare programs and public schooling. (*Id.* ¶ 47, RE 1, Page ID # 12.)

The federal government therefore carries out its refugee resettlement program through economic dragooning of state funds and instrumentalities, which is impermissible under the Tenth Amendment to the United States Constitution and in excess of the federal government's powers under the Constitution's Spending Clause. (*Id.* ¶ 48, RE 1, Page ID # 12.)

Responding to these concerns, the Tennessee General Assembly passed Senate Joint Resolution 467 to challenge the federal Refugee Resettlement Program. (*Id.* ¶ 6, RE 1, Page ID # 3.) By letter dated July 5, 2016, the Tennessee Attorney General delegated his authority to file suit to the Tennessee General Assembly. (*Id.*) The filing of the present action followed, and now Plaintiffs' appeal the dismissal of their case.

SUMMARY OF THE ARGUMENT

The District Court erred both in finding a lack of subject matter jurisdiction and in holding that Plaintiffs' complaint failed to state a claim upon which relief could be granted.

First, the District Court erroneously found a lack of subject matter jurisdiction by concluding that Plaintiffs lack standing. Here, the power of the Tennessee General Assembly to appropriate as its legislators may

vote has been invaded by federal Medicaid mandates. Due to this loss of powers, the Tennessee General Assembly has sustained an injury and satisfies Article III standing. Similarly, the two individual legislators have standing as designees of the General Assembly. The General Assembly also has standing to litigate in the name of the State of Tennessee because of a joint resolution passed by the legislature as well as its inherent right to sue to vindicate the legislative powers of the State in its sovereign capacity. The District Court's rejection of standing in all three instances created from whole cloth requirements for standing found in neither Tennessee nor federal law.

As to the District Court's finding that Plaintiffs' claims were not ripe, such a holding overlooks the fact that a clear dispute exists between the parties as to their legal obligations and, due to the threatened loss of federal funds and the potential imposition of civil penalties, Plaintiffs would suffer a hardship without a judicial resolution of their dispute. Additionally, the statute relied upon by the District Court to hold that review is precluded, 42 U.S.C. § 1316, does not apply here because the parties' dispute does not concern what the requirements of federal

Medicaid law are, but rather whether those requirements are constitutional.

Finally, the District Court erred in dismissing the case under Rule 12(b)(6) because Plaintiffs' claim fits squarely within the holding of *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012). In short, the State of Tennessee is compelled to fund a program from which it has sought to withdraw. It must fund the program or risk losing all of its federal Medicaid funding. This is the same threat the Supreme Court has held to constitute an attempt to commandeer state resources in violation of the Spending Clause and Tenth Amendment. Neither the passage of time nor Tennessee's prior participation in the program can preclude it from now suing to vindicate its sovereign powers. Thus, the District Court's decision should be reversed.

I. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION.

Standard of Review

A motion under Rule 12(b)(1) challenging subject matter jurisdiction may be either "facial" or "factual." *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction,

and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. A factual attack challenges the factual existence of subject matter jurisdiction." *Id.* (internal citation omitted). Thus, with a facial attack appellate review is *de novo*. *Id.* at 760. Under a factual challenge, "a reviewing court must accept the district court's factual findings unless they are clearly erroneous . . . [while] review of the district court's application of the law to the facts is *de novo*." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996).

A. Contrary To The Holding Of The District Court, 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).

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

By holding that the General Assembly lacked standing to sue to vindicate its powers, (*see* Order, RE 45, Page ID #1136-1137), the District Court made a fundamental error in its standing analysis that is explicitly condemned by the U.S. Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). There the Supreme Court cautioned that, when determining whether the a party has standing to bring a claim alleging loss of its rights, courts "must not 'confus[e] weakness on the merits with absence of Article III standing.'" *Ariz. State Legis.*, 135 S. Ct. at 2663 (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011)).

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, RE 38-3, Paged ID # 955-958).

In *Arizona State Legislature*, the Arizona Legislature challenged an amendment to the state constitution that removed redistricting authority from the Legislature and vested that authority in an independent body. 135 S. Ct. at 2660-61. In holding that the Arizona Legislature had standing, the Supreme Court emphasized that, since the plaintiff-legislature had a sufficient number of votes to defeat or enact a provision impacted by the constitutional amendment, it suffered sufficient harm to its 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.

