No. 19-1137

# In the Supreme Court of the United States

TENNESSEE, BY AND THROUGH THE TENNESSEE GENERAL ASSEMBLY, ET AL., PETITIONERS

*v.*

U.S. DEPARTMENT OF STATE, ET AL.

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

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

Tennessee has participated in Medicaid since 1968. Since that time, participating States have been required to provide benefits to lawfully admitted refugees who satisfy federal eligibility requirements. In 2016, the Tennessee General Assembly called for the State's Attorney General to bring suit against the federal government to assert that, under the Tenth Amendment, Tennessee cannot be required to expend state funds to provide Medicaid benefits to eligible refugees. The General Assembly urged that requiring such spending as a condition of Medicaid participation became unconstitutional when Tennessee withdrew 12 years ago from a different federal program, under which States can receive federal grants to administer various refugee resettlement-assistance services. After Tennessee's Attorney General declined to bring such a suit, the General Assembly commenced this action.

The questions presented are:

1. Whether the court of appeals correctly held that the Tennessee General Assembly failed to establish a concrete and imminent institutional injury sufficient to support Article III standing.

2. Whether the Tenth Amendment requires Congress to excuse Tennessee from providing Medicaid benefits to eligible refugees, because the State has withdrawn from a separate federal grant program.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 931 F.3d 499. The opinion of the district court (Pet. App. 39a-91a) is reported at 329 F. Supp. 3d 597.

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 2019. A petition for rehearing was denied on October 16, 2019 (Pet. App. 92a-93a). On December 27, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 16, 2020, and the petition was filed on March 13, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. In 1965, Congress created the Medicaid program, "a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Participation by States in Medicaid is voluntary, but States that choose to participate are required to comply with requirements set forth in the Medicaid statute and in regulations promulgated by the Department of Health and Human Services (HHS). *Ibid.*

Tennessee has participated in the Medicaid program since 1968. Pet. App. 5a. That participation requires Tennessee to establish and maintain a "plan for medical assistance" that provides coverage to certain groups of needy people (including the low-income aged, blind, and disabled) and that is approved by the Secretary of HHS. 42 U.S.C. 1396a(a)(10)(A)(i) and (b); 42 C.F.R. 430.10. Each State administering Medicaid under an approved plan receives funds from the federal government according to a statutory formula. 42 U.S.C. 1396b(a), 1396d(b).

Whenever a State wishes to alter its plan, it must submit a proposed plan amendment to HHS's Centers for Medicare & Medicaid Services (CMS) for review. 42 C.F.R. 430.12. If CMS initially determines that the proposed plan amendment does not comply with federal law and disapproves it, a dissatisfied State may obtain administrative review. 42 U.S.C. 1316; 42 C.F.R. 430.18. The CMS Administrator's final decision regarding the proposed plan amendment is then subject to direct appellate review. 42 U.S.C. 1316; 42 C.F.R. 430.38.

Because the State's existing funding is tied to its existing state plan, the State's funding is not affected by CMS's rejection of a proposed plan amendment; so long as the State continues to administer its existing approved plan in compliance with federal requirements, federal funding remains available. See 42 C.F.R. 430.35(a)(1).

If CMS believes that a State's existing plan or its administration of that plan ceases to comply with federal law for any reason, the agency first attempts to resolve the matter informally. See 42 C.F.R. 430.32, 430.35. If that informal intervention fails, CMS may initiate a formal compliance action, which gives the State an opportunity for a hearing before any federal funding can be withheld. 42 C.F.R. 430.35(a) and (d), 430.70, 430.83-430.88; see 42 U.S.C. 1396c (requiring "reasonable notice and opportunity for hearing"). Following a hearing, a presiding officer issues a recommended decision, which is subject to review by the CMS Administrator. 42 C.F.R. 430.80(a)(11), 430.102(b). The Administrator's decision marks the earliest point in the process at which federal funds may be withheld. 42 C.F.R. 430.102(c), 430.104(c); see 42 U.S.C. 1396c (explaining that, upon a finding of non-compliance, the agency either withholds further payments to the State or, in its discretion, may "limit payments to categories under or parts of the State plan not affected" by the non-compliance). As with proposed plan amendments, the CMS Administrator's decision is subject to direct appellate review. 42 U.S.C. 1316(a)(3); 42 C.F.R. 430.38(a)-(b).

b. "The 1965 Medicaid statute was * * * silent on the availability of Medicaid to aliens." *Lewis* v. *Thompson*, 252 F.3d 567, 571 (2d Cir. 2001). Years earlier,

however, this Court had determined that the Constitution does not allow States to "impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States." *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); see *id.* at 419-420. And in 1971, this Court confirmed that States cannot deny welfare benefits to lawfully admitted aliens "merely because of their alienage," absent the federal government's authorization. *Graham* v. *Richardson*, 403 U.S. 365, 378 (1971); see *id.* at 374-378 (discussing *Takahashi*, 334 U.S. at 419-420); see also *Toll* v. *Moreno*, 458 U.S. 1, 12 (1982) (explaining that the Court's "decision in *Graham* * * * followed directly from *Takahashi*"). The Secretary of HHS thereafter promulgated a rule "to implement the Supreme Court decision in *Graham*." 38 Fed. Reg. 16,910, 16,910 (June 27, 1973) (emphasis added); see Pet. App. 6a-7a. That rule made clear that States participating in Medicaid must provide benefits to all aliens "permanently residing in the United States under color of law" who meet Medicaid's eligibility requirements. 38 Fed. Reg. 30,259, 30,259 (Nov. 2, 1973). That is, noncitizen residents—including lawfully admitted refugees—who satisfied Medicaid's eligibility requirements could not be excluded from the program. See *ibid.*

