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

STATE OF TENNESSEE, by and through the Tennessee General Assembly, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:17-cv-01040-STA-egb
UNITED STATES DEPARTMENT OF STATE, *et al.*,	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Dated: August 18, 2017

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INTRODUCTION

Defendants have explained that the Court lacks subject-matter jurisdiction over Plaintiffs' claim for three independent reasons: (1) Plaintiffs lack standing to bring their claim; (2) the claim is not ripe for review; and (3) district-court review of Plaintiffs' claim is precluded by the Medicaid statute. Mem. of Facts & Law in Supp. of Defs.' Mot. to Dismiss (ECF No. 24-1) ("Defs.' Mem."), at 14-24. Defendants have also demonstrated that neither the Tenth Amendment, nor the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), shields the State of Tennessee from its longstanding Constitutional obligation to provide Medicaid benefits to refugees on the same terms as it does to U.S. citizens. Defs.' Mem. at 24-35. Plaintiffs' response, based on reinventions of their Complaint and inapposite precedent, is insufficient to rebut these grounds for dismissal.

ARGUMENT

I. PLAINTIFFS' CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION.

A. Plaintiffs Do Not Have Standing To Assert Their Claim.

1. The State legislators do not have standing.

Plaintiffs have failed to establish that State legislators Stevens and Weaver have standing in their official capacity.[1] Confronted with the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), Defs.' Mem. at 15-16, Plaintiffs respond that the legislators have met the requirements of Article III because the General Assembly has standing and designated the legislators to act on its behalf. Pls.' Opp. at 4-5. This argument, however, departs from the

[1] Plaintiffs' response does not address Defendants' point that their Complaint (ECF No. 1) ("Compl.") contains no allegations of personal injury to the legislators that would support their standing as individuals. *Compare* Defs.' Mem. at 14-15 *with* Resp. in Opp. to Defs.' Mot. to Dismiss (ECF No. 38) ("Pls.' Opp."), at 3-5. Accordingly, Plaintiffs have abandoned this theory of standing. *See Montgomery v. Kraft Foods Glob., Inc.*, 2012 WL 6084167, at *6 (W.D. Mich. Dec. 6, 2012), *aff'd*, 822 F.3d 304 (6th Cir. 2016).

allegations in the Complaint, *see* Compl. at 1 (omitting any mention that legislators are filing suit on behalf of legislature), ¶¶ 8-9 (same), and thus should be rejected by the Court. *Tangas v. Int'l House of Pancakes LLC*, 2016 WL 614006, at *4 (N.D. Ohio Feb. 16, 2016) ("[I]t is hornbook law that a plaintiff cannot amend a complaint through arguments in an opposition brief.").

Even under this revised theory the legislators would not have standing to bring suit on behalf of the legislature. As an initial matter, the General Assembly itself lacks standing here. *See* Defs.' Mem. at 16-17; *infra* at 2-3. Additionally, Plaintiffs have not identified a State law that authorizes the legislators to speak for the General Assembly. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664-67 (2013) (citing *Karcher v. May*, 484 U.S. 72, 81-82 (1987)). State law confers upon the Attorney General, not the General Assembly or legislators, the authority to initiate suit on behalf of the State or General Assembly. *See* Defs.' Mem. at 17-19. Senate Joint Resolution ("SJR") 467 provides no exception, both because a resolution cannot amend a statute or constitutional provision, *Vertrees v. State Bd. of Elections*, 214 S.W. 737, 742 (Tenn. 1919); Tennessee General Assembly, How A Bill Becomes A Law, http://www.capitol.tn.gov/about/billtolaw.html (last visited August 17, 2017) ("Resolutions differ from bills in that they do not become law but simply serve to express the views of the majority of one or both houses of the Legislature."), and because SJR 467 was effectively vetoed by the Governor, *see* Intervenor-Defs.' Mem. of Facts & Law in Supp. of Mot. to Dismiss (ECF No. 25-6), at 11-12.[2]