The Supreme Court also 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 chambers of the General Assembly passed SJR 467 authorizing suit and alleging deprivation and nullification of their legislative powers. 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. (Complaint ¶¶ 7, 8, 9, 30, 33, 34, 36, 44, 47, 48; RE 1, Page ID # 3-5, 8-12; *see also* Stevens Decl. ¶ 2, RE 38-1, Page ID # 950-951; Weaver Decl. ¶ 2, RE 38-2, Page ID # 953.) In fact, the underlying cause of action itself—the Tenth Amendment to the United States Constitution—makes clear that Defendants are infringing on the State's sovereignty and nullifying its powers.

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). 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, RE 38-4, Page ID # 959-61.) 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. The District Court held that the General Assembly cannot sue because it has not sustained a "complete loss" of its legislating ability, (Order, RE 45, Page ID #1137), but this is simply not the standard used to determine whether a legislative body has standing to sue under Article III. *Compare United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("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").

The District Court's conclusion that the General Assembly lacks standing conflates a perceived weakness of the merits of Plaintiffs' claim with Article III standing. 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, the District Court's decision that the General Assembly lacks standing should be reversed.

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

The District Court likewise erred in holding that Senator John Stevens and Representative Terri Lynn Weaver lacked standing. (Order, RE 45, Page ID #1132-1136.) "[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." *Am. Tel. & Tel. Co.*, 551 F.2d at 391.

For example, in *United States v. American Telephone*, a U.S. House 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 at 385-86. 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 intervened as a defendant on his own behalf and on behalf of the House Committee. *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 both 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 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 v. Perry*, 133 S. Ct. 2652 (2013). There, the Court stated that authorized state officers in their official capacities have standing. 133 S. Ct. 2652, 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 SJR 467, 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. (Stevens Decl. ¶ 3, RE 38-1, Page ID # 951; Weaver Decl. ¶ 3, RE 38-2, Page ID # 954.) The General Assembly "as a whole has standing" so it "can designate [Senator Stevens and Representative Weaver] to act on its behalf" as well. *Am. Tel.*, 551 F.2d at 391; *infra* Part I.A.1.

3. The General Assembly May Sue On Behalf Of The State.

Additionally, the District Court erred in holding that the General Assembly could not bring suit on behalf of the State of Tennessee. (*See* Order, RE 45, Page ID #1137-40.) The State of Tennessee divides its powers into three departments. Tenn. Const. Art. II, § 1. Yet, the District Court held the General Assembly cannot bring suit to halt encroachment into its powers. 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). There can be no legitimate dispute that the State of Tennessee has sustained a constitutional injury by the requirement

that it provide refugees access to 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. *See* Tenn. Const. art. VI, § 5 (creating office of attorney general). 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, District Court assumed that the Tennessee Constitution's separation of powers clause, *see* Tenn. Const. art. II, § 2,[1] demands that only its Attorney General

[1] 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).

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*.") (emphasis added). 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 by the District Court is particularly unsuitable in the present case because it is the 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. *See* Tenn. Const. art. II, § 24. That is, it is a legislative power that is 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 to an assumption of any of the Tennessee Attorney General's inherent functions to enforce the law. *See* Tenn. Const. art. 2, § 3 ("The legislative authority of this state shall be vested in a General Assembly[.]").

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), RE 38-7, Page ID # 966-969.) 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.

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 duly authorized to represent the State's interests. It

would be inappropriate, as a matter of federalism, for a federal court to assume that the State's Attorney General made such a delegation if he could not lawfully do so.

4. The District Court's Opinion Grants The Tennessee Attorney General A Veto Over The Power Of The General Assembly To Litigate And Creates Confusion In Tennessee Constitutional Law.