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, popularly known as the Welfare Reform Act. In the Welfare Reform Act, Congress—exercising its authority to "treat[] aliens differently from citizens," *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)—limited aliens' claims to federal benefits in several ways. First, it identified a limited category of

"qualified alien[s]" who may be able to establish eligibility for federal benefits, and deemed all other aliens categorically ineligible for such benefits. 8 U.S.C. 1611-1613. Lawfully admitted refugees are among the "qualified alien[s]." 8 U.S.C. 1641(b)(3). Second, Congress subjected most qualified aliens to a five-year waiting period following admission to the United States before they may qualify for Medicaid. 8 U.S.C. 1613(a). But it did not apply that waiting period to refugees. 8 U.S.C. 1613(b)(1). Third, the Act, as amended in 1997, limited the duration of States' obligations to refugees, allowing States to deny them Medicaid on the basis of their alienage seven years after their admission to the United States. 8 U.S.C. 1612(b)(1) and (2)(A)(i); see Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5302(b), 111 Stat. 598. All together, the Welfare Reform Act made clear that States may not deny coverage to refugees who satisfy Medicaid's eligibility requirements until seven years after their admission. See Pet. App. 7a-8a, 44a.

c. In 1980, Congress established "a permanent and systematic procedure" for admitting refugees to the United States, as well as "comprehensive and uniform provisions for [their] effective resettlement." Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102 (amending the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*). Congress allowed for the annual admission of refugees in "such number as the President determines * * * is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. 1157(a)(2). Once admitted, refugees are required to apply for status as lawful permanent residents one year after entry, 8 U.S.C. 1159(a)(1), and may apply for citizenship after five years, 8 U.S.C. 1159(a)(2), 1427(a).

Pursuant to the Refugee Act, the State Department's Bureau of Population, Refugees, and Migration manages the U.S. Refugee Admissions Program, a public-private partnership involving federal agencies, domestic non-profit organizations, and international organizations that work together to orchestrate the admission and resettlement of refugees. See Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Refugee Admissions*, https://go.usa.gov/xP8Y3. The Bureau of Population, Refugees, and Migration consults with state and local governments "concerning the sponsorship process and the intended distribution of refugees among the States and localities before their placement." 8 U.S.C. 1522(a)(2)(A). But the Refugee Act is "not intended to give States and localities any veto power over refugee placement decisions." H.R. Rep. No. 132, 99th Cong., 1st Sess. 19 (1985). Determinations about individual placements are thus made under the authority of the State Department, working in conjunction with non-profit resettlement agencies. See Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Reception and Placement*, https://www.state.gov/refugee-admissions/reception-and-placement/.

The Refugee Act also "provides for federal support of the refugee resettlement process." S. Rep. No. 256, 96th Cong., 1st Sess. 2 (1979). That support system is principally managed by HHS's Office of Refugee Resettlement (ORR). Under ORR's Refugee Resettlement Program, the federal government funds a number of federal programs to facilitate refugees' transition to the United States, including social services, case-management services, short-term cash assistance for refugees who are not eligible for Temporary Assistance for Needy Families (TANF) or Supplemental Security

Income, and short-term medical assistance for refugees who are not eligible for Medicaid or the State Children's Health Insurance Program. See 8 U.S.C. 1522(c) and (e); 45 C.F.R. 400.1, 400.4-400.13, 400.45-400.69, 400.90-400.107, 400.140-400.156. Cash and medical assistance are generally available only to refugees who have been in the United States for less than three years, and may be far more limited. See 8 U.S.C. 1522(e)(1) and (5); 45 C.F.R. 400.211.[1]

ORR disburses funds to its grantees—which may be States or non-profit organizations—to administer resettlement services. See 8 U.S.C. 1522; 45 C.F.R. 400.1. States are not required to expend their own funds to administer those services; ORR fully covers the costs. ORR is also authorized, subject to adequate appropriations, to reimburse States for their share of the costs of providing joint federal-state benefits (such as TANF and Medicaid) to eligible refugees during their first three years in the United States. 8 U.S.C. 1522(e)(1) and (4). For the last 30 years, however, Congress has not appropriated any funds for that purpose. Pet. App. 88a; see 60 Fed. Reg. 33,584, 33,588 (June 28, 1995) (45 C.F.R. 400.203-400.204).