2. The General Assembly does not have standing.

Plaintiffs also fail to demonstrate that the General Assembly has standing to bring this suit. Plaintiffs effectively contend that *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), eliminated any requirement of a concrete and

[2] Because the General Assembly lacks standing, and State law precludes it from designating members to bring this suit on its behalf, Plaintiffs cannot persuasively rely on *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976). *See* Pls.' Opp. at 3-4.

particularized injury where legislative standing is concerned, and that the question "boils down to pure numbers." On this basis they maintain that the General Assembly has standing because at least "51% of [its] members … vote[d] to authorize the lawsuit." Pls.' Opp. at 5, 7-8.

Plaintiffs misconstrue *Arizona State Legislature* and the precedent on which it is founded. In *Arizona State Legislature*, a ballot initiative amended the state constitution by transferring congressional redistricting authority from the state legislature to an independent commission. 135 S. Ct. at 2661. The legislature then "commenced [an] action after authorizing votes in both of its chambers." *Id.* at 2664. But that authorization alone was not sufficient to confer standing on the legislature; rather, the Supreme Court explained that the legislature had standing because the ballot initiative, "together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative . . . would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." 135 S. Ct. at 2665 (citing *Raines*, 521 U.S. at 823-24). Similarly, the Supreme Court's decision in *Coleman v. Miller*, 307 U.S. 433 (1939), does not indicate that a legislature's standing depends simply on a tally of aggrieved legislators, but rather "stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), *on the ground that their votes have been completely nullified*." *Raines*, 521 U.S. at 823 (emphasis added); *cf. id.* at 829.

Thus, far from suggesting that a legislature's standing "boils down to pure numbers," Pls.' Opp. at 5, the Supreme Court's jurisprudence confirms that a legislature must establish that it has suffered a concrete and particularized injury—namely, a complete loss of legislative power—to meet the requirements of Article III. Plaintiffs here do not satisfy that standard, having alleged not a loss of power to enact appropriations legislation, but only that the legislation they prefer, once enacted, might conflict with federal law. *See* Compl. ¶ 7.

3. The General Assembly may not bring suit on behalf of the State.

Plaintiffs also have not established that the legislature may speak for the State in this action. They suggest that the separation-of-powers principles embedded in the State constitution are so "[f]lexib[le]" as to permit the General Assembly to litigate on the State's behalf. Pls.' Opp. at 9-11. But *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995), the sole Tennessee case relied on by Plaintiffs, refutes their position, as it confirmed the exclusive authority of each department in its respective sphere. *See id.* at 452-55 (holding that administrative agencies created by the legislature may not encroach upon the province of the judicial department by determining a statute's constitutionality (citing Tenn. Const. Art. II, §§ 1, 2)). Accordingly, *Richardson* here instructs that the General Assembly, tasked "to make, alter, and repeal the law," may not attempt to "administer[] and enforce[] the law" as well. *Id.* at 453.

Moreover, Plaintiffs do not contest that Tennessee statutes confer exclusive authority on the Attorney General to litigate on behalf of the State. *Compare* Defs.' Mem. at 17-18 *with* Pls.' Opp. at 8-12. Based on these statutes, and consistent with the State constitution's separation-of-powers provisions, courts have described the Attorney General as "the State's principal civil litigator," *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 772 (Tenn. Ct. App. 2001); *see also State v. Chastain*, 871 S.W.2d 661, 665 (Tenn. 1994), even when the interests of the legislature are implicated, *see* Pls.' Opp. at 10; *Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ.*, 2012 WL 6003540, at *3 (W.D. Tenn. Nov. 30, 2012) (concluding that the Attorney General is "required to respond to discovery requests on [the General Assembly's] behalf"), *supplemented*, 2012 WL 6607288 (W.D. Tenn. Dec. 18, 2012) (Attorney General is the General Assembly's "legal representative" for purposes of discovery).