The District Court's opinion sews tremendous confusion into Tennessee constitutional law. Perhaps most troubling is the fact that it appears to grant the Tennessee Attorney General a veto over whether the General Assembly's powers may be vindicated by litigation. Thus, the courts—even state courts under the District Court's reasoning—would be closed to any attempt by the General Assembly to sue in defense of its own powers. No Tennessee case compels such a result, and federal cases clearly permit a suit for part of the government to sue in vindication of its unique rights. *See, e.g., U.S. House of Representatives*, 130 F. Supp. 3d at 68.

Moreover, for the District Court's conclusion about the separation of powers under Tennessee law to be correct, many aspects of Tennessee state government must be held unconstitutional, including the State's 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. It would also mean that the General Assembly could never constitutionally litigate for the State, thereby nullifying Tenn. Code Ann. § 8-6-109(c) (permitting General Assembly to defend laws). (*See* Order, RE 45, Page ID #1138-1139 (stating it would be unconstitutional for a member of any other branch to exercise the Attorney General's powers).) And, it would invalidate similar provisions in other states that have express separation of powers language in their constitutions and yet permit the state legislature to litigate for the state. *See, e.g.,* N.C. Const. art I, § 6; N.C. Gen. Stat. § 1-72.2. Thus, the decision implicates many more laws than just SJR 467.

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, before the District Court sustained any objection to the effectiveness of SJR 467 or the Attorney General's letter delegating litigation authority, and especially before vitiating the general ability of

the General Assembly to pursue litigation for itself, it should have certified these questions to the Supreme Court of Tennessee under Rule 23 of that court. *See* Tenn. Sup. Ct. R. 23, § 1; *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[.]"). Therefore, to the extent this Court harbors any doubts about the ability of Plaintiffs to pursue this litigation under the Tennessee Constitution, they respectfully ask that the question be certified to the Tennessee Supreme Court.

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

Besides holding that Plaintiffs lacked standing, the District Court erred as well in holding that Plaintiffs' claims were not ripe. (Order, RE 45, Page ID # 1141-1145.) 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). The district court held that Plaintiffs' claim is not ripe because they have not either amended their Medicaid plan to not comply with federal law or withheld Medicaid funds from refugees in violation of federal law. (Order, RE 45, Page ID # 1143.)

Plaintiffs, though, are under a clear, unequivocal mandate from the federal government to provide Medicaid to otherwise eligible refugees. 45 C.F.R. § 400.94(b)-(c). 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. The ripeness doctrine does not require Plaintiffs to put "a gun to [their] head" and pull the trigger by violating federal law prior to bringing their suit. *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*,[2] the defendants attempted to argue that the injury to the legislature was too speculative as it 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. 135 S. Ct. at 2663. The Court rejected this argument, holding that the legislature need not pass a proposal to establish its injury, especially when such an act would violate the law. *Id*. at 2663-64; *see 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 General Assembly is not required to pass a law or submit a proposal that would be invalid and rejected under the current law. Article III's case or controversy requirement does not require the General

[2] 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).

Assembly to break the law as it stands now, or attempt to break the law, to challenge the constitutionality of the federal government's actions. *Id*.

The District Court in the present case issued a contradictory holding. On the one hand, it held 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. (Order, RE 45, Page ID # 1143). On the other hand, the court held 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." (*Id*. at Page ID # 1153). It is wholly incongruous to assert at one time assert that it is unclear what would happen should Tennessee stop funding the refugee program then, just a few pages later, hold that it is violative of the Equal Protection Clause to refuse to cover refugees under state Medicaid programs. (*Id*. at Page ID # 1143, 1153). If there was any doubt in the clearly worded statutory mandates, the District Court's opinion cures 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*. (Complaint ¶ 29, RE 1, Page ID # 8); *Abbott Labs.*, 387 U.S. at 152 (holding that 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 the district court held that Plaintiffs will violate the Equal Protection Clause should they not fund the federal program through Medicaid. The inevitability of such suits is abundantly clear as outside parties have already sought to

litigate as intervening defendants in this action. (*See* Mot. to Intervene, RE 25.)

Thus, Plaintiffs' claim is ripe, and the District Court's holding otherwise should be reversed.

