No. 21-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,
Plaintiff-Appellees,

v.

JANET YELLEN, ET AL.,
Defendant-Appellants.

On Appeal from the United States District Court
For the Southern District of Ohio
No. 1:21-cv-00181-DRC

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH AND WEST VIRGINIA

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INTERESTS OF *AMICI*

Amici curiae—the States of Arizona, Alabama, Alaska, Arkansas, Florida, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia—all have a compelling interest in protecting their sovereign powers under the Constitution and our federal system of dual sovereigns. Indeed, "[t]he federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (citation omitted). "For this reason, 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.' Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *National Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 577 (2012) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

To these ends, the States have a compelling interest in ensuring that States can challenge federal statutes that unconstitutionally

infringe on their sovereign rights and violate the federal principles of the Constitution. Moreover, these States have a strong interest in being able to enact their own tax policy without federal interference. As explained below, Ohio's interest in doing so amply supports Article III standing here.

INTRODUCTION

This case involves a straightforward, recurrent, and fundamentally important question: whether federal courts have authority under Article III to protect important State interests from federal encroachment. The Supreme Court has long ago settled that question, by repeatedly intervening to ensure that federal legislation does not "undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577; *accord Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 188. The federal government's primary argument in this case seeks to limit the ability of States to protect those interests. This Court should reject that argument.

This case involves a challenge brought by the State of Ohio to a provision of the American Rescue Plan Act (hereinafter, the "Tax Mandate"), which prohibits the States from using ARPA moneys to

"either directly or indirectly offset" any reduction in net tax revenue as a result of a tax policy change. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 9901 (2021) (adding § 602(c)(2)(A) to the Social Security Act (42 U.S.C. § 801 *et seq.*)). Any state that violates this provision is required to repay funds to the Treasury. *Id.*

Although Congress may impose conditions on the States in exchange for the receipt of federal money, this power is limited. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Ohio has correctly argued that this provision coerces their agreement and is fatally ambiguous.

The Federal Government argues in the main that—although Ohio has cut taxes and accepted funds under ARPA—Ohio nonetheless fails to present a justiciable controversy. This argument misapprehends State standing under Article III in several ways and fails to appreciate the significant sovereign interests implicated by the Tax Mandate. This Court should reject these arguments.

ARGUMENT

The government's argument against Ohio's standing commits a fundamental error. By relying entirely on *enforcement* of the Tax Mandate as the only source of injury-in-fact, the government overlooks

numerous other ways in which states can suffer concrete injury from the Tax Mandate. This unduly narrows state standing to bring challenges to unconstitutional federal encroachment upon state sovereignty. Perhaps most clearly, Federal Defendants' fail to address any of the costs states face from the Tax Mandate as the regulated party, particularly compliance costs. These direct costs stem in part from the provision's unconstitutional ambiguity, and alone suffice to show injury-in-fact.

I. A State Suffers Immediate, Cognizable Injury When It Is Presented With Ambiguous Conditions

A plaintiff has standing if he can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). For purposes of evaluating whether jurisdiction exists, this Court "must assume *arguendo* the merits of [the State's] legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007).

As noted, Congress's authority under the Spending Clause is subject to several specific limitations and requirements, including that conditions placed on federal grants to states not be ambiguous, and that the federal government may not coerce States to agree to conditions. *See Dole*, 483 U.S. at 207-08. In *NFIB*, the Supreme Court explained that the

ability of States to "voluntarily and knowingly" accept spending conditions "is critical to ensuring that Spending Clause legislation" respects the constitutionally enshrined separate sovereignty of the States. *NFIB*, 567 U.S. at 577. Under this federal system, Congress may neither "command[] a State to regulate or indirectly coerce[] a State to adopt a federal regulatory system as its own." *Id.* at 578. As in *NFIB* itself, the Supreme Court has repeatedly rebuked Congress for attempting to "commandeer" or for "undermin[ing]" the status of States. *Id.* at 577 (citing cases). This system of dual sovereignty serves several important interests, including protecting political accountability and enhancing individual liberty. *Id.* at 578.

The government ignores all of this and treats the states as it would any private party challenging an enforcement provision. Its analysis, relying largely on a district court's decision in Missouri dismissing a challenge to the Tax Mandate, is limited explicitly to the question of whether the State had suffered injury-in-fact under the rubric of "pre-enforcement review of a threatened government action as set out in *Susan B. Anthony List*." *State v. Yellen*, No. 4:21CV376 HEA, 2021 WL 1889867, at *3 (E.D. Mo. May 11, 2021). *See also* App. Brief at 7-9. In

Susan B. Anthony List, the Supreme Court addressed the "recurring issue" of when "threatened enforcement of a law" creates injury-in-fact. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). *Susan B. Anthony List* sets forth a three-part test for establishing pre-enforcement review: (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) future conduct "arguably … proscribed by a statute;" and (3) a "credible threat" of "future enforcement." *Id.* at 160, 163. According to the government, because Ohio did not show how its tax cuts would reduce its revenue, it failed to show any realistic danger of sustaining a direct injury. App. Brief at 9.