State participation in the Refugee Resettlement Program is voluntary. A State that wishes to participate

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[1] The duration of ORR's resettlement services is subject to adjustment, based on changes in appropriations, to ensure full funding to States. For example, since the mid-1990s, ORR's cash and medical-assistance programs have been available only to qualifying refugees who have been in the United States for less than eight months. 58 Fed. Reg. 64,499, 64,500 (Dec. 8, 1993); see Cong. Res. Serv., *Refugee Admission and Resettlement Policy* 12 n.50 (Dec. 18, 2018), https://go.usa.gov/xfXmd; ORR, HHS, *Cash & Medical Assistance*, https://go.usa.gov/xf9bN.

must submit a plan describing how the State will coordinate cash, medical assistance, and other forms of support to promote refugees' resettlement and economic self-sufficiency. 8 U.S.C. 1522(a)(6); 45 C.F.R. 400.4(a), 400.5(b). States may withdraw from the program with 120 days' notice to ORR. 45 C.F.R. 400.301(a). If a State chooses to withdraw, ORR may select other grantees (such as non-profit organizations) to administer the federally funded resettlement services in that State. See 8 U.S.C. 1522(c) and (e); 45 C.F.R. 400.301(c); see also 45 C.F.R. 400.69.

Although Tennessee once participated in the Refugee Resettlement Program, it withdrew from the program effective June 2008. Pet. App. 8a. ORR then selected Catholic Charities of Tennessee as the grantee to administer an alternative program of federally funded assistance for refugees residing in Tennessee. *Ibid.*; see ORR, HHS, *About Wilson/Fish*, https://go.usa.gov/xP8rh.

2. a. In 2016, the Tennessee General Assembly passed Senate Joint Resolution (SJR) 467, calling for the State's Attorney General to commence "legal action" against the federal government. S.J. Res. No. 467, 109th Gen. Assemb. 1 (Tenn. May 20, 2016). The resolution noted that the State had withdrawn from the federal Refugee Resettlement Program, and declared that the federal government's continued requirement that Tennessee provide Medicaid benefits to eligible refugees as a condition of receiving federal Medicaid funding violates the Tenth Amendment. *Id.* at 1-2. The resolution purported to authorize the General Assembly "to retain outside counsel to commence a civil action" against the United States if the Attorney General declined to do so. *Id.* at 2; see Pet. App. 9a.

The General Assembly sent SJR 467 to the Governor of Tennessee for approval. Pet. App. 9a. He returned it without signing, noting "constitutional concerns about one branch of government telling another what to do." *Ibid.* (quoting Governor's statement). The General Assembly took no further legislative action. See *id.* at 9a, 37a n.15.

The Tennessee Attorney General did not bring suit. Pet. App. 9a. He explained that "the 10th Amendment theories that underpin SJR 467 are unlikely to provide a viable basis for legal action," because "[i]mmigration and refugee resettlement are matters largely reserved for federal jurisdiction." D. Ct. Doc. 24-3, at 11 (June 1, 2017) (July 5, 2016 letter from Tennessee Attorney General and Reporter Herbert H. Slatery III, to Tennessee Senate Chief Clerk Russell Humphrey and Tennessee House of Representatives Chief Clerk Joe McCord); see Pet. App. 9a-10a.

b. The General Assembly, along with two state legislators, filed this suit. Pet. App. 10a. The General Assembly purported to sue on its own behalf and on behalf of the State of Tennessee. *Ibid.* The two legislators joined the suit as representatives of their respective chambers, as well as in their capacities as individual legislators. *Ibid.*

Petitioners' complaint alleged that, "by enacting and implementing 8 U.S.C. §§ 1612 and 1522(e)(7)," the federal government had unconstitutionally "coerc[ed] the state into subsidizing," and "commandeer[ed] state funds to finance," the resettlement of refugees in Tennessee, thereby "impermissibly intrud[ing] on Tennessee's state sovereignty." Compl. 2, 4. Petitioners sought a declaration that, given "Tennessee's withdrawal from the Refugee Resettlement Program, the State should

no longer be required to accept refugees for resettlement and/or be forced to expend State funds to cover the costs of the health-care services the refugees receive under Medicaid." Pet. App. 78a; see Compl. 14 (requesting that respondents be "permanently enjoined from resettling additional refugees within the State of Tennessee unless and until the United States government * * * absorbs all costs for the resettlement program that are currently being incurred by the State").

c. The district court dismissed the case, holding that it lacked subject-matter jurisdiction and that, in the alternative, petitioners had failed to state a Tenth Amendment claim upon which relief could be granted. Pet. App. 39a-91a.

The district court first determined that the General Assembly and individual legislators lacked Article III standing, Pet. App. 55a-61a, and that the General Assembly was not authorized to sue on behalf of the State itself, *id.* at 62a-65a. The court also concluded that petitioners' claims were unripe because Tennessee's Medicaid program was in compliance with federal law, and no change was anticipated. *Id.* at 65a-70a. The court explained that if Tennessee were to seek to amend its Medicaid state plan in a manner that CMS determined to be non-compliant, judicial review of the proposed change would be available. *Id.* at 43a, 68a-70a. The court further concluded that the Medicaid statute's provisions for administrative and direct appellate review precluded the district-court review sought by petitioners. *Id.* at 71a-73a.

Even assuming that jurisdiction existed, however, the district court determined that petitioners had failed to state a viable Tenth Amendment claim. Pet. App.