Plaintiffs' remaining arguments are also without merit. First, Plaintiffs again invoke SJR 467 as a basis for the General Assembly to litigate on the State's behalf. Pls.' Opp. at 11. But as

previously discussed, that resolution never took effect, and in any event cannot amend the constitutional or statutory responsibilities conferred upon the Attorney General. *See supra* at 2. Second, Plaintiffs cite no authority to support the position that the Attorney General may delegate his authority, and decline to address the contrary authorities cited by Defendants. Instead Plaintiffs weakly contend that "[i]t would be inappropriate to assume that the State's Attorney General made such a delegation if he could not lawfully do so." Pls.' Opp. at 12. No such assumption is required, however, given that the Attorney General purported to delegate his authority only "to the extent allowed by Tennessee law." Letter from the Hon. Herbert H. Slatery III, Attorney General and Reporter of the State of Tennessee (ECF No. 24-3), at 4. He did not determine that such delegation would be lawful. *Id.*

Finally, the Court need not certify any questions regarding the legislature's standing to the Tennessee Supreme Court, *see* Pls.' Opp. at 12, because the existing constitutional provisions, statutory scheme, and jurisprudence set out "a reasonably clear and principled course," *Ray v. Madison Cty.*, 2016 WL 4006081, at *1 (W.D. Tenn. July 25, 2016) (citation omitted). Certification of the standing question is also unnecessary because, as discussed below, the Court may dismiss this case on other jurisdictional grounds.

Because Plaintiffs have failed to demonstrate standing, the Court must dismiss their claim for lack of subject-matter jurisdiction.

B. Plaintiffs' Claim Is Not Ripe For Review.

Plaintiffs likewise have failed to demonstrate that their claim is ripe for review. First, they have not established that their claim is fit for a judicial decision. Plaintiffs argue that the Government will "inevitab[ly]" withhold Medicaid funds from Tennessee if the State does not provide Medicaid benefits to refugees. Pls.' Opp. at 13-15. But that result can hardly be described as "inevitable" when (1) the State itself has not taken a single step toward denying

Medicaid benefits to refugees, such as submitting a Medicaid State plan amendment; (2) the State agency responsible for submitting and implementing such a plan has neither joined this case as a plaintiff nor submitted a declaration in support of Plaintiffs' position; (3) the Federal Government has not commenced the thorough administrative process required prior to withholding any funds; and (4) the Government has broad discretion in how it responds to a State's non-compliance, including withholding only a limited amount of funds from the State. *See* Defs.' Mem. at 20-22. Thus, Plaintiffs' claim is not fit for review because it "depends on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Warshak v. United States*, 532 F.3d 521, 526 (6th Cir. 2008) (citation omitted).[3]

The three cases relied on by Plaintiffs do not support their argument. Notably, none concerned ripeness. *See Arizona State Legislature*, 135 S. Ct. at 2661-64; *NFIB*, 567 U.S. at 519; *Florida ex rel Bondi v. HHS*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011). Nor can Plaintiffs draw support from the Supreme Court's standing analysis in *Arizona State Legislature.* Pls.' Opp. at 14-15. In that case, the Court held that the legislature's alleged injury was not speculative, given its allegations that it had already suffered a concrete and particularized harm from the adoption of the ballot initiative. 135 S. Ct. at 2663-65. By contrast, the injury Plaintiffs fear here—a loss of all Federal Medicaid funding—has not occurred and may never occur given the Government's authority to withhold less than all of a State's Medicaid funds in a case of non-compliance. *See* Defs.' Mem. at 4, 21-22.

[3] Plaintiffs suggest that these contingencies are irrelevant in light of the holding in *Graham v. Richardson*, 403 U.S. 365 (1971), that the Equal Protection Clause prohibits the State from denying welfare benefits on the basis of alienage. *See* Pls.' Opp. at 25. But the fact that individual refugees could seek to enforce *Graham's* mandate in federal court says nothing about the variety of steps the Federal Government could or would take if the State denied Medicaid benefits to refugees.

