No. 16-3093

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF OHIO, ET AL., Appellants, v. UNITED STATES OF AMERICA, ET AL., Appellees.	: : : : : : :	On Appeal from the United States District Court for the Southern District of Ohio District Court Case No. 2:15-cv-321

APPELLANTS' PETITION FOR REHEARING EN BANC

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STATEMENT

The panel acknowledges that "Ohio is correct that in *Michigan [v. U.S.*, 40 F.3d 817, 823-24 (6th Cir. 1994)] we reiterated that 'before a federal tax can be applied to activities carried on directly by the States … the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue,'" Panel Op. at 10. But its opinion conflicts with *Michigan* by allowing HHS to apply the Affordable Care Act's Transitional Reinsurance tax against Ohio absent any such explicit congressional instruction. The panel further subverts *Michigan* by declining even to examine whether Congress's stated definition of the objects of that tax includes the States (in fact, the definition omits them), saying that it "need not reach" that question before ruling that they are taxed based on non-tax provisions of the Act that by their express terms (and *unlike* the tax provision at issue) *do* specifically apply to the States. *Id*. at 9, *but see id.* at 7 ("Ohio is correct that [the] Transitional Reinsurance Program statute does not explicitly define [taxable] group health plans to include states nor does it list states as being required to remit payment under the ACA").

This Court said in *Michigan* that if Congress wants to levy a tax directly against state entities, "it knows how to make the kind of 'plain statement' *necessary* to impose such a tax." 40 F.3d at 824 (emphasis added). And indeed,

the ACA does so with tax provisions Congress intends to apply against the States, such as the "Cadillac tax" (which applies to coverage "by the government of any State or political subdivision," 26 U.S.C. 4980I(d)(1)(E)), and "patient centered outcome" fees (which extend to "any governmental entity," 26 U.S.C. 4377(b)(1)). But the panel rationale here that "Congress has demonstrated an ability explicitly to exempt state and local governments from certain requirements in the past, and it chose not to do so with respect to the [Transitional Reinsurance tax] Program," Panel Op. at 9, turns *Michigan* on its head.

En banc consideration also is merited because this case involves other exceptionally important issues. The panel's construction implicates profound constitutional issues at the intersection of the anti-commandeering and intergovernmental tax immunity doctrines.

INTRODUCTION

The ACA's Transitional Reinsurance tax operates both to subsidize certain private insurance companies and to pad federal coffers: the three-year program is designed to raise $25 billion, with $20 billion "paid to certain health insurance providers to supplement those providers covering high-risk individuals," while the "remaining five billion dollars are 'deposited into the general fund of the Treasury of the United States and may not be used' for the [Transitional Reinsurance] Program." Panel Op. at 4, citing 42 U.S.C. 18061(b)(3)(B)(ii), (iii), (iv), and

(b)(4). In the words of the bipartisan Congressional Budget Office, that money is raised through a "per-enrollee assessment on most *private* insurance plans, including self-insured plans and plans that are offered in the large-group market." CBO, *Updated Estimates*, April 2014 at 7, https://www.cbo.gov/sites/default/files/45231-ACA_Estimates.pdf (emphasis added). The tax "collect[s] payments from 'health insurance issuers' and 'group health plans,'" with the "amount owed … determined by multiplying enrollment count … by a previously determined contribution rate." Panel Op. at 3, 4.

"All parties to this suit agree that the State of Ohio and its political subdivisions do *not* qualify as contributing [taxable] entities under the 'health insurance issuer' prong." District Ct. Op., Doc.24, PageID#276. HHS argues that the phrase "group health plans" as used in the Transitional Reinsurance tax provisions at 42 U.S.C. 18061 comprehends self-insurance programs of Ohio governmental entities, but the statute says "group health plan"

> means an employee welfare benefit plan (*as defined in section 3(1) of the Employee Retirement Income Security Act of 1974* [29 U.S.C. § 1002(1)] to the extent that the plan provides medical care … to employees … directly or through insurance …

42 U.S.C. 300gg-91(a)(1) (emphasis added); *see also* Panel Op. at 4.

"[A]s defined" in the specifically referenced ERISA section, an "employee welfare benefit plan" means "any plan, fund, or program … established or maintained by an employer" to provide medical benefits. 29 U.S.C. 1002(1).

"Employer" as used there means any "person" acting as such, 29 U.S.C. 1002(5), and "person" in that context

> means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. 1002(9).

Ohio argued below that state entities do not fit into that definition, that in any event Congress made no "clear statement" here showing the necessary considered intent to tax state entities, and that any such intent for the purposes of this particular program would strain constitutional bounds. The district court disagreed, saying that even were it inclined to follow the definitional "chain of inferences" (rather than look to other provisions), governmental entities would still fit because ERISA's "person" catalogue is not exhaustive, "but, rather, includes other un-enumerated entities" such as States. Doc.24, PageID#295-97. The court also concluded that "Congress has spoken clearly enough" for the agency to impose the tax on Ohio, *id.* at PageID#306, and further rejected Ohio's constitutional claims.

The panel affirmed, citing other provisions of the ACA that explicitly cover '"group health plans that are non-Federal governmental plans.'" Panel Op. at 8, citing 42 U.S.C. 300gg-21(a) and -22(b). Further noting that an "employee welfare benefit plan" and a "governmental plan" are separately defined terms in ERISA,

and that Title 1 of ERISA contains a specific exclusion for governmental plans, the panel found that "under the ERISA definition that applies to the ACA, … governmental plans are employee welfare benefit plans" because otherwise the exclusion would be superfluous. *Id.* at 8-9. Therefore, the panel said, "[w]e need not reach" the question of whether Ohio is an "employer" "person" for purposes of the group health plan definition incorporating the ERISA definition. *Id*. at 9. The panel invoked an unpublished FLSA case as further support for its position, and did not accept Ohio's argument that when the statutes mean to cover governmental plans they use different, longer phrases than "group health plans" (such as "group health plans that are non-Federal governmental plans"):

> [A]dopting Ohio's argument that ERISA's use of the term 'person' evinces Congress's intent not to cover states requires that the statute's explicit indications to the contrary be ignored. We will not do so. Congress has demonstrated an ability explicitly to exempt state and local governments from certain requirements in the past, and it chose not to do so with respect to the Program.