C. Plaintiffs' Suit Is Not Precluded Under The Medicaid Statute.

The federal statute relied upon by the District Court to hold that this suit is precluded, 42 U.S.C. § 1316, (*see* Order, RE 45, Page ID #1145-1147), is in fact inapplicable to the instant case. Specifically, 42 U.S.C. § 1316 governs the process *only* for a "[d]etermination of conformity [of a State Medicaid plan] with requirements for approval." Plaintiffs do not seek to have a plan approved because such an attempt would be futile. Plaintiffs freely admit that what they seek differs from the current requirements established by federal law. Thus, a statute on the "[d]etermination of conformity" is completely irrelevant. Plaintiffs do not seek a determination of whether their proposal conforms to Medicaid requirements; they seek a determination of whether the Medicaid and refugee resettlement requirements conform with the Constitution. As detailed in above, 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.

The District Court ruled that *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), supports its decision that Plaintiffs' claim is precluded, but just the opposite is true. In *Thunder Basin*, the Supreme 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. This is squarely within the purview of the district court. *See Florida*, 780 F. Supp. 2d at 1265. The opinion of the District Court that Plaintiffs' claims are precluded by Medicaid law should thus be reversed.

Therefore, because Plaintiffs have standing, because Plaintiffs' claim is ripe, and because Plaintiffs are in the proper forum, the District Court had subject matter jurisdiction over Plaintiffs' claim. Accordingly, Plaintiffs respectfully ask for reversal of the District Court's decision below finding a lack of subject matter jurisdiction.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS HAD FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED.

After finding a lack of subject matter jurisdiction, the District Court proceeded to consider the merits by deciding and granting Defendants Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. (*See* Order, RE 45, Page ID # 1147-1161.) As explained below, however, the District Court's decision that Plaintiffs failed to state a plausible claim for relief should be reversed.

Plaintiffs' complaint presented 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 Act. As a result, Plaintiffs' complaint needed to allege a plausible claim that the resettlement program was being applied unconstitutionally "in the particular context" and not that its application would be unconstitutional in every context, as would have been the case with a facial challenge. *Women's Medical Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (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 alleged as-applied violations by Defendants of the Constitution's Spending Clause and Tenth Amendment through a commandeering of state funds to finance a federal program, the District Court erred in granting Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Standard of Review

This Court reviews a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted *de novo*. *Benzon v. Morgan Stanley Distribs.*, 420 F.3d 598, 605 (6th Cir. 2005) (citing *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 680 (6th Cir. 2004)). A court considering a motion to dismiss must "accept[] as true all non-conclusory allegations in the complaint and determine whether they state a plausible claim for relief." *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009) (citing *Iqbal v. Ashcroft*, 556 U.S. 662, 678 (2009)). When reviewing a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accept its factual allegations as true, and draw all reasonable inferences in favor

of the plaintiff. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

A. The Spending Clause And Tenth Amendment Work Together To Protect The 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 (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 United States 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*, 567 U.S. 519 (2012), when several states challenged the Medicaid expansion provision of the Affordable Case Act. 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.

In the Supreme Court's most recent term, it again returned to these principles of federalism and reaffirmed this anti-commandeering principle with its ruling in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). There, the Supreme Court emphasized again that Congress has no power "to issue direct orders to the governments of the States." *Id.* at 1476. Thus, applying the Court's precedent, it held that a law prohibiting state legislatures from legalizing sports betting was unconstitutional. *See id.* at 1468-69. "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from

voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id.* at 1478.

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 accounts 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) (describing a "100-percent reimbursement to the States for all refugees"). 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 the will of its legislature, 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. As a result, the will of its legislature has been commandeered. *See Murphy*, 138 S. Ct. at 1478. Given that the Supreme Court in *NFIB* found that the threatened loss of only ten percent of a state 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 invasive of federalism and subject to invalidation by this Court.

Nevertheless, in considering Defendants' motion to dismiss, the District Court committed several errors of law on the merits of Plaintiffs' claims, which are detailed below. As a result, the opinion below fails to properly protect the Tenth Amendment rights of the sovereign states and massively empowers the federal government beyond the bounds permits by the Constitution and Supreme Court precedent.

B. The Federal Government's Power Over Immigration Does Not Entitle It To Force States To Fund The Refugee Resettlement Program, Nor Does the Equal Protection Clause Require States To Grant Preferential Treatment To Refugees.