73a-91a. The court explained that the federal government does not "commandeer[]" state funds when it resettles refugees, including refugees who may qualify for Medicaid, in Tennessee. *Id.* at 81a; see *id.* at 78a-82a. The court rejected petitioners' reliance on Tennessee's withdrawal from ORR's Refugee Resettlement Program, explaining that whether Tennessee serves as a grantee administering ORR's various federal refugee-assistance programs has no bearing on the State's obligations as a traditional Medicaid participant. *Id.* at 82a-89a. The court explained that those obligations have always included providing coverage to eligible refugee applicants. *Id.* at 82a. And that fact, the court observed, readily distinguishes this case from *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), in which Congress conditioned Medicaid funding on the "implementation of an entirely new program." Pet. App. 86a.

3. The court of appeals affirmed the district court's determination that petitioners lack Article III standing and its dismissal of the case for lack of subject-matter jurisdiction. Pet. App. 1a-38a.

The court of appeals rejected the General Assembly's argument that a legislative body may sue whenever "51% of the members of the legislative body vote to authorize the lawsuit." Pet. App. 20a (quoting Pet. C.A. Br. 17). The court observed that a "vote tally," though perhaps necessary, is not sufficient to confer standing on a legislative body. *Id.* at 21a. Instead, the court explained, the General Assembly was required to establish a concrete and impending "institutional injury," *id.* at 22a (citation omitted)—that is, an injury to its legislative powers, "such as disruption of its legislative process, usurpation of its authority, or nullification

of anything it has done," *id.* at 27a. But the court explained that the General Assembly's complaint was premised not on an institutional injury to the legislature but on "an alleged injury to the *state*": the potential loss of federal Medicaid funds if the General Assembly were to exclude lawfully admitted refugees from the State's appropriations for its share of Medicaid costs. *Id.* at 25a. The court reasoned that the General Assembly did not allege that it would suffer its own cognizable injury, including "that it cannot pass appropriations bills." *Id.* at 26a. The court further observed that the General Assembly merely objected to a provision of Medicaid that "permits refugees to enroll in Medicaid if they satisfy the other criteria for eligibility." *Id.* at 27a.

The court of appeals noted that, at oral argument, petitioners had raised a "substantially" new argument about the General Assembly's ability "to balance the state budget" in the event of an unexpected influx of refugees who might be eligible for Medicaid. Pet. App. 26a n.11. The court determined that the General Assembly's hypothetical concerns did not establish a concrete and imminent injury for several reasons. *Ibid.* First, petitioners never suggested "that refugee placements have caused, or threatened to cause, [the State's] budget to become unbalanced." *Ibid.* Second, statutory consultation requirements concerning refugee resettlement protected against petitioners' hypothetical. *Ibid.* (citing 8 U.S.C. 1522(a)(2)). And third, the historical record showed that the threat of an unbalanced budget was not "real, immediate, and direct." *Id.* at 27a n.11 (citation omitted); see *id.* at 26a-27a n.11 (contrasting

petitioners' hypothetical resettlement of 10,000 refugees in two weeks with the 13,000 refugees resettled in Tennessee from 2008 to 2016).[2]

The court of appeals also concluded that petitioners' other efforts to establish Article III standing failed. Pet. App. 28a-38a. The court rejected the individual legislators' claims, which were largely derivative of the General Assembly's asserted standing. *Id.* at 28a-29a. And it determined that the General Assembly could not assert the State's injuries, as state law did not authorize the General Assembly to bring suit on behalf of the State itself. *Id.* at 29a-38a.

Given petitioners' lack of standing, the court of appeals concluded that it lacked subject-matter jurisdiction. Pet. App. 38a. The court accordingly did not address the other alternative grounds on which the district court had dismissed the suit: lack of ripeness, statutory preclusion, and failure to state a claim upon which relief can be granted. *Ibid.*

**ARGUMENT**

Petitioners contend (Pet. 13-18) that the Tennessee General Assembly has Article III standing as a legislative body to bring this suit, and (Pet. 18-20) that Tennessee cannot be required to expend any state funds to provide Medicaid benefits to eligible refugees. The court of appeals correctly rejected petitioners' standing argument, and its decision does not conflict with any decision of this Court or of another court of appeals. Be-

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[2] In the subsequent three years, a total of 1624 refugees were resettled in Tennessee—609 in 2017, 420 in 2018, and 595 in 2019. Office of Admissions, Refugee Processing Ctr., Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Interactive Reporting: Refugee Arrivals*, https://ireports.wrapsnet.org/.

cause the court of appeals concluded that it lacked jurisdiction, it did not address petitioners' substantive claim, which is meritless in any event. In addition, this case would be an unsuitable vehicle for this Court's review because alternative grounds independently justify the district court's dismissal for lack of jurisdiction. No further review is warranted.

1. To establish Article III standing, a plaintiff must show, *inter alia*, that he has "suffered an injury in fact * * * that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547-1548 (2016) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). If a state legislature seeks to litigate as "an institutional plaintiff asserting an institutional injury," it must allege a concrete and imminent injury to its legislative function and authority. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015).

As the court of appeals properly concluded, petitioners do not identify a cognizable institutional injury to the Tennessee General Assembly itself. See Pet. App. 20a-28a. And petitioners do not challenge the court of appeals' additional conclusion that the General Assembly is not authorized under state law to sue on behalf of the State of Tennessee. See Pet. 11 n.1. Moreover, even assuming that petitioners had alleged a cognizable injury, they would be unable to establish redressability—another element of standing's "irreducible constitutional minimum." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560).

a. i. Petitioners first contend (Pet. 13-14) that the federal government's Medicaid-eligibility requirements

constitute a cognizable injury to the General Assembly's appropriations power. That contention lacks merit.