Id.

Michigan's clear statement rule thus is satisfied given statutory context, the panel held. And the panel dismissed as unduly alarmist Ohio's constitutional arguments about the dangers of accountability shifting in tax-imposition/benefit-claiming programs. *Id.* at 11-15.

ARGUMENT

I. The panel opinion upends *Michigan* by applying the Transitional Reinsurance tax directly against Ohio absent any express intention by Congress to do so, and even in the face of statutory language that omits States as objects of the tax.

Michigan held that because "the 'plain statement rule' applies in the tax field," Congress "must express any … intent [to tax States] 'unequivocally'" and must make such intent "'unmistakenly clear in the language of the statute'." 40 F.3d at 824 (citations omitted). The clear statement requirement "'assures that the legislature has in fact faced, and intended to bring into issue'" the question before the court, *Bond v. U.S.*, 134 S. Ct. 2077, 2089 (2014); "it must be plain to anyone reading the Act" that Congress intended such a result, *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991).

Here, there is absolutely no indication, anywhere, that Congress considered applying this tax to the States. Such an intent is not even "'drawn merely from general wording of the statute applicable ordinarily to private sources of revenue'," as opposed to being stated "'expressly'" as *Michigan* requires. 40 F.3d at 823. Rather, Congress applied this tax to "group health plans," defined for this part of the statute to mean healthcare-related employee welfare benefit plans "as defined in section 3(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1002(1)]." 42 U.S.C. 300gg-91(a)(1) (applicable through 42 U.S.C. 18111). That ERISA definition denotes a plan established or maintained by an

"employer," 29 U.S.C. 1002(1), which there means a "person" acting in that capacity, 29 U.S.C. 1002(5), with "person" for that purpose defined to

> mean[ ] an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. 1002(9).

No element of that listing includes state entities. As the federal government was explaining in another forum contemporaneously with this case, an ERISA Title 1 "employer" must be a "person," and "[t]he definition of 'person' … includes only individuals and *non-governmental* business and labor entities active in the pension field." United States Supp. Opening Br. at 9, *Call Henry, Inc. v. United States*, 125 Fed. Cl. 282 (Fed. Cl. 2016) (emphasis added) (*see* Kansas panel Amicus Br., Attachment A, at 48). Although the federal government withdrew its *Call Henry* position after briefing to the panel here (and after having served its purposes in that other case), its logic there was impeccable: "Given the clear language used in Title I's definitions of 'employer' and 'person,' as well as the deliberate omission of the Federal government from those definitions, 'it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope.' *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013)." *Id.* The Court of Claims agreed. *Call Henry*, 125 Fed. Cl. at 286-87.

That appears to be the uniform conclusion of courts apart from this case. *See Commonwealth of Pa. v. Quaker Med. Care*, 836 F. Supp. 314, 318 (W.D. Pa. 1993) ("Congress did not include governmental agencies within its specifically defined list of [ERISA] persons"). And it is consistent with the "longstanding interpretive presumption that 'person' does not include the sovereign" unless the statute so specifies. *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000); *see also, e.g.*, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) ("Particularly is this true where the statute imposes a burden or limitation").

Especially in the face of textual demonstration that the tax does *not* extend to States, the panel's contrary decision reflects a stark conflict with *Michigan*. None of the panel's reasons for extending the tax here is rooted in any clear statement of congressional intent to do that. And the panel's conclusion that it "need not reach" the meaning of the statutory words that designate the objects of the tax conflicts, too, with the Supreme Court's admonition that definitions matter. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes a specific definition, we must follow that definition, even when it varies from that term's ordinary meaning").

First, the panel references certain provisions of the ACA that relate to (separately defined) "non-Federal governmental plans," and reasons that such plans must be "a subset of group health plans." Panel Op. at 8. But the exclusion

provision the panel cites from 42 U.S.C. 300gg-21(a)(2) comes in a section that explicitly commands that the "requirements of subparts 1 and 2 [42 U.S.C. 300gg - 300gg-19a, as described in Ohio's opening panel brief at pp. 41-51 and including provisions governing preexisting conditions, dependent coverage, etc.] *shall apply* with respect to group health plans only – (A) subject to paragraph (2), *in the case of a plan that is a nonfederal governmental plan*," before going on to allow a limited exclusion for "a nonfederal governmental plan which is a group health plan" to which the designated provisions (which do *not* include the Transitional Reinsurance tax provisions) "otherwise apply." Like the provision allowing federal enforcement of applicable sections, 42 U.S.C. 300gg-22(b)(1)(B), as also cited by the panel, this requirement extends to a "non-Federal governmental plan that is a group health plan." This language makes Ohio's point that the statutory phrase "group health plan" on its own does not comprehend the States, but when Congress wished to extend coverage to States, it used distinct phrases to include a "non-Federal [sometimes 'nonfederal'] governmental plan that is a group health plan."

The panel's inference that the phrase "group health plan" standing on its own subsumes governmental plans thus is incorrect as statutory analysis, and in any event is not a plain statement of considered intent to apply a tax against the States per *Michigan*. Neither the panel nor HHS has cited any ACA provision

(apart from the tax at issue that they mistakenly say applies directly to Ohio) that arguably applies to the States and that is not set forth in terms covering "a group health plan that is a non-federal governmental plan" or some very similar recital.

So when Congress wished to address creditable coverage, for example, it referenced insurance arising not only under a "group health plan," but *also* under a "governmental plan." 42 U.S.C. 300gg-41(b)(1). When Congress intended the ACA's "Cadillac tax" to apply to governmental entities, it specified that "[a]pplicable employer-sponsored coverage shall include coverage under any group health plan established and maintained … by the government of any State or political subdivision thereof." 26 U.S.C. 4980I(d)(1)(E). The same is true of the patient centered outcome fees, for which (unlike the Transitional Reinsurance tax), "person" is defined to include "any governmental entity" and which further specifies that "governmental entities shall not be exempt from the fees." 26 U.S.C. 4377(b)(1).