Plaintiffs also have not established that they face significant hardship if this Court withholds review. Plaintiffs fail to distinguish (or even reference) the numerous cases holding that compliance with CMS's administrative process places no hardship on States challenging Medicaid program requirements. *Compare* Defs.' Mem. at 22-23 *with* Pls.' Opp. at 15-16. Instead, Plaintiffs first claim that their hardship is evidenced by the fact that they have alleged a violation of the Tenth Amendment. Pls.' Opp. at 15-16. But a litigant cannot satisfy ripeness requirements simply by abstractly "alleg[ing] the undermining of our two-sovereign structure of government." *Id.*; *see Rush v. Barham*, 618 F. App'x 789, 792 (5th Cir. 2015) (affirming dismissal of Tenth Amendment claim for lack of ripeness because "further factual development is required"). The cases cited by Plaintiffs, Pls.' Opp. at 15-16, do not suggest otherwise, especially as neither considered the ripeness of a Tenth Amendment claim. *See NFIB*, 567 U.S. at 577; *Elrod v. Burns*, 427 U.S. 347 (1976).

Second, Plaintiffs assert that they face significant hardship given the possibility that Defendants could withhold up to $7 billion in Medicaid funds from Tennessee each year. Pls.' Opp. at 16. But as other courts have concluded in response to similar arguments, that concern is entirely speculative. *E.g.*, *New Jersey v. HHS*, 2008 WL 4936933, at *9 (D.N.J. Nov. 17, 2008).

Finally, Plaintiffs suggest that it is nevertheless appropriate to seek a declaratory judgment here because "[a] judicial answer to the constitutional questions raised by Plaintiffs' complaint would settle the issues between the parties and obviate the uncertainty currently faced by the State." Pls.' Opp. at 31-32. But the Declaratory Judgment Act does not allow Plaintiffs to bypass the ripeness requirement. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997); *Estate of Frerichs by Dunn v. Knox Cty.*, 2017 WL 3160568, at *4 (E.D. Tenn. July 25, 2017). At this point Plaintiffs have taken no steps to deny Medicaid benefits to refugees, and thus their request for declaratory judgment is precisely the type of "premature adjudication" that

the ripeness doctrine is meant to avoid. *Magaw*, 132 F.3d at 284 (doctrine prevents courts "from entangling themselves in abstract disagreements") (citation omitted).[4]

The Court should therefore dismiss Plaintiffs' claim because it is not ripe for review.

C. The Medicaid Statute Precludes District-Court Review.

Plaintiffs offer no persuasive response to Defendants' point, based on *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), that district-court review of their claim is precluded by the Medicaid statute. Plaintiffs do not dispute that the Medicaid statute sets out a comprehensive review structure, beginning with a notice of non-compliance, followed by robust administrative proceedings, and culminating in review by a Federal court of appeals, 42 U.S.C. §§ 1316, 1396c. *See* Pls.' Opp. at 16-17. Nor do they dispute that a plaintiff asserting a non-constitutional claim under that scheme would be precluded from litigating in district court. *Id.*; *see also, e.g., New York v. HHS*, 2008 WL 5211000, at *15-16 (S.D.N.Y. Dec. 15, 2008). Rather, they merely assert that their claim is not precluded because "[t]he only question is one of constitutional interpretation." Pls.' Opp. at 17. But that argument is foreclosed by *Elgin v. Department of the Treasury*, 567 U.S. 1, 13-20 (2012), which held that a statutory scheme that precludes district-court review is no less exclusive in cases involving constitutional claims. And the lone case cited by Plaintiffs is inapposite, both because it predates *Elgin* and because it did not consider a preclusion argument. *See* Pls.' Opp. at 17 (citing *Florida*, 780 F. Supp. 2d at 1265).