Petitioners assert (Pet. 14) that "the General Assembly's position is no different than that of the Arizona Legislature" in *Arizona State Legislature*, *supra*. In that case, the Arizona legislature challenged a ballot initiative that amended the state constitution "to remove redistricting authority from the Arizona Legislature and vest that authority in an independent commission." 135 S. Ct. at 2658. This Court observed that, under the state constitution, any redistricting map produced by the commission would be implemented, and the legislature would lack any power to try to supersede the commission's map with its own. *Id.* at 2663-2664. The Court accordingly concluded that the legislature had standing to challenge the ballot initiative, because vesting redistricting authority in the commission "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id.* at 2665 (brackets in original; citation omitted).

As the court of appeals explained, petitioners' "insistence that its circumstances are identical to those in *Arizona State Legislature* is misplaced." Pet. App. 27a. Petitioners urge (Pet. 14) that the General Assembly's authority to appropriate state funds has been "invalidat[ed]," because it must fund the State's share of the Medicaid costs of qualifying refugees if it wishes to satisfy the Medicaid statute's conditions on the receipt of federal funding. But nothing has been invalidated; the General Assembly's power to appropriate funds remains intact. See Pet. App. 26a-28a. In contrast with the Arizona legislature, which "could not take *any* redistricting action," and thus suffered the "concrete" loss

of one of its institutional powers, the Tennessee General Assembly "*can* pass appropriations bills, which can allocate or not allocate funds as it wishes." *Id.* at 27a; see *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019) (contrasting *Arizona State Legislature*, in which the challenged law "*permanently* deprived the legislative plaintiffs of their role," with circumstances in which a legislature's "dominant initiating and ongoing role" was not altered).

At bottom, petitioners' complaint is not that the General Assembly lacks the authority to validly pass an appropriations bill, but that when the General Assembly exercises that authority, there may be—depending on the content of the bill—consequences for the State under federal law. See, *e.g.*, Pet. App. 61a. Put differently, the General Assembly has lost only the ability to decide both (1) to participate in a federally funded program, and (2) to impose its own eligibility rules on that program via its appropriations. But petitioners identify no precedent suggesting that being put to that extremely common choice constitutes a cognizable harm to a state legislative body. Cf. *Bethune-Hill*, 139 S. Ct. at 1953 (explaining that a state legislative body's asserted standing cannot "rest[] solely on its role in the legislative process"). Quite unlike the circumstances of *Arizona State Legislature*, no legislative authority has been usurped, either temporarily or permanently, and no action by the General Assembly, either past or future, has been nullified.

In the end, petitioners rely on an asserted Tenth Amendment injury to the *State*, not the General Assembly. See Pet. App. 27a. Indeed, petitioners seemingly recognize that is so, by asking this Court to "hold that

*states* have standing to challenge unconstitutional federal actions that impose funding obligations on states." Pet. 13 (emphasis altered). The State of Tennessee, however, is not a party to this suit, the Tennessee Attorney General having declined to bring a Tenth Amendment challenge after concluding that it is not viable. See Pet. App. 9a. And as petitioners now acknowledge (Pet. 11 n.1), the General Assembly must establish standing in its own right and cannot rely on the State's interests. See Pet. App. 26a.[3]

ii. Petitioners also contend (Pet. 17) that the General Assembly has suffered an institutional injury to its ability "to craft a balanced budget." As an initial matter, the court of appeals suggested that petitioners have forfeited that argument by failing to raise it "substantially" before oral argument. Pet. App. 26a n.11. In any event, it lacks merit.

Petitioners hypothesize (Pet. 17) that "the federal government could place a large number of refugees in Tennessee toward the very end of a budget cycle, and the large, unexpected increase in state Medicaid spending for those refugees would upset what had otherwise been a careful legislative balance of state revenues and expenses." But that hypothetical is purely abstract and

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[3] A State might bring this type of challenge in multiple ways. Most clearly, if a State unsuccessfully proposed to CMS to amend the state plan to reflect the State's proposal to eliminate coverage for eligible refugees, jurisdictional requirements of standing and ripeness would be satisfied and judicial review would be available before any loss of federal funding. See pp. 26-28, *infra*. A State might also be able to challenge certain changes in federal law that require the State to alter its state plan by a specified date in order to remain in compliance with the Medicaid statute. See *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519 (2012).

speculative, for the reasons the court of appeals described. See Pet. App. 26a n.11. In particular, petitioners do not claim that refugee placements have ever caused, or threatened to cause, any imbalance in the State's budget. That is unsurprising given the size of the State's budget and the number of refugees resettled annually in Tennessee—only a subset of whom may actually satisfy Medicaid eligibility requirements. Compare, *e.g.*, Tenn. Pub. Ch. No. 405 (May 17, 2019) (enacting $38.5 billion budget for 2019-2020), with p. 13 & n.2, *supra* (reporting refugee resettlement statistics, including the 595 refugees placed in Tennessee in 2019).