Second, the panel concludes that while Title I of ERISA separately defines "employee welfare benefit plan" and "governmental plan," the former must subsume the latter because otherwise ERISA's governmental exclusion would be "superfluous." Panel Op. at 9. That view contradicts the persuasive explanation given by the government in its *Call Henry* briefing that the "design and structure of Title I confirm that Congress did not intend" to extend ERISA to governmental

entities and that the exclusion works to reinforce that design. *See* U.S. Supplemental *Call Henry* brief at 11. It also fails to recognize that a plan "neither established nor maintained by a statutory 'employer'" falls outside ERISA. *See, e.g.*, *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980) (echoing Department of Labor); *cf. MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 183 (5th Cir. 1992) ("if [an entity] is not an 'employer,' then the … Plan is not an [employee welfare benefit plan] within the territory we know as ERISA").

The "superfluity" point, then (which in any event may not be "a particularly useful guide to a fair construction," *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (ACA context)), cannot be said to mark an "unequivocal[ ]," "unmistakenly clear" statement of intent to reach States – especially given that the exclusion works to ensure that ERISA's provisions will not be construed to apply against even governmental entities that might meet the "person" definition (including, for example, the government run corporations or associations such as the Postal Service, the TVA, and the port authorities to which this Court adverted in *Michigan*, 40 F.3d at 829, or the quasi-corporate trust that was directly at issue there). Even beyond ERISA's "person" definition, the governmental exclusion underscores what this Court has called "the broad remedial purpose of ERISA –

protection of participants in private pension plans." *See Farrell v. Auto. Club of Mich.*, 870 F.2d 1129, 1134 (6th Cir. 1989).

Congress's use of the ERISA definition—invoking a statute universally understood to "govern[ ] the administration of private … benefit plans," *Michigan Carpenter's Council v. C.J. Rogers, Inc.*, 933 F.2d 376, 381 (6th Cir. 1991) – simply does not signal an intent to apply this tax against the States.

Third, the panel opinion depends on *Cunningham v. Gibson Cty.*, 1997 WL 123750 (6th Cir. 1997), to reject "Ohio's argument that ERISA's use of the term 'person' evinces Congress's intent not to cover states…," Panel Op. at 9, and even to suggest the contrary, *id*. at 10. *Cunningham*, however, was not an ERISA case but an FLSA case that came well *after* Congress *explicitly* extended the FLSA's overtime and minimum wage coverage to "virtually all state and local- government employees." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985). It did not override this Court's published holding in *Brown v. City of Covington*, 805 F.2d 1266, 1269 (6th Cir. 1986), that a definition of "person" virtually identical to the one at issue here could not be construed to include government entities that the statute did not reference. Nor did it reject the *Vermont Agency* presumption that "person" is presumed not to include the States, or rebut the Supreme Court's separate explanation that where legislation by its terms extends to partnerships, corporations, and associations, "[t]he absence of any

comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extent to them." *United States v. UMW*, 330 U.S. 258, 275 (1947).

Fourth, the panel offers these rationales as meeting *Michigan's* plain statement requirement in light of the Supreme Court's observation that the statement of evident intent need not be found "'in a single section or in statutory provisions enacted at the same time'." Panel Op. at 10, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000). But *Kimel* in fact demonstrates just how far from the plain statement standard the panel opinion moves. *Kimel* reflects a threshold for "unmistakably clear" expression of State coverage that no provision related to the Transitional Reinsurance tax begins to approach: as *Kimel* emphasized, the statute there explicitly provided for suits "against any employer (including a *public agency*)" and then defined "public agency" to include "'the government of a *State* or political subdivision thereof,'" and "'any agency of … a *State* or political subdivision of a *State*.'" 528 U.S. at 73-74 (emphasis added). Every single statutory reference cited by *Kimel* as including a public agency is one more than the Transitional Reinsurance provisions make.

Finally, the panel opinion says that the statute in *Michigan* "was directed specifically toward corporations" [as the tax here is directed toward "group health plans"], and that the federal government "failed to provide any evidence that

Congress intended to tax state trusts" [just as HHS here has failed to provide any evidence that Congress intended to tax self-insured state plans]. Panel Op. at 10. Here, too, this novel tax never had been applied against the States. The panel does not distinguish *Michigan* so much as brush it aside with contradictory rationale given the finding, *id.* at 9, that the tax does not "explicitly … exempt" States.

II. By giving federal authorities unprecedented scope to hide behind State taxing powers in helping fund unlimited federal projects, the panel opinion disregards the Supreme Court's accountability-shifting concerns.

The Transitional Reinsurance tax (1) transfers money to private companies that by definition do not insure the (State self-insured) State employees on the basis of whom the tax is collected, and (2) takes for the federal general fund dollars that by law "'may not be used' for the Program." Panel Op. at 4. Rather than hyperbole, *cf.* Panel Op. at 11, that is an accurate description both of the program itself and of the reasons it is unconstitutional.

As the Supreme Court has warned, "[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." *Printz v. U.S.*, 521 U.S. 898, 930 (1997). Federal authorities must not manipulate the States into "bear[ing] the brunt of public disapproval" for federal programs. *New York v. U.S.*, 505 U.S. 144, 169 (1992). The anti-commandeering doctrine is animated by

these principles of accountability rooted in our Constitution's structure. But here, HHS requires Ohio to raise money from its citizens to fund federal programs unrelated to Ohio's self-insurance of its employees.