Accordingly, Plaintiffs have failed to establish that the Court has subject-matter jurisdiction over their claim.

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[4] Defendants note that in *School District of the City of Pontiac v. Sec'y of Education*, 584 F.3d 253 (6th Cir. 2009), the Sixth Circuit held that a pre-enforcement challenge seeking a declaration that the plaintiffs did not need to comply with certain requirements of the No Child Left Behind Act was ripe. *Id.* at 256, 262-64. *School District of Pontiac* is inapposite, however, because it was undisputed there that resort to available administrative remedies would be futile. *Id.* at 262 n.3. Here, by contrast, no such assertion has been or could be made. *See* Defs.' Mem. at 21-22; *Warshak*, 532 F.3d at 531-32.

II. PLAINTIFFS' ARGUMENTS ON THE MERITS ARE CONTRARY TO LAW.

A. The Allegation That Refugee Resettlement Imposes Incidental Costs on Tennessee States No Claim Under the Tenth Amendment.

Plaintiffs' arguments in support of the merits of their Tenth Amendment claim—that the Government's implementation of the Refugee Act, 8 U.S.C. § 1522, and the Welfare Reform Act, 8 U.S.C. § 1612, impermissibly intrudes on Tennessee's sovereignty—also lack substance.

The legal position staked out in Plaintiffs' Complaint is that following Tennessee's withdrawal from the Refugee Resettlement Program in 2008, the Federal Government should have ceased resettlement of refugees in Tennessee, or, alternatively, compensated the State for its costs of providing health-care services to refugees enrolled in Medicaid. *See* Compl. ¶¶ 38, 42, 54; *id.* Prayer for Relief ¶ 2; *see also* Defs.' Mem. at 28. As Defendants have shown, however, the Constitution does not condition the Federal Government's plenary power to admit aliens, nor their right to settle in the State of their choosing, on a State's consent. *See id.* at 28-30, citing, *inter alia*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416, 420 (1948) ("The authority to control immigration … is vested solely in the Federal government …[and] all persons lawfully in this country [may] abide in any state on an equality of legal privileges…."). Nor does the State possess an interest protected by the Tenth Amendment in withholding State Medicaid funds from refugees, as it is the Constitution itself that requires Tennessee to make public benefits such as Medicaid available to lawfully present aliens on the same terms as they are provided to citizens. *Id.* at 31, citing *Graham v. Richardson*, 403 U.S. 365, 371-76 (1971); *see also Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (Tenth Amendment's reservation of State power does not supersede duties "imposed upon the States by the Constitution itself"). And as Defendants also explained, the Welfare Reform Act merely limits the State's obligation to provide Medicaid coverage to refugees that it would otherwise incur under *Graham*, and cannot be condemned as an affront to State sovereignty. Defs.' Mem. at 32.

Lacking arguments to the contrary, Plaintiffs reveal the true essence of their complaint—that the Federal Government is "passing the costs" onto States of providing Medicaid coverage to refugees that the Government, exercising its plenary authority over immigration, decides to admit to this country. Pls.' Opp. at 1, 23. Attempting to clothe this grievance in Tenth Amendment garb, Plaintiffs contend that the Government's actions unconstitutionally "commandeer[ ] State funds and coerc[e] the State to expend funds to support and maintain a federal program." *Id.* at 1, 18, 23. This argument ignores the plain reality that Tennessee's fiscal options are "increased, not constrained," by its participation in the Medicaid program. *Kansas v. United States*, 214 F.3d 1196, 1203-04 (10th Cir. 2000). Plaintiffs also cite no precedents supporting their argument, which is contrary to established law.