Moreover, the statutory guidelines for refugee resettlement, 8 U.S.C. 1522(a)(2), reinforce the conjectural nature of petitioners' hypothetical. By requiring at least quarterly consultation between the federal and state governments and identifying factors that help determine initial placements—such as avoiding placing refugees in areas that are "highly impacted * * * by the presence of refugees or comparable populations," 8 U.S.C. 1552(a)(2)(C)(i)—the guidelines make the sudden placement of an unprecedented number of refugees in a single State highly unlikely.[4] Given all of those circumstances, petitioners' hypothetical concerns about a surprise last-minute disruption of the state budget do not present the kind of "certainly impending" injury

[4] In September 2019, the President issued an executive order providing that the federal government would exercise its discretion to the maximum extent possible to avoid settling refugees in States and localities that did not consent to resettlement. See Exec. Order No. 13,888, 84 Fed. Reg. 52,355 (Oct. 1, 2019). In January 2020, however, a district court preliminarily enjoined that executive order. See *HIAS, Inc.* v. *Trump*, 415 F. Supp. 3d 669 (D. Md. 2020), appeal pending, No. 20-1160 (4th Cir. filed Feb. 13, 2020).

that this Court has "repeatedly reiterated" is necessary to establish an injury-in-fact. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409-410 (2013).

b. The court of appeals' standing decision does not conflict with any decision of any other court of appeals. Indeed, as the court observed, a finding that the General Assembly lacks standing here is consistent with the D.C. Circuit's decision in *Alaska Legislative Council* v. *Babbitt*, 181 F.3d 1333 (1999). See Pet. App. 24a-25a. In that case, the Alaska Legislative Council, representing the state legislature, brought a Tenth Amendment claim challenging federal management of federal lands in the State. 181 F.3d at 1335. Like the Tennessee General Assembly here, the Council maintained that the federal statute at issue had "nullified [its] legislative prerogatives" to manage the State's fish and wildlife resources. *Id.* at 1337. The D.C. Circuit observed that the Council was merely challenging the State's general "loss of political power" to enact conflicting legislation. *Id.* at 1338. The court thus determined that the Council's suit alleged an injury "not to the Legislature," but "to the State itself. *Ibid.* It dismissed the Council's claim for lack of Article III standing because, like the Tennessee General Assembly, the Council was not authorized to represent the State and had identified "no separate, identifiable, judicially cognizable injury" to the legislature that would "entitle[] it to sue on its own behalf." *Id.* at 1339.

In urging this Court to grant review, however, petitioners contend (Pet. 15) that the decision below conflicts with the Fifth Circuit's decision in *Texas* v. *United States*, 809 F.3d 134 (2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016) (per curiam). In *Texas*,

several States sued to enjoin the implementation of certain federal immigration programs, and the Fifth Circuit found that the State of Texas had standing because the implementation of those programs would impose financial costs on the State. See *id.* at 155. But as petitioners acknowledge, *Texas* "involved *state*, rather than legislative, standing." Pet. 15 (emphasis added). That distinction makes all the difference here: As the court of appeals explained, any alleged injury in this case is "to Tennessee's sovereignty," not to the General Assembly in its own institutional capacity. Pet. App. 27a. Again, the State is not a party to this suit, and the General Assembly has not challenged the determination that it lacks the authority to litigate on the State's behalf. See Pet. 11 n.1; see also *Bethune-Hill*, 139 S. Ct. at 1951 (rejecting legislature's standing even though, "[n]o doubt, * * * the State itself could press this appeal").

c. Petitioners lack standing for the additional reason that their alleged injury is not "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. Even if petitioners suffer a cognizable institutional injury when considering whether to appropriate state funds for eligible refugees' Medicaid costs, that asserted injury could not be remedied through this litigation concerning the allegation of a possible withholding of federal funds.

On the merits, petitioners assert (Pet. 12) that the outcome here should be the same as *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012) (*NFIB*). In *NFIB*, States challenged the Affordable Care Act's significant expansion of Medicaid eligibility, and this Court held that the federal government could not condition the States' existing federal Medicaid

funding on their participation in what amounted to a "new program." *Id.* at 582 (opinion of Roberts, C.J.). That holding redressed the States' injuries by allowing them to decline to expend state funds on the challenged expansion without forfeiting their ongoing participation in the traditional Medicaid program. See *id.* at 575-576.

Following *NFIB*'s example, it may be assumed that a judicial decision in petitioners' favor would prevent the federal government from withholding, or threatening to withhold, its share of Medicaid funding if Tennessee declined to expend funds to provide coverage to eligible refugees. See, *e.g.*, Pet. 19. But as petitioners appear to acknowledge (Pet. 23), independent of issues concerning federal funding, under this Court's decision in *Graham* v. *Richardson*, 403 U.S. 365 (1971), the federal Constitution does not allow States, without federal authorization, to offer welfare benefits to citizens while refusing them to lawfully admitted refugees. See *id.* at 376-380 (explaining that only the federal government may limit refugees' access to benefits); see also pp. 3-4, *supra*. Petitioners do not challenge that principle. In these circumstances, a ruling in the General Assembly's favor regarding only the withholding of federal funding would not redress any asserted injuries stemming from a requirement to include lawfully admitted refugees under its state Medicaid program. Cf., *e.g.*, *Renne* v. *Geary*, 501 U.S. 312, 319 (1991) (recognizing that separate, unchallenged legal requirements that preclude effective relief pose a barrier to redressability).