This case is closer to *Printz* and *New York* than to *Garcia*, which involved the States' compensation of their own employees and did not involve a transfer of tax dollars from the States to unrelated federal programs. And *Garcia*, which pre-dated the Supreme Court's principal anti-commandeering decisions, expressly declined to go beyond labor standards "to identify or define what affirmative limits the constitutional structure might impose on federal action." 469 U.S. at 556. Taxation is different from generally applicable regulatory schemes precisely because of its unique accountability-camouflaging/benefit-claiming potential—yet the panel opinion here identifies no logical stopping point short of threatening "the political accountability key to our federal system" that the Tenth Amendment is designed to protect. *Cf. NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

The intergovernmental tax immunity doctrine intersects with the anti-commandeering doctrine to underscore the importance of observing accountability principles in the taxation context. The panel's conclusion that any nondiscriminatory federal tax on the States is constitutional if it "can be remedied through the political process," Panel Op. at 14, seems never to have commanded more than two votes on the Supreme Court. *See, e.g.*, *New York v. United States*,

326 U.S. 572, 587-89, 595 (1946) (total of six voting Justices conclude that either some or all nondiscriminatory direct federal taxes on the States would violate the Constitution). Thus in *South Carolina v. Baker*, 485 U.S. 505, 526, 518 n.11, 523 n.14 (1988), the Court found it significant to note that the federal tax on individual bondholders there "clearly imposes no direct tax on the States," and the Court twice emphasized that it was not changing the law on direct taxation. Because the federal government in *Baker* did not try to hide behind the States, those whose money was taken knew what level of government had taken it.

And in *Massachusetts v. U.S.*, 435 U.S. 444 (1978), Justice Brennan's plurality opinion not only recognized "the limitation the existence of the States constitutionally imposes on the national taxing power," it also observed constraints on direct federal taxation of States: "Where the subject of tax is a natural and traditional source of federal revenue and where it is inconceivable that such a revenue measure could ever operate to preclude traditional state activities, the tax is valid." *Id.* at 459-60. Even federal user fees will be upheld as against the States seemingly only "[s]o long as the charges … are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied…." *See id.* at 466-67. Applying the Transitional Reinsurance tax against Ohio violates each of these tests.

Michigan questioned the immunity doctrine's continuing vitality, but the State had withdrawn its constitutional arguments and this Court's holding against applying that tax to Michigan centered on the fact that Congress had not expressly and unequivocally chosen to do so. *Michigan* took pains, that is, to ensure that the "political process" to which the panel opinion here refers would not be circumvented. The panel opinion's refusal to follow *Michigan* in insisting upon congressional plain statement made "expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue" before imposing this tax against Ohio magnifies its willingness to override tax immunity doctrines too.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Federal Rule of Appellate Procedure 32(g), that this *Appellants' Petition for Rehearing En Banc* contains 3,899 words in accordance with Federal Rule of Appellate Procedure 35(b)(2)(A).

/s/ Frederick D. Nelson
Frederick D. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March 2017, this *Appellants' Petition for Rehearing En Banc* was filed electronically. By operation of the Court's electronic filing system, notice of this filing will be sent to all parties for whom counsel has entered an appearance. Parties have access to this filing through that Court system.

/s/ Frederick D. Nelson
Frederick D. Nelson

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0040p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF OHIO et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA et al.,
Defendants-Appellees.

No. 16-3093

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:15-cv-00321—Algenon L. Marbley, District Judge.

Argued: September 27, 2016

Decided and Filed: February 17, 2017

Before: COLE, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

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OPINION

KAREN NELSON MOORE, Circuit Judge. This case involves a novel challenge to the Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), and presents us with the question of whether one of the ACA's tax provisions applies to state government employers with the same force that it applies to private employers. Plaintiffs-Appellants the State of Ohio and several of its political subdivisions and public universities ("Ohio" or the "State") filed suit against, inter alia, the United States Department of Health and Human Services ("HHS"), alleging that the Federal Government illegally collected certain monies from the State in order to supplement the Affordable Care Act's Transitional Reinsurance Program ("Program"). Arguing that the Program's mandatory payment scheme applies only to private employers and not to state and local government employers, Ohio sought a refund of all payments made on its behalf and a declaration that the Program would not apply to the State in the future. Ohio also argued that application of the Program against the State violated the Tenth Amendment to the United States Constitution and principles of intergovernmental tax immunity. The district court, in a thorough and reasoned opinion, granted a motion to dismiss filed by the United States, and denied a motion for summary judgment filed by Ohio. The district court concluded that the Program applies to state and local government employers just as it applies to private employers, and that the Program as applied to Ohio does not violate the Tenth Amendment. For the reasons stated below, we **AFFIRM**.

I. BACKGROUND

Congress enacted the Affordable Care Act in 2010 to address concerns regarding nationwide access to affordable, quality healthcare. *King v. Burwell*, --U.S.--, 135 S. Ct. 2480, 2485–86 (2015) ("The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market."). Among the ACA's provisions are (1) a tax credit to help individuals purchase health insurance through public healthcare Exchanges; (2) a ban on insurers considering an individual's health when deciding whether to provide insurance or in setting the premium; and (3) a requirement that each

individual maintain insurance coverage or remit payment to the Internal Revenue Service. *Id.* at 2486–87. While many of the ACA's requirements have been the subject of widespread litigation and controversy, this case revolves around a lesser-known provision, the Transitional Reinsurance Program. *See* 42 U.S.C. § 18061. The Program is a premium-stabilization arrangement that aims to combat volatility in the individual market by collecting payments from "health insurance issuers" and "group health plans" and distributing those payments over a three-year period to health insurance issuers that cover high-risk individuals in the individual market. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014 (Final Rule), 78 Fed. Reg. 15,410, 15,411 (Mar. 11, 2013) ("The Affordable Care Act establishes . . . a transitional reinsurance program . . . to provide payments to health insurance issuers that cover higher-risk populations and to more evenly spread the financial risk borne by issuers."). Specifically, the ACA mandates that:

> **(1) In general**
>
> In establishing the Federal standards under section 18041(a) of this title, the Secretary, in consultation with the National Association of Insurance Commissioners (the "NAIC"), shall include provisions that enable States to establish and maintain a program under which—
>
> **(A)** health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments to an applicable reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014 (as specified in paragraph (3)[])], and
>
> **(B)** the applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A) that cover high risk individuals in the individual market (excluding grandfathered health plans) for any plan year beginning in such 3-year period.