The proposition that the Federal Government violates the Tenth Amendment simply because its exercise of powers delegated to it by the Constitution has a financial impact on the States has been refuted time and again by decisions of the Supreme Court, the Sixth Circuit, and other courts of appeals. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court held that the Tenth Amendment did not prohibit Congress from extending the minimum-wage and overtime-pay provisions of the Fair Labor Standards Act (FLSA) to cover State and local-government employees. *Id.* at 555-57 (overruling *Nat'l League of Cities v. Usery*, 436 U.S. 833 (1976)). The Court reached this conclusion notwithstanding the "financial impact on States and localities," and the "serious … effects on state and local planning, budgeting, and the levying of taxes." *Id.* at 578 (Powell, J., dissenting).

The Court similarly held, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), that the minimum-wage and overtime-pay requirements of the FLSA could validly be applied to employees of certain State schools, hospitals, and other institutions, *id.* at 93-99, over the objections of the dissent that the Act's requirements would "disrupt the fiscal policy of the States" in disregard of

"state sovereignty protected by the Tenth Amendment," *id.* at 201-03 (Douglas, J., dissenting).[5] In *Reno v. Condon*, 528 U.S. 141 (2000), the Court rejected a Tenth Amendment challenge to the Driver's Privacy Protection Act (DPPA) (a law that "regulate[d] the States exclusively," *id.* at 151) notwithstanding that the Act restricted sales of drivers' personal information that "generate[d] significant revenues for the States," *id.* at 143-44, and that compliance with the Act's restrictions would "consume the employees' time and thus [State] resources," *id.* at 150.

Citing *Garcia*, the Sixth Circuit recently rejected a claim that the Affordable Care Act (ACA) violates the Tenth Amendment by requiring that group health plans offered by States to their employees make millions of dollars in payments to the Federal Government to subsidize health-care coverage of high-risk individuals. *Ohio v. United States*, 849 F.3d 313, 321-23 (6th Cir. 2017). In reaching the same conclusion, the district court in *Ohio* expressly rejected the argument that "impos[ing] financial consequences on a state government" necessarily violates the Tenth Amendment, noting that the Supreme Court "ha[d] rejected the argument that a federal statute requiring the expenditure of state funds to comply with it amounts to a Tenth-Amendment violation." *Ohio*, 154 F.3d at 656-58. *See also Florida ex rel McCollum v. United States*, 716 F. Supp. 2d 1120, 1151-54 (N.D. Fla. 2010) (dismissing claim that provisions of the ACA interfered with State sovereignty, notwithstanding "adverse[ ] impact [on] the state fisc").

Plaintiffs' contention that "passing on" costs of refugee health-care to the States "commandeers" State funds is also indistinguishable from Tenth Amendment claims previously made by States that the Government's alleged failure to control illegal immigration "coerced" them into paying the costs of educational services for illegal alien children. *See, e.g., Padavan v.*

[5] *Wirtz* was overruled by the Court in *Usery*, 436 U.S. at 854-55, but *Usery*, in turn, was overruled by *Garcia*, 469 U.S. at 556-57, "placing *Wirtz* back on solid ground." *Ohio v. United States*, 154 F. Supp. 3d 621, 657 (S.D. Ohio 2016), *aff'd*, 849 F.3d 313 (6th Cir. 2017).

United States, 82 F.3d 23, 25-26, 28 (2d Cir. 1996). All courts of appeals to consider this claim rejected it, observing that the Government was not "commandeering" the States to provide free public education to undocumented children, but rather, that the States were required to do so by the Equal Protection Clause, as held in *Plyler v. Doe*, 457 U.S. 202 (1982). *See California v. United States*, 104 F.3d 1086, 1093 (9th Cir. 1997) ("Because the State's obligation to provide this education derives from an independent constitutional obligation and not federal immigration policy … the Tenth Amendment is not implicated."); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) (same); *New Jersey v. United States*, 91 F.3d 463, 465 (3d Cir. 1996) (same); *Padavan*, 82 F.3d at 29. Likewise, because Tennessee's obligation to provide Medicaid benefits to refugees on the same terms as U.S. citizens ultimately derives from the Constitution, *Graham*, 403 U.S. at 371-76, and not Federal refugee policy, Plaintiffs' refrain about "passing on" costs to the States implicates no Tenth Amendment concerns.[6]