2. Petitioners also urge this Court (Pet. 18-20) to review the merits of their constitutional claim—an issue that the court of appeals did not reach, and that no other court of appeals has addressed. Petitioners identify no

reason that such an extraordinary step would be warranted here. Indeed, as the district court concluded, this case does not present any viable Tenth Amendment claim. See Pet. App. 73a-91a.

a. Petitioners challenge a longstanding condition of Tennessee's Medicaid participation: They complain (Pet. 19) that, if the General Assembly stops eligible refugees from enrolling in Tennessee's Medicaid program or does not pay the State's share of the Medicaid costs associated with such refugees, the State risks losing its federal Medicaid funding. And they contend (*ibid.*) that such a result would be unconstitutional "for the exact same reason" that this Court rejected the Medicaid expansion in *NFIB*. But the comparison between the longstanding Medicaid eligibility requirements at issue here and the unprecedented Medicaid expansion in *NFIB* is inapt.

In *NFIB*, this Court held that Congress could not condition a State's pre-existing Medicaid funding on the State's compliance with the Affordable Care Act's significant expansion of Medicaid's eligibility rules, which would have made all low-income childless adults eligible for coverage. See 567 U.S. at 575-585 (opinion of Roberts, C.J.); *id.* at 689 (opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). As the Chief Justice's opinion explained, the expansion was unduly coercive because, although styled as a modification of the Medicaid program, it was so drastic a change that it established "in reality a new program." *Id.* at 582 (opinion of Roberts, C.J.). Previously, the "Medicaid program require[d] States to cover only certain discrete categories of needy individuals," such as low-income children or low-income adults with disabilities. *Id.* at 575. The new statutory provisions, "in contrast, require[d] States

to expand their Medicaid programs * * * to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line." *Id.* at 576 (emphasis omitted). That expansion "accomplished[d] a shift in kind, not merely degree," as it transformed Medicaid from "a program to care for the neediest among us" to "an element of a comprehensive national plan to provide universal health insurance coverage." *Id.* at 583.

The reasoning of *NFIB* is inapposite here. The requirement that a participating State maintain a Medicaid plan that provides benefits to refugees who fall within Medicaid's traditional categories of needy individuals (*e.g.*, low-income children) is not new in any sense. Eligible refugees have been part of the Medicaid program from its inception. See pp. 3-5, *supra*. When originally enacted, Congress did not authorize the exclusion of lawfully admitted refugees on the basis of their alienage, and this Court has held that the Constitution does not permit States to exclude otherwise-eligible beneficiaries on that basis. See *Graham*, 403 U.S. at 374-378. In 1973, HHS confirmed by rule that States participating in Medicaid must provide benefits to all eligible aliens "permanently residing in the United States under color of law." 38 Fed. Reg. at 30,259. And in 1996 and 1997, Congress legislated against that backdrop in authorizing States to deny Medicaid only to otherwise-eligible refugees who have been in the United States for more than seven years. 8 U.S.C. 1612(b)(1) and (2)(A)(i). In short, Congress has not suddenly expanded Medicaid eligibility for refugees; it merely *limited* the duration of States' obligations, 24 years ago.

b. Petitioners do not contest that, as a participant in the Medicaid program for the last 50 years, Tennessee

has maintained a state plan that covers eligible refugees. Nor do they contend that Congress has expanded States' obligation to cover eligible refugees. Instead, petitioners focus (Pet. 19-20) on an entirely different program: ORR's Refugee Resettlement Program. Petitioners assert (Pet. 20) that Tennessee's withdrawal from that program should "end its financial obligations under Medicaid to refugees the federal government settles in Tennessee." That assertion misapprehends the nature of the Refugee Resettlement Program and its relationship to Medicaid generally.

In 1980, Congress authorized a set of grant-making programs—referred to collectively as the Refugee Resettlement Program—to provide transitional support to newly resettled refugees. See 8 U.S.C. 1522; 45 C.F.R. 400.1; see also pp. 6-8, *supra*. Those programs offer social services, as well as short-term cash and medical-assistance programs for recent arrivals who do not qualify for programs such as TANF or Medicaid. See 8 U.S.C. 1522(c) and (e). ORR oversees the Refugee Resettlement Program and distributes funding to the grantees that agree to administer the services. See 45 C.F.R. Pt. 400. Tennessee was one such grantee until 2008, when it withdrew from the program. Pet. App. 8a. When Tennessee chose to discontinue its participation, ORR chose Catholic Charities of Tennessee to take its place in administering the federally funded services. *Ibid.*; see 8 U.S.C. 1522(c) and (e); 45 C.F.R. 400.301(a) and (c).

Petitioners do not (and plainly could not) contend that Tennessee's withdrawal from the Refugee Resettlement Program diminished the federal government's authority to resettle refugees in the State or authorized

Tennessee to exclude refugees. See Pet. 4 ("It is undisputed that states cannot stop the federal government from placing refugees within their borders."). They nevertheless contend (Pet. 20) that, under the Tenth Amendment, the State's decision to "exit" the Refugee Resettlement Program should likewise permit it to opt out of its obligations to those refugees under Medicaid. But the fact that Tennessee discontinued its role in administering certain resettlement services in 2008 has no bearing on the State's longstanding obligations under the Medicaid statute. Tennessee has withdrawn from the Refugee Resettlement Program, not from the Medicaid program. And so it remains subject to the same conditions on its receipt of federal funding for Medicaid that have always applied: The state plan must ensure coverage for eligible refugees.