42 U.S.C. § 18061(b)(1) (footnote omitted); *see also id.* § 18041(a)(1)(C), (c)(1) (providing that HHS may establish reinsurance programs for states that decline to do so). Ohio's reinsurance program is operated by HHS.

The State of Ohio and several of its political subdivisions have paid contributions (totaling approximately $5.4 million for benefit year 2014) to the Program under protest. Additionally, four state universities that have joined Ohio in this suit (University of Akron, Shawnee State University, Bowling Green State University, and Youngstown State University) have paid nearly $765,000 to the Program. R. 13 (Am. Compl. at 9–13) (Page ID #67–71).

Of the approximately $25 billion in revenue that is expected to be generated from the Program, $20 billion is paid to certain health insurance providers to supplement those providers covering high-risk individuals. 42 U.S.C. § 18061(b)(3)(B)(ii). The remaining five billion dollars are "deposited into the general fund of the Treasury of the United States and may not be used" for the Program. *Id.* §§ 18061(b)(3)(B)(iii), (iv), and (b)(4).

The term "health insurance issuer" as it applies to the transitional reinsurance program,

> means an insurance company, insurance service, or insurance organization (including a health maintenance organization, as defined in paragraph (3)) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance (within the meaning of section 514(b)(2) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1144(b)(2)]. Such term does not include a group health plan.

42 U.S.C.A. § 300gg-91(b)(2). The term "group health plan,"

> means an employee welfare benefit plan (as defined in section 3(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1002(1)]) to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise.

42 U.S.C.A. § 300gg-91(a)(1). The amount owed by each health insurance issuer and group health plan is determined by multiplying enrollment count (as self-reported by each required entity) by a previously determined contribution rate for each applicable benefit year. 45 C.F.R. § 153.405(a).

On January 26, 2015, Plaintiffs (State of Ohio; Warren County, Ohio; The Ohio Department of Administrative Services; University of Akron; Shawnee State University; Bowling Green State University; and Youngstown State University) filed this action against the

United States, HHS, and the Secretary of HHS in her official capacity. R. 1 (Compl.) (Page ID #1). On February 13, 2015, Plaintiffs filed an Amended Complaint adding Plaintiff Ohio Turnpike and Infrastructure Commission. R. 13. (Am. Compl.) (Page ID #58). The Amended Complaint alleges that:

> 1. The United States illegally or erroneously assessed or collected tax revenue from Plaintiffs;
> 2. The Secretary's interpretation of group health plans is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and
> 3. Defendants collected tax revenues in violation of the Tenth Amendment to the United States Constitution, anti-commandeering principles, and the Intergovernmental Tax Immunity Doctrine.

R. 13 (Am. Compl. at 14–18) (Page ID #72–76). On March 25, 2015, the United States District Court for the Southern District of Ohio issued a scheduling order memorializing the parties' agreement to forgo discovery and submit the case on motions. R. 16 (Sched. Order) (Page ID #85). Defendants filed a motion to dismiss for failure to state a claim on April 10, 2015. R. 17 (Mot. to Dismiss) (Page ID #86). Plaintiffs filed a motion for summary judgment and a memorandum in opposition to Defendants' motion to dismiss on May 15, 2015. R. 18 (Mot. for S. J. and Opp. to Mot. to Dismiss) (Page ID #114). Defendants filed a response in opposition to the motion for summary judgment and in reply in support of their motion to dismiss on July 2, 2015. R. 21 (Def. Resp. in Opp. to Mot. for S. J. and Reply in Support of Mot. to Dismiss) (Page ID #189). Plaintiffs filed a reply in support of their motion for summary judgment and a memorandum in opposition to Defendants' motion to dismiss on August 4, 2015. R. 22 (Plaintiffs' Reply in Support of Mot. for S. J. and in Opp. to Mot. to Dismiss) (Page ID #223). The district court held a hearing on the motions on December 22, 2015.

On January 5, 2016, the district court granted Defendants' motion to dismiss for failure to state a claim and denied Plaintiffs' motion for summary judgment. The district court found that: (1) Pursuant to the Administrative Procedure Act, the court had jurisdiction to review the determination of HHS that the Transitional Reinsurance Program applies to health plans provided on behalf of Ohio to its employees; (2) the Program applies to state and local government employers; and (3) application of the Program to the States does not violate the

Tenth Amendment or the intergovernmental tax immunity doctrine. *Ohio v. United States*, 154 F. Supp. 3d 621 (S.D. Ohio 2016). Plaintiffs appealed. R. 26 (Notice of Appeal) (Page ID #331).

Ohio is not alone in claiming that the Program does not apply to the States. The States of Kansas, Arizona, Indiana, Louisiana, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming have submitted an amicus brief in support of Ohio. Amici argue, as does Ohio, that the ACA does not apply the Program to the States under the ERISA definition of welfare benefit program or the clear statement rule; that state tax immunity extends beyond discriminatory laws; and that the Program interferes with state sovereignty and does not represent a traditional source of federal revenue.

II. DISCUSSION

A. Standard of Review

"We review *de novo* a district court's dismissal of a suit" for failure to state a claim. *United States ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 407 (6th Cir. 2016). "A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is designed to test the sufficiency of the complaint. 'The district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.'" *Riverview Health Institute LLC v. Medical Mutual of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)).

We note at the outset that the district court's opinion in this case was thoughtful, evenhanded, and well-reasoned. After having conducted our own thorough and de novo review, for the reasons stated below, we affirm the district court's judgment in its entirety.