To the extent the District Court's dismissal of this action rests on the broad power of the federal government to regulate immigration policy, (*see* Order, RE 45, Page ID # 1151-1152), it erred because that power does not include any authority to compel the states to finance federal immigration decisions. Similarly, neither the Equal Protection Clause nor any other part of the U.S. Constitution requires States to follow the federal government's lead in giving preferential treatment to persons settled in a State as a "refugee" under federal law.

1. The Federal Government's Power To Regulate Immigration Does Not Entitle It To Violate A State's Sovereignty.

First, Plaintiffs are not claiming any authority to regulate immigration or to discriminate against refugees or any other category of immigrants. Such arguments are mere straw men. 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* Compl. *Prayer for Relief* ¶ 2, RE 1, Page ID #14.) Plaintiffs do contend, however, that the U.S. 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; RE 1, Page ID # 12.)

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 the federal government 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 Prepaid Postsecondary 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). To the extent the District Court's held otherwise, it is contradicted by established precedent, which makes 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.

2. States Are Not Compelled By The Constitution To Give Refugees Preferential Treatment Over Other Members Of The Immigrant Population.

Attempting to escape the fact that the Refugee Resettlement Program is funded by the States, Defendants argued below that refugees were simply part of the population of lawfully present aliens and that this entire population is the responsibility of a state's Medicaid program. Such an argument, however, 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 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 the states would otherwise be responsible. Instead, 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.

Nevertheless, the District Court, accepting the argument advanced by Defendants below, held that the State of Tennessee is obligated to provide benefits to any members of refugee population pursuant to *Graham v. Richardson*, 403 U.S. 365 (1971), and the Equal Protection Clause, U.S. Const. amend. XIV, § 1. (*See* Order, RE 45, Page ID # 1152-

1154.) Plaintiffs expressly reject any suggestion that they are seeking to discriminate against refugees, and 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). Therefore, *Graham v. Richardson*, 403 U.S. 365 (1971), and related cases 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 have been 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* Complaint ¶¶ 32-35; RE 1, Page ID # 9-10.) 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, any contention that Plaintiffs seek to discriminate against refugees in violation of the Equal Protection Clause is simply wrong. Nothing in the Equal Protection Clause or any precedent interpreting a State's duty to provide equal protection of the law, however, mandates that the State grant preferential treatment to persons deemed "refugees" by the federal government.

C. The District Court Erroneously Relied On Tennessee's Prior Participation In The Refugee Resettlement Program And The Mere Passage Of Time To Dismiss This Challenge.

Because of the manner in which the federal government has implemented the Refugee Resettlement Act, the State of Tennessee must support a federal program from which it withdrew in 2007. The District Court, however, held that Tennessee is effectively stuck financing that program, (*see* Order, RE 45, Page ID # 1158-1160), despite the injury it

causes to the State's sovereignty. This conclusion runs afoul of Supreme Court precedent and should be rejected.

1. A State's Prior Support For Federal Legislation Does Not Prevent It From Later Challenging Its Constitutionality.

First, the District Court's conclusion that the passage of time can foreclose the present challenge, (*see* Order, RE 45, Page ID # 1158-1160), is directly contrary to the Supreme Court's clear holding in *New York v. United States* rejecting the argument that "prior support for [an] Act estop[s] [a state] from asserting the Act's unconstitutionality." 505 U.S. at 183. Indeed, "[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.* at 182. Tennessee's prior participation in either the Refugee Resettlement Program or in Medicaid more generally is thus in no way dispositive of whether the program is unconstitutional.

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."). Moreover, "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. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 297 (4th Cir. 2001). The fact then that time has passed since the federal Refugee Resettlement Program was first enacted does not mean that the State of Tennessee cannot now assert that the program is unconstitutional and reclaim its sovereign powers under the federal Constitution.

2. The Refugee Resettlement Program Has Changed Greatly Over Time.

The fact that the refugee resettlement program has morphed, particularly since 2008, into something different than what was originally enacted by Congress provides additional support to Tennessee's right to withdraw and not have its funds commandeered to support the program further. As described by Plaintiffs' complaint, the program is in fact "new" and "surprising" under *NFIB*, especially with respect to the federal government's actions since Tennessee's formal withdrawal.