Petitioners observe (Pet. 20) that, in the Refugee Act of 1980, Congress authorized ORR to reimburse States for their "state share" of the costs of providing Medicaid to certain refugees. 8 U.S.C. 1522(e)(4). A decade later Congress stopped appropriating funds for that purpose; as a result, ORR has not offered such state-share reimbursements since 1991. See Pet. App. 88a; see also 60 Fed. Reg. at 33,588 (45 C.F.R. 400.203-400.204). Petitioners now assert (Pet. 2, 23) that when the federal government ended those additional payments 30 years ago, it "broke its promise" to "reimburse the state for 100% of its costs." And they assert (Pet. 20) that the contraction of the ORR reimbursements is "why Tennessee elected to withdraw" from the Refugee Resettlement Program 17 years later.

Those assertions are misguided. The federal government never made a "promise" that 100% of a State's Medicaid costs for refugees would be reimbursed, as the

Refugee Act provided only that funding of any "state share" payments was authorized. See 8 U.S.C. 1522(e)(4). Indeed, ORR has never been authorized to reimburse States for Medicaid costs associated with *all* refugees. Compare 8 U.S.C. 1552(e)(1) and (4) (authorizing reimbursement for state share with respect to refugees in the United States for less than three years), with 8 U.S.C. 1612(b) (confirming eligible refugees' access to Medicaid during first seven years in the United States). Unlike the unprecedented expansion of Medicaid at issue in *NFIB*, the cessation of "state share" appropriations in 1991 did not amount to a "surprising * * * postacceptance" condition on Tennessee's Medicaid participation. 567 U.S. at 584 (opinion of Roberts, C.J.). Both before 1980 and since 1991, Tennessee has participated in Medicaid without supplemental payments to help cover the state share for certain refugees. And neither the introduction nor cessation of those discretionary reimbursements altered Tennessee's pre-existing obligations under the Medicaid statute and the Constitution. Put simply, the State was never authorized to decline to fund benefits for eligible refugees if it wished to comply with Medicaid's federal-funding conditions. The district court therefore correctly concluded that petitioners failed to state a viable Tenth Amendment claim. Pet. App. 91a.

3. In addition, this case would be a poor vehicle for considering either question presented because it suffers from other independent jurisdictional defects. Most notably, as the district court determined, this suit does not present a ripe controversy. Pet. App. 65a-70a.

Because Tennessee's Medicaid plan currently complies with the requirement to provide benefits to eligible refugees, Tennessee faces no actual or impending

loss of federal funding. The State has not taken any steps to defund refugees' care. In particular, the Tennessee Department of Finance and Administration's Bureau of TennCare, which administers the State's Medicaid program, has not proposed any change to the state plan with respect to refugees, nor has the General Assembly directed the state agency to do so. If the Bureau of TennCare were to request approval for a proposed plan amendment, any decision by CMS to disapprove the proposed amendment would be subject to judicial review before federal funding would be affected. See *Mayhew* v. *Burwell*, 772 F.3d 80, 84 n.4 (1st Cir. 2014) (reviewing federal government's denial of state plan amendment, including the State's contention that a particular federal coverage requirement exceeded Congress's authority), cert. denied, 576 U.S. 1004 (2015); see also pp. 2-3, *supra* (describing review process). Requiring a proposed plan amendment and request for approval therefore does not "put 'a gun to their head,'" as petitioners assert. Pet. 21 (brackets and citation omitted).

Petitioners contend (Pet. 21) that the challenge in *NFIB* arose in "[t]he exact same" posture. That contention is incorrect. The state plaintiffs in *NFIB* challenged a new federal statute that required them to change their state plans to effectuate a major expansion of Medicaid eligibility before a statutory deadline. See 567 U.S. at 576 (opinion of Roberts, C.J.). Existing state plans would therefore become noncompliant on the deadline set by Congress. See *id.* at 575-576. Here, by contrast, the longstanding requirement to provide coverage to eligible refugees is already reflected in Tennessee's approved state Medicaid plan. Tennessee has not been asked to effectuate any change whatsoever, let

alone to overhaul its Medicaid program before a deadline set by Congress. As a result, petitioners effectively request an adjudication of a hypothetical plan amendment that the State has not proposed.

For similar reasons, the district court also concluded that petitioners' suit is statutorily precluded by the administrative-review process, from which petitioners have a right to a direct appeal. Pet. App. 71a-73a; see 42 U.S.C. 1316, 1396c. Petitioners contend (Pet. 22) that they "do[] not seek to have a plan approved" via that statutorily prescribed process "because such an attempt would be futile." But Tennessee may—without risking its federal funding—propose a plan amendment denying coverage to refugees and may defend against the presumptive denial of that amendment by raising in a court of appeals any constitutional challenges. See *Mayhew*, 772 F.3d at 84 n.4. As a result, the State cannot decline to comply with the statutory review process and seek a district-court adjudication outside of that process.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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