B. Group Health Plans and the Transitional Reinsurance Program

The State of Ohio challenges the district court's determination that "Congress intended the Transitional Reinsurance Program to apply to state and local government employers in the same manner that the program applies to private-sector employers. The text, structure, and

purpose of the Affordable Care Act and related statutes compel this result." *Ohio*, 154 F. Supp. 3d at 633. Ohio's objections to the application of the Transitional Reinsurance Program to the States are both statutory and constitutional. Ohio first argues that the Program cannot apply to the States pursuant to both the "plain statement rule" and the ERISA statute. Appellants Br. at 14. Second, Ohio suggests that application of the Program to the States is unconstitutional under both the anti-commandeering doctrine and the intergovernmental tax immunity doctrine. *Id.* at 15. The United States counters that, "Plaintiffs' reliance on clear statement principles does not advance their position because the relevant statutory provisions clearly encompass their plans," Appellees Br. at 10, and "[t]heir intergovernmental tax immunity claim fails because that immunity applies to taxes that discriminate against state or local governments . . . and the transitional reinsurance program is nondiscriminatory," *id.* (internal citation omitted).

1. The Term "group health plan" Applies to State-Provided Health Insurance Plans

Ohio first argues that the Transitional Reinsurance Program does not apply to the States because the statute's definition of "group health plans" does not encompass plans offered to state employees. Appellants Br. at 16. Ohio is correct that Transitional Reinsurance Program statute does not explicitly define group health plans to include states nor does it list states as being required to remit payment under the ACA. The United States responds that "the Act expressly adopts the Public Health Service Act's definition of 'group health plan'. . . [which] clearly includes plans offered by state and local government employers . . . ." Appellees Br. at 11.

The relevant statute, 42 U.S.C. § 18061(b)(1)(A), requires that "health insurance issuers, and third party administrators on behalf of group health plans, are required to make payments to an applicable reinsurance entity for any plan year beginning in the 3-year period beginning January 1, 2014 . . . ." This section of the ACA does not explicitly define the term "group health plans." Instead, the statutory framework adopts a series of cross-references to both the Public Health Service Act ("PHSA") and the Employee Retirement Income Security Act of 1974 ("ERISA"). First, the ACA adopts expressly the PHSA's definition of "group health plan" as defined by 42 U.S.C. § 300gg-91(a). 42 U.S.C. § 18021(b)(3) ("The term 'group health plan' has the meaning given such term by section 300gg-91(a) of this title."). As stated in 42 U.S.C. § 300gg-91, a "group health plan" is "an employee welfare benefit plan (as defined in section

3(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1002(1)]) to the extent that the plan provides medical care . . . to employees or their dependents . . . directly or through insurance, reimbursement, or otherwise." ERISA defines "employee welfare benefit plan" in turn as "any plan . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits . . . ." 29 U.S.C. § 1002(1).

The Public Health Service Act explicitly contemplates that plans like Ohio's are covered under the definition of "group health plan." Under a section titled "Limitation on application of provisions relating to group health plans," the PHSA specifically provides that certain "non-Federal governmental plans" may elect to be excluded from certain provisions of the PHSA. 42 U.S.C. § 300gg-21(a)(2). Congress must have therefore intended that a subset of group health plans include certain non-Federal governmental plans. The PHSA's enforcement mechanism further supports the Federal Government's argument that non-Federal governmental plans are indeed a subset of group health plans under the PHSA. Generally, the PHSA grants enforcement authority over health insurance issuers to the States. 42 U.S.C. § 300gg-22(a). However, the Federal Government exercises enforcement authority over "group health plans that are non-Federal governmental plans." *Id.* § 300gg-22(b)(1)(B).

Provisions in ERISA further support that Congress intended the term "group health plans" to include plans offered by state and local government employers. ERISA defines both "employee welfare benefit plan" and "governmental plan." 29 U.S.C. §§ 1002(1), (32). An "employee welfare benefit plan" is "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . ." *Id.* § 1002(1). A "governmental plan" is "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." *Id.* § 1002(32). Similar to the PHSA, ERISA contemplates that a governmental plan is a type of employee welfare benefit plan. *See id.* § 1003(b)(1) ("The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a governmental plan (as defined in section 1002(32) of this title)." That

Congress provided an exclusion for governmental plans from certain provisions of ERISA that apply to employee welfare benefit plans confirms, under the ERISA definition that applies to the ACA, that governmental plans are employee welfare benefit plans. To conclude otherwise "violates the interpretive canon that cautions against construing statutory language in a way that renders any of it superfluous." *U.S. v. Llanez-Garcia*, 735 F.3d 483, 498 (6th Cir. 2013).

Ohio contends that reliance on ERISA is misplaced because ERISA's definition of the term "employee benefit plan" uses the word "employer" which is defined elsewhere in the statute using, inter alia, the word "person." Appellants Br. at 19. We need not reach this issue because the definitions in the PHSA and ERISA are clear that the term "group health plans" under the ACA encompasses employee welfare benefit plans, which include governmental plans. We have previously rejected an argument similar to Ohio's. *See Cunningham v. Gibson Cty.*, Nos. 95-6665, 95-6667, 1997 WL 123750, at *2 (6th Cir. Mar. 18, 1997) ("[I]f defendants' argument that local governments are not persons within the meaning of [the Fair Labor Standards Act] is accepted, the result is exemption of local governments from even FLSA's most fundamental provisions. As this cannot be understood to have been the intent of Congress, the defendants' argument must fail."). Similarly, adopting Ohio's argument that ERISA's use of the term "person" evinces Congress's intent not to cover states requires that the statute's explicit indications to the contrary be ignored. We will not do so. Congress has demonstrated an ability explicitly to exempt state and local governments from certain requirements in the past, and it chose not to do so with respect to the Program. We therefore conclude that Congress intended the Transitional Reinsurance Program to apply to the States with the same force that it applies to private employers.