In point of fact, the present challenge falls squarely within the ambit of *NFIB v. Sebelius*. The gravamen of Defendants' argument, which was accepted by the District Court, is that the provision of

Medicaid services to refugees is a mere 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*.

First, the 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 about a decade ago and the federal government's subsequent use of contractors to continue the program—at state expense. Plaintiffs' complaint explains this history. (Complaint ¶¶ 38-41; RE 1, Page ID # 10-11.) As originally passed, the Refugee Resettlement Act relied on federal funding. (*Id.* ¶ 23-26; RE 1, Page ID # 7-8.) 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 reduced and by 1991 eliminated entirely, thereby making the states responsible funding the program. (Complaint ¶¶ 27-28; RE 1, Page ID # 8.) 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, RE 1, Page ID # 9.) Nevertheless, the federal government continues to resettle refugees in Tennessee with the aid of private contractors. (*Id.* ¶¶ 33, 38-40; RE 1, Page ID # 9, 10-11.) These refugees then are eligible to enroll in TennCare at state expense. (*Id.* ¶ 36-37; RE 1, Page ID # 10.) 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; RE 1, Page ID # 10, 11.)

Simply declaring 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. (Complaint ¶¶ 27-28, 42; RE 1, Page ID # 8.)

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[.]" (Response to Mot. to Dismiss, RE 38, Page ID #945 (quoting USCIS Policy Manual, Vol. 7, Part L, Chapter 1.B (June 28, 2017), Exhibit E, RE 38-5, Page ID # 962-963. 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, of course, 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. ("Arrivals by State and Nationality as of June 30, 2017" (FY 1975 through 30 June 2017), U.S. Dept. of State (2017)), RE 38-6, Page ID # 964-965.) 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 is willing to bring 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.

3. The Threatened Loss Of Funds Suffices To Allege Injury.

The District Court further erred in holding that Plaintiffs' suit should be dismissed because the federal government has not yet decided to punish the State of Tennessee for any failure to adhere to federal Medicaid requirements. (Order, RE 45, Page ID # 1160-1161.) The Supreme Court in *NFIB* 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. *See* 567 U.S. at 583-85. Just as in *NFIB*, the instant challenge is amenable to 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 acknowledged below 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 contended that this threatened loss of twenty percent of the entire state budget is somehow not coercive. (*See* Defs.' Mem. of Law, RE 24-1, Page ID # 218.) Such an argument rests on Defendants' representation that the federal government might potentially decide not to 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 for making state budgetary decisions.

Plaintiffs are pursing 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, Plaintiffs here seek a determination of the State's 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 later be ordered by a court to support it would cause innumerable issues and inject unnecessary confusion in multiple cycles of the state's budgetary and appropriations process. Instead, Plaintiffs seek to have these issues settled before enacting a budget that potentially endangers billions of dollars in federal receipts. This aim is fully consistent with the purpose of a declaratory judgment, which is considered 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)).

Accordingly, Plaintiffs' complaint alleged a plausible claim against Defendants, and the District Court's dismissal under Rule 12(b)(6) should be reversed.

CONCLUSION

For the above reasons, Plaintiffs hereby respectfully ask that this Court reverse the District Court's Order of March 19, 2018, dismissing this case as well as its Judgment entered the same date and that this matter be remanded for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7) and 6 Cir. R. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Century Schoolbook, and contains 12,705 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Page ID# Range	Description
R. 1	1-15	Complaint
R. 24	169-245	Defendants' Motion to Dismiss with Exhibits
R. 25	246-346	Motion to Intervene with Exhibits
R. 38	909-969	Plaintiffs' Response to Motion to Dismiss with Exhibits
R. 39	970-992	Defendants Reply in Support of Motion to Dismiss
R. 40	993-1082	Plaintiffs' Sur-Reply in Opposition to Motion to Dismiss with Exhibits
R. 45	1119-1161	Order
R. 46	1162	Judgment
R. 47	1163-1165	Notice of Appeal