Plaintiffs cite no authority to the contrary, apart from snippets quoted out of context from *Printz v. United States*, 521 U.S. 898 (1997). *Printz* held that the Brady Act violated the residual sovereignty of the States by imposing an unconditional legal obligation on state law enforcement officials to conduct background checks on prospective handgun purchasers. *Id.* at 933-34. "The Federal Government," the Court held, "may not compel the States to enact or administer a

[6] Seeking to avoid this conclusion, Plaintiffs attempt to argue that the Welfare Reform Act actually imposes costs on Tennessee, rather than limiting the costs of providing Medicaid coverage to refugees that it would otherwise incur under *Graham*. Pls.' Opp. at 21-26. First they contend that it is speculative whether the Act in fact reduces the cost of refugee resettlement to Tennessee. *Id.* at 2, 25. But it is incontrovertible that the Welfare Reform Act limits the State's cost of Medicaid coverage for refugees to a sum that is less than, or at most equal to, what would otherwise be required by *Graham*. *See* Defs.' Mem. at 31-32. Plaintiffs next observe that the Act provides refugees greater access to Medicaid benefits than other lawful aliens. Pls.' Opp. at 21-23; *see also id.* at 24-25. But that does not mean that the Act imposes additional costs on the States. It means only that Congress did not go as far in the case of refugees in *relieving* States from the financial burden of *Graham's* mandate.

federal regulatory program." *Id*. at 933 (citation omitted); *see id*. at 919-20; *Cutter v. Wilkinson*, 423 F.3d 579, 589 (6th Cir. 2005) ("Together *New York* [*v. United States*, 505 U.S. 144 (1992)] and *Printz* stand for the unexceptionable proposition that Congress cannot force the states to enact or administer a federal regulatory scheme."). As Defendants have shown, no Federal law compels Tennessee to participate in the Refugee Resettlement Program. Defs.' Mem. at 10. Plaintiffs seek to construe *Printz* more broadly, however, as prohibiting the Federal Government from "forc[ing] 'state governments to absorb the financial burden of implementing a federal … program.'" Pls.' Opp. at 23, quoting *Printz*, 521 U.S. at 930; *see also id.* at 19, 21. That reading of *Printz* is untenable in light of subsequent cases, particularly *Condon.* There, notwithstanding the financial burden on the States of complying with the DPPA, the Court unanimously "reject[ed] the … argument that the DPPA violates the principles laid down in … *Printz.*" 528 U.S. at 150. As recognized by the district court in *Ohio*, *Condon* "demonstrates the fallacy with the State's commandeering-through-financial-impact argument." 154 F. Supp. 3d at 658.

B. *NFIB* Is Inapposite.

Finally, Plaintiffs fail to bring this case within the scope of *NFIB.* As Defendants explained, the controlling plurality in *NFIB* held that the ACA unconstitutionally compelled the States "to accept policy changes" by conditioning their continued receipt of Medicaid grants on implementing what the Court considered to be an entirely new program of health-care coverage that they could not have anticipated. 567 U.S. at 580-85; *see* Defs.' Mem. at 33-34. Plaintiffs do not dispute this understanding of the plurality's rationale, *see* Pls.' Opp. at 20; rather, they attempt to make a case that changed conditions and modifications to the Refugee Resettlement Program have transformed it into a "new program" that Tennessee could not have foreseen, *id.* at 27-29. None of the circumstances described in the Complaint, or in Plaintiffs' brief, depicts the kind of dramatic programmatic transformation that underlies the ruling in *NFIB.*

Plaintiffs first point to the fact that, although the Refugee Act as passed in 1980 authorized the Government to reimburse the States for the cost of providing Medicaid coverage to refugees, by 1991 Congress had ceased to appropriate funds for that purpose. Pls.' Opp. at 27-28; *see* Defs.' Mem. at 9 & n.5. Having continued, however, to participate in the Medicaid program for more than a quarter century since this source of funding expired, Tennessee cannot now claim "surprise" that it must cover its share of refugee Medicaid costs without reimbursement from the Federal Government. That is all the more so considering that in the more than 45 years since *Graham* was decided, routine Federal reimbursement for the States' share of refugee Medicaid costs was at most an 11-year exception, not the rule.

Plaintiffs next maintain that the growing number of refugees admitted "in recent years" has unexpectedly increased the cost of refugee health-care to the States. Pls.' Opp. at 29.[7] But the periodic outbreak of international humanitarian crises—such as the crisis in Syria—followed by mounting numbers of refugees seeking to resettle on our shores, is an historically foreseeable phenomenon. Indeed, the stated purpose of the Refugee Act of 1980 was "to establish a coherent and comprehensive U.S. refugee policy" to replace the "patchwork of different programs that [had] evolved in response to specific crises," H.R. Rep. No. 96-608, at 1 (1979); S. Rep. No. 96-256, at 4 (1979), including (but by no means limited to) the flight of East European peoples from Communist regimes following World War II, the Cuban refugee crisis of the early 1960s, and the exodus of Indochinese refugees following the U.S. withdrawal from Vietnam. *See* H.R. Rep. No. 96-608, at 2-6; S. Rep. No. 96-256, at 4-5, 10-11. Accordingly, the Act has always provided for flexibility, not consistency, in annual refugee admissions. Under the Act's terms "the

[7] As an initial matter, the facts on which this argument is based are not pled in the Complaint, but are plucked from an exhibit attached to Plaintiffs' brief, and the argument should be rejected as another impermissible attempt by Plaintiffs to "amend [their] complaint through arguments in an opposition brief." *See supra* at 2, quoting *Tangas*, 2016 WL 614006, at *4.

number of refugees who may be admitted" each year is not fixed, or determined according to a prescribed formula, but "shall be such number as the President determines, before the beginning of the fiscal year … is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2). The President may also admit additional numbers of refugees as needed to meet "unforeseen emergency refugee situation[s]." *Id.* § 1157(b). Given the history of recurrent refugee crises, and the purposes and plain terms of the Refugee Act, peaks and valleys in the numbers of annual refugee admissions are to be expected.

Lastly, Plaintiffs maintain that Tennessee could not have anticipated that the Federal Government would continue to resettle refugees there (who enroll in Medicaid at State expense) following Tennessee's withdrawal from the Refugee Resettlement Program in 2008. Pls.' Opp. at 28, 29. But as Defendants have already explained, nothing in the Refugee Act conditions the resettlement of refugees in a State on the State's participation in the Program. Defs.' Mem. at 10. Moreover, the Government's practice of relying on private non-profit organizations to administer refugee resettlement in States that elect to discontinue participation in the Program, *see id.* (describing such "Wilson/Fish" programs), was well-established by at least 1999, nearly a decade before Tennessee made its decision to withdraw. *See* Notice of Availability of Funding, 64 Fed. Reg. 19793, 19794 (Apr. 22, 1999) (noting availability of Wilson/Fish funding, and two pre-existing projects, where States "discontinue[d] participation in the program").

In brief, none of the events described by Plaintiffs represents a departure, much less a radical change, from the settled understanding pursuant to which Tennessee has accepted Federal Medicaid funds for over 40 years—that it must cover lawfully present aliens, including refugees, under its Medicaid program. *See* Defs.' Mem. at 34. *NFIB* does not apply here.

CONCLUSION

Defendants' motion to dismiss should be granted.

Dated: August 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to LR 7.2(a)(1), I hereby certify that on August 18, 2017, I served the foregoing Reply Memorandum in Support of Defendants' Motion to Dismiss on all counsel of record by filing it with the Court by means of its Electronic Case Filing system.

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