But *Susan B. Anthony List* is not the only framework under which Ohio could establish standing because the Tax Mandate, at the time the complaint was filed, inflicted an actual and ongoing—not merely imminent—injury on the States. The purpose of the three-part analysis in *Susan B. Anthony List* is to address whether plaintiffs who fear enforcement have demonstrated "a sufficiently imminent injury" to give rise to a case or controversy under Article III. 573 U.S. 149 at 152. But the Tax Mandate inflicted *actual* injuries on the States at the time of its

passing by undermining States' sovereign rights, regardless of whether there was imminent enforcement.

The Tax Mandate inflicts actual injuries on Ohio by undermining the State's sovereign authority in at least two ways. First, the ambiguity in the Tax Mandate transgresses upon the State's "sovereign prerogative" to be presented with unambiguous terms in conditional federal grants, so it can exercise its choice "voluntarily and knowingly." *See Ohio v. Yellen*, __ F.Supp.3d __, 2021 WL 2712220, at *4, *12 (S.D. Ohio July 1, 2021). That ambiguous conditions harm States at the time they are offered is consistent with common sense: if a State cannot even understand what an offer means at the time that it can make a choice to accept, that injures the State. Regardless of whether the State accepts, its conduct has been materially affected by the unconstitutional condition. Under this framework that the Supreme Court has repeatedly recognized, the States' injury was an accomplished fact when the ARPA was signed into law and the States were presented with a choice that could impose enforceable (if ambiguous) conditions on their exercise of their sovereign powers. The fact that the State had a nominal choice in

the matter does not preclude a constitutional violation, as the lower court properly recognized.

Second, as Ohio has argued (although the district court did not reach it), the States were coerced into taking these funds and accepting this unconstitutional condition. In *NFIB*, the Court addressed Medicaid spending which "account[ed] for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *NFIB*, 567 U.S. at 581. The ARPA funds loom similarly large in their scale, and the pandemic additionally created unique economic pressures, making this money especially important to State budgets and leaving the States particularly vulnerable to federal coercion.

In sum, Ohio's injury in this case is the same injury that gives plaintiffs standing in every unconstitutional-conditions case: being forced to choose between exercising its constitutional rights and receiving a government benefit. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52–53 & n.2 (2006). The *West Virginia* court correctly recognized as much: "Their injury in fact is having to choose between forgoing a benefit (federal funds) or accepting that benefit on

unconstitutional terms." *West Virginia v. U.S. Dep't of Treasury*, 7:21-cv-00465-LSC, 2021 WL 2952863 at *7 (N.D. Ala. July 14, 2021).

The justiciability of Ohio's injuries at this stage is underscored by the Supreme Court's decision in *NFIB* itself. *NFIB* involved a challenge brought by several states under the Spending Clause to a provision of the Affordable Care Act that did not go into effect until *4 years* after the challenge was filed. *See NFIB*, 567 U.S. at 539. Yet not one of the several opinions of the Supreme Court Justices raised any concern over whether a State could bring this pre-enforcement challenge. Instead, all nine Justices apparently viewed the States' standing as so obvious that it did not merit discussion. *NFIB* therefore strongly implies that standing exists here as well, where the unconstitutional condition is being imposed immediately—rather than set to go into effect four years later.

II. Ohio Suffers An Imminent Injury From The Threatened Enforcement Of The Tax Mandate

In any event, even if satisfying the *Susan B. Anthony* test for pre-enforcement challenges was the sole avenue for Ohio to establish standing, Federal Defendants' argument fails by relying exclusively on Ohio's alleged failure to show that its tax revenue would decrease.

A. Ohio Has A Constitutionally Protected Interest In Accepting ARPA Funds

Ohio need only show that it has intent to engage in a course of conduct "arguably affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 159. Ohio has the requisite constitutional interest here because it has a statutory entitlement to funds under ARPA. Ohio, however, has already cut taxes and wants to continue to have authority to cut taxes into the future. This desired course of conduct is affected with a constitutional interest; the State taxing power is "indispensable" to State's sovereign authority. *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824).

B. Ohio Faces A Realistic Danger Of Enforcement

Ohio next needs to show that it faces "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *See California*, 141 S. Ct. at 2114 (*quoting Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)). This standard is easily met here. If the State reduces its tax revenue, it faces a real risk of recoupment of the funds to which it is otherwise entitled.

The government's counter-argument relies on an interpretation of the Tax Mandate that is unsupported by the statute's plain text. The

government argues that, because Ohio cannot show that the tax cut will be "paid for" by ARPA funds, it is not injured. But this simply is not what the Tax Mandate or its implementing regulations state. Rather, the Tax Mandate states it is triggered by "indirect offset[s]" of ARPA funds. And Treasury's Interim Final Rule puts that language into action. In fact, under Treasury's regulations, the Tax Mandate explicitly extends to inadvertent decreases in tax revenue and contemplates Treasury will effectively review past conduct for indirect offsets through 2024. *See Coronavirus State and Local Fiscal Recovery Funds,* 86 Fed. Reg. 26,786 (May 17, 2021), https://www.federalregister.gov/d/2021-10283/p-398 ("IFR" or "Rule").

Under that Interim Final Rule, Ohio has ample reason to fear that its tax policy could be undermined by the Tax Mandate. The Rule sweeps quite broadly and captures a wide variety of tax changes. Furthermore, as Ohio argues, the Tax Mandate is impossible to understand to the point of being unconstitutionally ambiguous. Nor have Defendants disavowed bringing recoupment actions against States. This is just like *Babbitt*: there, the statute also had never been applied, and the State had not disavowed the intent to invoke the statute. *Babbitt*, 442 U.S. at 302. As

the Court explained, standing existed there because "Appellees [we]re thus not without some reason in fearing prosecution." *Id.* So too here.

III. The Tax Mandate Imposes Significant Compliance Costs On The States

Apart from the threat of enforcement and the damage to Ohio's sovereignty, Ohio has standing to challenge the Tax Mandate because it directly imposes compliance costs on the State. The IFR implementing the Tax Mandate requires States to report actual net tax revenue, the value of changes in tax policy, and spending cuts with documentation showing that the cuts can cover a tax revenue decrease under the rule. *Coronavirus State and Local Fiscal Recovery Funds,* 86 Fed. Reg. at 26,810. The IFR also explicitly requires the States to break out and "identify any sources of funds that have been used to permissibly offset" tax changes. *Id.* at 26,807, 26,809 (requiring the States to "identify and calculate the total value of changes that could pay for revenue reduction due to covered changes and sum these items" and describing the procedures for doing so). The breadth of the information demanded by Treasury's Rule is necessary because the Tax Mandate has such a broad and shifting meaning. These costs are traceable to the unconstitutional provision, as without the Tax Mandate, none of this information would

be necessary to collect—no other provision requires tracking of spending offsets, or the value of changes in tax policy.

These mandates plainly impose some burden on the State. Indeed, the Treasury Department has expressly stated in its own rule that the reporting requirements "will generate administrative costs … includ[ing], chiefly, costs required to … file periodic reports with Treasury." 86 Fed. Reg. at 26,817. Indeed, it went so far as to solicit "comment[s] to better estimate and account for these costs, as well as on ways to lessen administrative burdens." *Id.* Put simply, the Treasury Department never doubted that the Tax Mandate would impose compliance costs through the IFR, and indeed acknowledged as much.

These costs are the monitoring regime put in place to ensure the State complies with the unconstitutional provision. *Compare with California*, 141 S. Ct. at 2119-20 ("[T]he problem for the state plaintiffs is that these other provisions also operate independently [from the challenged provision]."). Although the ARPA does independently require States to make a "detailed accounting" of "all modifications to the State's … tax revenue sources," see 42 U.S.C. §802(d), that requirement is far less broad and burdensome than what the IFR imposes specifically to

enforce the Tax Mandate's "directly or indirectly offset" provision, and the statutorily required accounting makes no mention of spending cuts or offsets. *Id.* §802(c)(2)(A).

It would be incredible if the Tax Mandate—which is a significant constraint on the States and is complex enough to have an explanation covering several pages of the Federal Register, see 86 Fed. Reg. at 26,807-26,811, did not impose any costs on the States. Because it does impose significant costs, there is a justiciable controversy over the validity of the provision.

Nor is the size of the marginal compliance costs relevant to the standing inquiry: Injury that is "personal" and "concrete" suffices regardless of size. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288-89 (2008) (upholding jurisdiction, noting that injury of "perhaps only a dollar or two" would even be sufficient). The cost of Tax Mandate compliance is not minor, but even if it were, it would be sufficient to establish standing.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the Brief of *Amici Curiae* States of Arizona, Alabama, Alaska, Arkansas, Florida, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia is proportionately spaced, has a typeface of 14 point and contains 2,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* States of Arizona, Alabama, Alaska, Arkansas, Florida, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on October 19, 2021, which will send notice of such filing to all registered CM/ECF users.

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