2. Ohio's *Michigan v. United States* and "Plain Statement Rule" Arguments Fail

Ohio next argues that the health plans it offers to its employees and those plans offered to the employees of its subdivisions do not qualify as group health plans under the Act because Congress has never made a plain statement of its intent. The United States responds that "[c]lear statement principles do not advance [Ohio's] position, because the relevant statutory text clearly encompasses [Ohio's] plans." Appellees Br. at 24. Ohio relies heavily on *Michigan v. United States* for the proposition that Congress must make a plain statement regarding any tax that it

wishes to impose directly against a state. *Mich. v. U.S.*, 40 F.3d 817, 824 (6th Cir. 1994). In *Michigan*, we held both that the Michigan Educational Trust, which was established to assist parents in financing their children's college educations, was a public agency not subject to federal income taxation in the absence of a plain statement from Congress, and that the plain statement rule applies in the tax field. 40 F.3d at 818. Ohio is correct that in *Michigan* we reiterated that "before a federal tax can be applied to activities carried on directly by the States . . . the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue." *Id*. at 823 (internal quotation marks omitted).

Ohio, however, asks too much of the ACA. The Supreme Court has "never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000). Thus, we conclude that the ACA's cross-reference definitional scheme is perfectly appropriate. *See also Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (holding that Congress need not "incant magic words in order to speak clearly," and requiring that the Court "consider 'context, including this Court's interpretations of similar provisions in many years past.'"(citation omitted)). When considering the Transitional Reinsurance Program in the context of the ACA (including the relevant definitions provided by the PHSA and ERISA) and our interpretations of similar provisions in cases past, we conclude that it is evident that Congress intended the term "group health plans" to encompass Ohio's plan.

Ohio's reliance on *Michigan* is misplaced for another important reason: *Michigan* dealt with a statutory scheme that was directed specifically toward corporations. The United States in *Michigan* failed to provide any evidence that Congress intended to tax state trusts, and even conceded that the statute had never been interpreted as so doing. *Michigan*, 40 F.3d at 823. By contrast, there is no question that the ACA, at least in part, applies to the States. The only issue before us is whether the term "group health plan" is meant to encompass health plans offered by state employers to their employees. A close and careful reading of the ACA and its cross-references compels an answer in the affirmative. Congress's plain statement that the Program applies to the States can be found in the series of cross-references discussed supra. We therefore

conclude that Ohio's statutory challenge fails, and the Transitional Reinsurance Program applies to the State of Ohio.

C. Ohio's Constitutional Claims

Ohio next argues that applying the Transitional Reinsurance Program to the States violates the Tenth Amendment to the United States Constitution. Specifically, Ohio objects to application of the Program under both the anti-commandeering and intergovernmental tax immunity doctrines. Ohio is concerned that the Program "requires an extraordinarily expansive, uncabined theory of federal power . . . under which federal politicians would be free to try to accrue political support through any type of corporate welfare scheme imaginable and then shirk accountability for total costs by ordering the States to collect money from their own citizens . . . ." Appellants Br. at 53. Further, Ohio argues, instead of aiding Ohio or its employees in connection with the State's money, the program "transfers money to private companies (that by definition do not insure the State employees) and [] takes for the federal general fund dollars that by law cannot be used for the purposes of the federal program under which the tax arises." *Id.* We find Ohio's alarmist posturing unpersuasive because the Program does not commandeer Ohio's legislative authority nor does it violate any remaining vestiges of the intergovernmental tax immunity doctrine.

1. Ohio's Anti-commandeering Claim is Foreclosed by *Garcia v. San Antonio Metropolitan Transportation Authority*.

Ohio first argues that payments to Transitional Reinsurance Program violate the Tenth Amendment because the Program commandeers Ohio's regulatory apparatus. The Supreme Court *in Garcia v. San Antonio Metropolitan Transit Authority* faced the question of whether there existed a Tenth Amendment violation where a state governmental employer was required to meet the overtime and minimum-wage requirements of the Fair Labor Standards Act (FLSA). 469 U.S. 528, 530 (1985). The Court found no violation because "Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause." *Id.* at 555–56. The *Garcia* Court held that the Tenth Amendment did not prohibit Congress from regulating state employers in the same manner that it regulates private-sector employers. We have similarly held that

Congress may enact "generally applicable laws that regulate state activities in the same manner as private conduct" and not violate the Tenth Amendment. *See EEOC v. Ky. Ret. Sys.*, 16 F. App'x 443, 452 (6th Cir. 2001).

Ohio's principal argument that the Program commandeers the State's regulatory apparatus relies almost exclusively on *Printz v. United States*, 521 U.S. 898, 930 (1997), and *New York v. United States*, 505 U.S. 144, 169 (1992). In *Printz*, a federal firearms law required that the chief law-enforcement officer in each local jurisdiction conduct certain checks to ensure compliance with the statute until a national background-check system was operative. *Printz*, 521 U.S. at 902. In the 1992 *New York* case, the Federal Government mandated that the States provide for disposal of certain low-level radioactive waste, and in some instances take title to and become liable for all damages caused by a state's failure promptly to take possession of said waste. *New York*, 505 U.S. at 150–51. The Supreme Court struck down both laws on the grounds that Congress impermissibly commandeered the legislative process of the States.

Neither *Printz* nor *New York* is applicable in this case. The congressional action in both cases required that certain state actors engage in specific conduct in order to comply with the statute. As we have previously held, there exists an important distinction in the Supreme Court's anti-commandeering cases between "generally applicable laws that regulate state activities in the same manner as private conduct," which have been held constitutional, and laws "that seek to control or influence the manner in which the States regulate private conduct," which are unconstitutional. *See Ky. Ret. Sys.*, 16 F. App'x at 452. *See also South Carolina v. Baker*, 485 U.S. 505, 514 (1988) (holding that a federal tax law was constitutional where it "regulates state activities" and does not "seek to control or influence the manner in which States regulate private parties"); *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding a federal law because it "does not require the States in their sovereign capacity to regulate their own citizens."). We cannot conclude that the Program seeks to control or influence the manner in which a state regulates private parties. Instead, it regulates the States directly by requiring participation in the Program in the exact same manner that it requires participation by private employers. This is a classic case of congressional action that is constitutionally permissible under the Tenth Amendment, and we therefore find Ohio's anti-commandeering arguments unpersuasive.

As the district court so aptly noted, "[t]he Affordable Care Act requires Ohio and its instrumentalities and political subdivisions to *comply* with a federal regulatory program, not to implement one." *Ohio*, 154 F. Supp. 3d at 659. We therefore conclude that the Federal Government has not commandeered the States by requiring participation in the Transitional Reinsurance Program in the same manner that it requires participation by private employers.

2. The Program Does Not Violate the Intergovernmental Tax Immunity Doctrine

Ohio's final argument is that the Transitional Reinsurance Program is a violation of the intergovernmental tax immunity doctrine, the concept that the federal and state governments should not tax each other. *See New York v. United States*, 326 U.S. 572, 576 (1946) ("[T]he fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other."). The district court concluded that the Program does not run afoul of the intergovernmental tax immunity doctrine because that doctrine "now protects only against *discriminatory* taxes levied directly on the states," and that "the Transitional Reinsurance Program imposes reinsurance contributions on private-sector employers and state and local government employers equally—i.e., non-discriminatorily." *Ohio*, 154 F. Supp. 3d at 659. We agree.

In the 1946 *New York v. United States* case, the Supreme Court upheld a federal tax imposed on the State of New York's bottling and sale of mineral water. *New York*, 326 U.S. at 573–74. Under the law at the time, public instrumentalities of the States were immune from taxation provided they were performing a "governmental function" and not a business or proprietary function. *Id.* at 579–80. The *New York* Court abandoned that rigid distinction, though no majority of the justices could agree upon a single rationale, with two justices agreeing that any non-discriminatory tax imposed upon a state was constitutional and four justices finding that a non-discriminatory tax could be unconstitutional if it "interfere[s] unduly with the State's performance of its sovereign functions of government." *Id.* at 587–89. The Supreme Court has only occasionally subsequently addressed the intergovernmental tax immunity doctrine.

A tax against the States will withstand a Tenth Amendment challenge if it: (1) does not discriminate against the States; and (2) can be remedied through the political process. *See Massachusetts v. U.S.*, 435 U.S. 444, 456 (1978) ("the political process is uniquely adapted to accommodating the competing demands 'for national revenue, on the one hand, and for reasonable scope for the independence of state action on the other.'"(citation omitted)); *Baker*, 485 U.S. at 526 n.15 ("the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents."). *See also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 n.17 (1994) (noting that "in the field of intergovernmental taxation . . . nondiscrimination . . . plays a central role in setting the boundary between the permissible and the impermissible.").

Ohio concedes that "the immunity doctrine has been narrowed over the years, and it is no longer understood to forbid indirect taxes on items such as state employee salaries or income from state contracts." Appellants Br. at 56 (citing *Baker*, 485 U.S. at 520–23). Ohio urges us to examine closely the plurality opinion delivered in *Massachusetts v. United States*, which recognized "the limitation the existence of the States constitutionally imposes on the national taxing power." 435 U.S. at 459. However, we conclude that reliance on *Massachusetts* is misplaced, as that Court had "no occasion to decide either the present vitality of the doctrine of state tax immunity or the conditions under which it might be invoked." *Id.* at 454. Indeed, the *Massachusetts* Court upheld a federal fee that was applied to state-owned property. *Id.* at 446. *Michigan v. United States*, the very case upon which Ohio so heavily relies for its statutory argument, speaks directly to the question of immunity. *See Mich. v. U.S.*, 40 F.3d at 822 ("The broad constitutional immunity from federal taxation once thought to be enjoyed by states . . . has been severely eroded . . . and several years ago the Supreme Court suggested that it is now an open question whether there is 'any' extent 'to which States are currently immune from direct non-discriminatory federal taxation.'" (quoting *Baker*, 485 U.S. at 518 n.11)). As this court noted in *Michigan*, "today's Supreme Court would say that Congress is free to impose a non-discriminatory tax" on a state government. *Id.* at 823.

At least one of our sister circuits agrees with the district court's conclusion that any intergovernmental immunity analysis requires examination of discriminatory application. The

Seventh Circuit in *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998), upheld a federal statute that levied upon the States certain fines for their failure to comply with its strictures. In upholding the statute, the court noted that:

> Gradually intergovernmental immunity turned into a rule of nondiscrimination, under which the governmental body's protection is vicarious: one government may tax (or regulate) another's trading partners only to the extent it imposes equivalent burdens on those who do business with private citizens. Neutrality between governmental and private spheres is a principal ground on which the Supreme Court has held that states may be subjected to regulation when they participate in the economic marketplace—for example, by hiring workers covered by the Fair Labor Standards Act. So long as public market participants are treated the same as private ones, they enjoy the protection the latter have been able to secure from the legislature; and as Congress is not about to destroy private industry (think what that would do to the tax base!) it can not hobble the states either.

163 F.3d at 1002–03 (citations omitted). While the Seventh Circuit was not directly confronted with a challenge to the intergovernmental tax immunity doctrine, we find its logic persuasive, and in line with our conclusion in *Michigan*. Whether the intergovernmental tax immunity doctrine is one which the Supreme Court would acknowledge as having any force today is an open question. We thus agree with the district court that "even under the State's erroneous view of the continued validity of the intergovernmental tax immunity doctrine, the Transitional Reinsurance Program remains constitutional." *Ohio*, 154 F. Supp. 3d at 665.

We conclude that the tax imposed under the Transitional Reinsurance Program is a non-discriminatory tax applied evenly to public and private group health plans. Application of the Program to the State of Ohio does not violate the intergovernmental tax immunity doctrine.

III. CONCLUSION

Because the Transitional Reinsurance Program was intended to apply to the State of Ohio, and because its application does not run afoul of the important principles of federalism or the Tenth Amendment to the United States Constitution, we **AFFIRM** the grant of the United States's motion to dismiss and the denial of Ohio's motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3093

THE STATE OF OHIO et al.,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA et al.,
Defendants - Appellees.

FILED
Feb 17, 2017
DEBORAH S. HUNT, Clerk

Before: COLE, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the grant of the United States's motion to dismiss and the denial of Ohio's motion for summary judgment are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk