No. 22-10168

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATE OF WEST VIRGINIA, et al.
Plaintiff-Appellees,

v.

U.S. DEPARTMENT OF THE TREASURY, et al.
Defendant-Appellants.

On Appeal from the United States District Court
For the Northern District of Alabama
No. 7:21-cv-00465-LSC

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, IDAHO, KENTUCKY, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, TENNESSEE AND TEXAS

MARK BRNOVICH
ATTORNEY GENERAL

Drew C. Ensign
Deputy Solicitor General
2005 N. Central Avenue
Phoenix, AZ 85004
Telephone: (602) 542-5025
Facsimile: (602) 542-4377
Counsel for the State of Arizona

Dated: April 1, 2022

(additional counsel listed on signature page)

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, the counsel for amici curiae certify that, except for the following, the list of persons or entities that are known to the undersigned to have an interest in the outcome of the case, are listed in the briefs previously filed by the parties.

Brnovich, Mark – Attorney General of Arizona and Amicus Curiae

Cameron, Daniel – Attorney General of Kentucky and Amicus Curiae

Ensign, Drew C. – Counsel for Amicus Curiae, State of Arizona

Fitch, Lynn – Attorney General of Mississippi and Amicus Curiae

Landry, Jeff – Attorney General of Louisiana and Amicus Curiae

Paxton, Ken – Attorney General of Texas and Amicus Curiae

Peterson, Doug – Attorney General of Nebraska and Amicus Curiae

Slattery, Herbert H. – Attorney General of Tennessee and Amicus Curiae

Wasden, Lawrence G. – Attorney General of Idaho and Amicus Curiae

Yost, Dave – Attorney General of Ohio and Amicus Curiae

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INTERESTS OF AMICI

Amici curiae—the States of Arizona, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Tennessee, and Texas—all have compelling interests 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, Amici States have compelling interests in ensuring that States can challenge federal statutes that unconstitutionally infringe upon their sovereign rights and violate the federalism principles of the Constitution. Moreover, States have strong interests in being able to enact their own tax policy without federal interference. As explained below, the Plaintiff States' interests in enacting their own policies amply supports their Article III standing here. And the Tax Mandate's palpable and hopeless ambiguity supports affirming the district court's permanent injunction.

INTRODUCTION

This case involves fundamentally important questions about both federalism and the power of federal courts to enforce them. The Supreme Court has repeatedly made plain that federal courts must 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. Defendants' (the "Secretary's" or "the government's") arguments in this case seek to limit the ability of States to protect those interests. This Court should reject those arguments.

This suit is a challenge brought by thirteen Plaintiff States 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*.)). Although Congress may impose conditions on the States in exchange for the receipt of federal money, this power is limited. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The Federal Government argues first that the States fail to present a justiciable controversy. This argument misapprehends State standing under Article III in several ways and rewrites the Tax Mandate in the process. The district court therefore properly held that the States have standing.

The district court also correctly held that the Tax Mandate was facially unconstitutional. "The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *NFIB*, 567 U.S. at 577. The Tax Mandate's hopelessly ambiguous language—*i.e.*, "either directly or indirectly offset"—falls far short of the clarity that the Constitution demands. Indeed, even Secretary Yellen admitted to Congress that the

Tax Mandate created a "a host of thorny questions."[1] But unambiguous language should raise no "thorny questions"—let alone a full-blown "host of" them—since the answers are supposed to be clear from the text itself. Secretary Yellen similarly told Congress that "given the fungibility of money, it's a hard question to answer" what the effect of the Tax Mandate would be.[2] And that difficulty arises precisely because the Tax Mandate is ambiguous.

The district court's conclusion that the Tax Mandate is unconstitutionally ambiguous should therefore be affirmed.

ARGUMENT

I. The States Have Article III Standing To Challenge The Tax Mandate

The Secretary's arguments against the States' standing commit two fundamental errors. First, the government ignores the injuries the Tax

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[1] *See The Quarterly CARES Act Report to Congress: Hearing Before the Sen. Comm. on Banking, Hous. & Urb. Affairs Comm.* at 1:10:00–1:13:36 (Mar. 24, 2021), https://tinyurl.com/thornyQs; *see also Crapo Urges Treasury to Give States Maximum Flexibility in Use of COVID Relief Funds* (Mar. 24, 2021), https://www.finance.senate.gov/ranking-members-news/crapo-urges-treasury-to-give-states-maximum-flexibility-in-use-of-covid-relief-funds

[2] *Id.*

Mandate is causing now, which are well-established in case law and substantiated by the States' evidence.

Second, Defendants misunderstand the standard for pre-enforcement review set forth in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) and insists that States only have standing to challenge the Tax Mandate if they effectively violate the law—and perhaps must even *admit* to the violation as well as a condition of obtaining judicial review. That is not the law. And Defendants' distortion of *Susan B. Anthony List* is exemplified by the fact that they gloss over the inconvenient fact that the decision was a *unanimous reversal* of a holding that a challenger lacked Article III standing for a pre-enforcement challenge.

A. The Tax Mandate Directly Injures The States' Sovereign Interests, Thereby Conferring Standing To Challenge It

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. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007).

The State taxing power is "indispensable" to States' sovereign authority. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824). "[I]t is an essential function of government," and "[t]here is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation." *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76–77 (1868).

In *NFIB*, Chief Justice Roberts 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 (op. of Roberts, C.J.). This system of dual sovereignty serves several important interests, including protecting political accountability and enhancing individual liberty. *Id.* at 578. 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 "undermining" the status of States. *Id.* (citing cases).

Just as Congress cannot regulate the States directly without engaging in unconstitutional commandeering, it similarly cannot coerce them to accept conditions through Spending Clause legislation. *See id.* at 577–578. Accordingly, for such to be valid, the must States agree to them. But the States can consent only if they are able to "exercise their choice" whether to join the federal program "knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Ambiguous conditions, by definition, deny the States an opportunity to understand "the consequences of their participation." *Id.* The rule prohibiting ambiguous conditions in Spending Clause legislation thus, no less than the rule prohibiting coercion, ensures the consent on which the constitutionality of these conditions rests.

Against that backdrop, a coercive or ambiguous spending condition that interferes with State taxing power necessarily imposes a concrete injury on the States. As with any commandeering case, absent the federal interference, a State would otherwise be able to enact any policy it likes.

But by narrowing the scope of options practically available, and by coercing States' participation without their knowing or voluntary choice, the Tax Mandate constrains the States' sovereign prerogative over this "indispensable" power.

This narrowing takes place through two mechanisms. First, the Tax Mandate expressly constrains the States from adopting certain tax policies, if those policies "directly or indirectly" offset the spending of Rescue Plan funds. Second, the Tax Mandate is woefully unclear as to the scope of "indirect offsets," which is an independent constitutional violation because that ambiguity alone hinders the States from adopting or considering certain policies by creating legal uncertainty as to the consequences of adopting those policies.

This second injury is illustrated by the uncontroverted evidence the States presented below, which was expressly accepted by the district court. Specifically, as the district court observed, Alabama State Senator Albritton explained that it was crucial for State legislatures to understand the financial effects of revenue laws and that the uncertainty surrounding the Tax Mandate led to the defeat of at least one bill in the Alabama Legislature. A-108-11. This declaration showed that Tax

Mandate's uncertainty is inflicting ongoing harm on the States' legislative processes.

The Secretary does not (and could not) contest this evidence. Instead, she argues (at 11-12) that Tax Mandate does not infringe sovereignty because the Mandate is simply a restriction on States' "use of funds" and the Alabama State Senator was simply confused about its meaning if he believed that it affected State tax cuts. But this is precisely the interpretive question which is disputed: the States argue that the Tax Mandate is not a mere restriction on the use of funds but is an expansive condition designed to deter the States from cutting taxes, akin to the condition struck down in *NFIB*. 567 U.S. at 580 (comparing conditions on the use of funds with "such conditions [that] take the form of threats to terminate other significant independent grants … as a means of pressuring the States to accept policy changes"). *See also Dole*, 483 U.S. at 206–07 (explaining that Congress may use spending clause power to further ancillary policy objectives). Defendants cannot defeat *jurisdiction* by arguing on that they are right on the *merits* of their statutory interpretation arguments. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits.").

As explained further below, the actual restrictions on the uses of funds are listed in 42 U.S.C. § 802(c)(1); the Tax Mandate is instead placed in 42 U.S.C. § 802(c)(2) and is structured differently; referencing "indirect[] offset[s]." The differences between these sections are ignored by the Secretary, who simply seeks to read "indirectly" out of the statute entirely. But even if the Secretary were absolutely right, this is a *merits* question. And for purposes of standing, merits questions must be resolved in favor of the Plaintiffs. *See Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015).

B. The Tax Mandate Inflicts Compliance Costs On The States

Apart from the threat of enforcement and the damage to the States' sovereignty, the States have standing to challenge the Tax Mandate because it directly imposes compliance costs on them. The Final Rule implementing the Tax Mandate requires States to, among other things, "identify and calculate the total value of changes that could pay for revenue reduction due to covered changes and sum these items." Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338, 4,427 (2022). The Rule also explicitly requires the States to report "[e]ach revenue-reducing change made to date during the covered period and …

[e]ach revenue-raising change" as well as "[e]ach covered spending cut" and compare those cuts against a "spending cut baseline." *Id.* at 4,428.

The breadth of the information demanded by Treasury's Rule is necessary because the Tax Mandate has such a broad sweep. 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 of ARPA requires tracking of spending offsets, or the value of changes in tax policy, or the tracking of particular types of policy, like tax delays. *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]."). These requirements 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." 87 Fed. Reg. at 4,444. Put simply, the Treasury Department has never truly doubted that the Tax Mandate would impose compliance costs. Nor should it have.

It would be incredible if the Tax Mandate—which is a significant constraint on the States and directly regulates them—did not impose any costs on the States. Because it does impose compliance costs, that alone creates a justiciable controversy over the validity of the Tax Mandate.

C. The Tax Mandate Inflicts Imminent Injury From Threat Of Enforcement

As the district court observed, several of the Plaintiff states passed tax cuts in spite of the Tax Mandate. A74-75; A108-10. This alone created a threat of enforcement and a justiciable controversy under *Susan B. Anthony List*. The Secretary's primary response misunderstands the *Susan B. Anthony List* test and effectively requires States to violate the law in order to establish standing. But "where threatened action by *government* is concerned, [federal courts] *do not require a plaintiff to expose himself to liability* before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (second emphasis added).

Under *Susan B. Anthony List*, an injury is imminent under Article III if (1) the plaintiff intends to "engage in a course of conduct arguably affected with a constitutional interest"; (2) the law at issue "arguably proscribe[s]" the plaintiff's intended conduct; and (3) there is a substantial threat of enforcement by the defendant. *Susan B. Anthony*

List, 573 U.S. at 161–62 (citation omitted). Plaintiff States established all three elements.

1. The States Have A Constitutionally Protected Interest In Accepting ARPA Funds And Unfettered Tax Reform

The States need only show that they have intent to engage in a course of conduct "*arguably* affected with a constitutional interest." *Id.* at 161 (citation omitted) (emphasis added). Here, no one disputes that they have enacted and intend to continue to enact statutes that could reduce net tax revenue. *See* A74-75; A108-10. There is thus no doubt that there is a "constitutional interest" in the ability to pass these tax measures unfettered from federal interference. *See Lane Cnty*, 74 U.S. (7 Wall.) at 76–77.

2. The Law "Arguably Proscribes" The Intended Conduct

It is sufficient to show that the statute "*arguably* proscribe[s]" the intended conduct. *Susan B. Anthony List*, 573 U.S. at 162 (emphasis added). This standard is easily met here; the language of the Tax Mandate prohibits any "indirect[] offset[s]" of Rescue Plan funds. Any decrease in net tax revenue could *arguably* trigger this provision.

The Secretary assert (at 28) that, because the States do not show specifically that a tax cut will be "paid for" by ARPA funds, they cannot show that the planned tax cuts are proscribed by the statute. Secretary Br. 28 ("No plaintiff submitted any evidence that it intends to use its Fiscal Recovery Funds … to pay for a reduction in net tax revenue."). In other words, the government wants the States to be required to show any tax cuts cannot be offset in any other way besides the Rescue Plan funds.

This proposed standard makes two main errors. *First*, it conflicts with the *Susan B. Anthony List* standard, which only requires that States intended conduct be "arguably" proscribed. And as long as the States' interpretation is correct, *any* reduction in net tax revenue is imperiled by the Mandate because "indirect" is a broad term without meaningful limits and money is fungible. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("[T]he law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures.").

Treasury's Rule furthers that understanding and operationalizes that language into action, explicitly extending the Mandate's reach broadly and contemplating that Treasury will effectively review past conduct for indirect offsets through 2026. 31 C.F.R. § 35.10. This clearly indicates that *any* tax policy change is "arguably" into range of the Mandate, even if the State has not run through every possible potential offset and conclusively established an intent to use Rescue Plan funds to offset potential cuts.

Second, if the States were otherwise required to show that their tax cuts could not be offset except by Rescue Plan funds, that would essentially require the States to show an actual violation of the Tax Mandate to obtain standing. But this is the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *School Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 278 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (*quoting MedImmune,* 549 U.S. at 129). The Declaratory Judgment Act thus confirms the States' standing here.

The States need not know whether their tax policy changes will lead to recoupment; the Tax Mandate is ambiguous, and the burden of evaluating every conceivable tax policy change for possible offsets is onerous. But the Constitution does not require plaintiffs to confess their own guilt as a precondition for obtaining jurisdiction. *See MedImmune*, 549 U.S. at 128–29 (2007) (emphasis added) (Article III "do[es] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.”).

3. There Is A Credible Threat Of Enforcement

While the Tax Mandate is new, and States are just beginning to receive their Rescue Plan funds, there is a credible threat that it could be enforced against States who cut their taxes. Defendants tellingly have not disavowed bringing recoupment actions against States. Indeed, they have not even “suggested that the newly enacted law will not be enforced, and [there is] no reason to assume otherwise.” *Am. Booksellers Ass’n*, 484 U.S. at 393. On the contrary, Defendants have vigorously defended the law in court, promulgated a complex regulation and enforcement mechanism, and have already threatened at least one State with recoupment of Rescue Plan funds on other grounds.[3]

The Plaintiff States then have good reason to fear enforcement actions by the federal government. This is sufficient basis for standing.

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[3] David Lawder, *U.S. Treasury threatens to claw back Arizona funds over anti-masking school grants*, Reuters (Jan. 14, 2022), https://www.reuters.com/world/us/us-treasury-threatens-claw-back-arizona-funds-over-anti-masking-school-grants-2022-01-14/

II. The Tax Mandate Is Unconstitutionally Ambiguous

Here, the constitutionality of the Tax Mandate is straightforward given its hopeless ambiguity. The Tax Mandate's unconstitutional ambiguity stems largely from two elements: (1) its unprecedented use of the impenetrable term "indirectly offset;" and (2) its innumerable, unfillable textual gaps. "Indirect" or "indirectly offset" are not terms used elsewhere in the U.S. Code, and for good reason—they are woefully unclear. Literally any use of ARPA funds could be set to "indirectly offset" a broad tax cut.

Beyond this vague term, the Tax Mandate leaves critical gaps unfilled; for example, the Tax Mandate does not specify what counts as a "reduction" in net tax revenue because there is no clear baseline. Nor does it make clear what counts as a "change" in State tax law. These and other gaps leave the States with no clear understanding of what it is accepting in taking on ARPA funds.

A. The Constitution Demands That Congress Disclose More Than The "Existence" Of A Condition

In seeking reversal, the Secretary bizarrely argues (at 15) that the Constitution "demands only that a condition's existence be clear from the statute." That existence-only contention not only misreads *Pennhurst* and this Court's precedents, but squarely violates the Supreme Court's decision in *NFIB* and *Arlington*, which post-date *Benning*.

As the *Ohio* court explained, the Supreme Court in these cases "directly reject[ed]" the view that the actual content of conditions is irrelevant. *Ohio v. Yellen*, No. 21-CV-181, 2021 WL 1903908, at *12 (S.D. Ohio May 12, 2021) ("First, the federal government claimed that the Spending Clause does not require that the *substance* of the conditions be clear, but merely that the statute make clear that conditions *exist*. Wrong. As noted above, Supreme Court and Sixth Circuit precedent directly reject that view.").

In *Arlington*, the Court was clear that it was the content of the condition which mattered. That case dealt explicitly with a provision in the Individuals with Disabilities Education Act ("IDEA"), which provides that a court in an IDEA case may award "reasonable attorneys' fees as part of the costs." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293-94 (2006) (citation omitted). The question presented there was whether IDEA permitted prevailing parents to recover expert fees as a part of "costs," as seemed to be suggested by legislative history. *Id.*

In resolving that question, the Court made clear that "[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* at 304. Applying that logic, the Court held that States could only be bound to the narrow understanding of the condition, since obligating States to cover attorneys' fees would go beyond what States were "clearly told." *Id.*

But if the *existence* of the condition was all that mattered, there would have been no need to apply this narrowing principle on the meaning of "costs": the Supreme Court could simply have observed that the *existence* of the IDEA's requirement to pay "costs" was obvious and affirmed on that ground alone. But the Court actually *reversed* the judgment below, and its holding was expressly premised on the need for clarity as to the *content* of the IDEA's condition, not merely its *existence*. That distinction was case dispositive in *Arlington*. Indeed, it was the *core holding*—but completely ignored by the Secretary.

Similarly, as explained above in *NFIB*, seven Justices struck down a Medicaid expansion condition on the States. *NFIB*, 567 U.S. at 575-76 (Roberts, C.J.). Both opinions reaching this conclusion in the case explained the importance of the State being able to both "knowingly" and "voluntarily" accept the conditions offered for the exercise Spending Clause power to be "legitima[te]." *Id.* at 577. *See also NFIB*, 567 U.S. at 676-77 (Scalia, J., dissenting). But a State cannot *knowingly* accept a condition without *knowing* what it does. The Secretary's contrary contention is a contradiction in terms that contorts the Supreme Court's holdings beyond recognition.

B. The Tax Mandate Is Not A Mere Restriction On The "Use Of Funds"

The Secretary asserts that the Tax Mandate is not ambiguous because it is a restriction on the State's "use of funds" which works within the States' existing budgeting. Secretary Br.12-13. According to the government, States are "familiar" with the need to "offset" tax cuts and they may not use federal funds to do so when they "balance their books." *Id.* at 13.[4] The government further asserts that this is no different than

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[4] This shameless suggestion does not lack for hypocrisy: Unlike the States, the federal government has not "balanced [its] books" in more than two decades. But the Secretary now seeks to wield the States' relative fiscal discipline, which the federal government sorely lacks, as a weapon to curtail the States' sovereignty over their own fiscal affairs. In the federal government's view, "no good deed goes unpunished." *Winter v. NRDC*, 555 U.S. 7, 31 (2008).

the "maintenance-of-effort" requirements that are a longstanding feature of Spending Clause legislation. *Id.* at 14. According to the federal government, "indirectly offset" is merely an innocuous term to prevent the States from engaging in budgeting gamesmanship. *Id.* at 13-14.

This is a mischaracterization of the Tax Mandate's text and how it operates in the Final Rule. Far from focusing on the specific "uses" of ARPA funds themselves, the Secretary looks to the State's overall tax policy in determining compliance. *See* 87 Fed. Reg. at 4,423-24. Furthermore, the Tax Mandate does not merely restrict the States budgeting processes as Defendants imply. Rather, under the Final Rule, Treasury analyzes States' books with the benefit of hindsight to seek out potential violations. Indeed, if "indirectly offset" is not mere surplusage, this is the only reading that makes sense.

Take a simple example: if the State were to spend its ARPA funds consistent with one of the ARPA permissible purposes for those funds (e.g., making "necessary investments" in broadband services) and then was to cut taxes reducing net revenue, under the Tax Mandate, the Treasury could later conclude that the ARPA funds spent on broadband were indirectly offsetting that loss of revenue—even if the State believed that no offset was taking place. But for the tax cut, Treasury could assert that the State would have paid for the broadband infrastructure with state funds. As Treasury expressly recognizes in the Final Rule, this is what it means for money to be fungible. *See* 87 Fed. Reg. 4,424 ("Consistent with the statutory text, the approach taken in the interim final rule recognizes that, because money is fungible, even if [ARPA] funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the state's or territory's funds that would otherwise have been needed to cover the costs of the reduction."). But the precise scope of what this means is undefined and left entirely up to Treasury's discretion. In this posture, the Tax Mandate simply acts to discourage states from cutting taxes, lest they be caught up in the Tax Mandate's uncertain scope.

This is not how maintenance-of-effort provisions operate even in the cases cited by Defendants. For example, the provision at issue in *Bennett* stated that Title I education funding could "in no case," be used "to supplant such funds from non-Federal sources." *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 660 (1985) (citation omitted)). Similarly, Treasury cites to *South Carolina Department of Education v. Duncan*, in which the Fourth Circuit considered the maintenance-of-effort provision in the IDEA, which provided that a "State must not reduce the amount of its own financial support for special education 'below the amount of that support [it provided] for the preceding fiscal year.'" 714 F.3d 249, 251 (4th Cir. 2013) (citation omitted). But those provisions simply required the State to continue spending on a single category of expenses at a particular level—not ensure that its entire tax policy does not "indirectly" use federal funds in some manner to "offset" revenue losses. Furthermore, these examples further show that Congress knows perfectly well how to draft maintenance-of-effort provisions when that is what it intends, but it critically did not do so here. Instead, the Tax Mandate does something altogether different: prohibiting States from "indirectly offsetting" tax cuts with ARPA expenditures.

Ultimately, all of this demonstrates that the Tax Mandate is best understood as an attempt to "pressure" the States not to cut taxes, not a restriction on the use of federal funds. *NFIB*, 567 U.S. at 577-78 (Roberts, C.J.). And in this posture, with the breadth of its scope, the States face a real risk that the Treasury, for the next several years, will be able to claw back ARPA funds whenever it finds—in its sole discretion—that it dislikes a State's tax policy. This is not a constitutional arrangement.

C. The Tax Mandate Provides No Meaningful Standards Or Limits

At the fundamental level, the essential parameters of a condition imposed by Congress need to be sufficiently clear such that States can ascertain the principal terms of the proposed "deal." "The legitimacy" of any attempt by Congress to impose conditions "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a State … is unable to ascertain what is expected of it." *Id.* This is a limitation on Congress's Spending Clause *power* and it protects the fundamental federal, dual sovereign character of our Republic.

The question, then, is whether the Tax Mandate provides sufficiently "clear notice" such that States can knowingly and voluntarily accept its fundamental terms. *Arlington*, 548 U.S. at 296. Defendants argue that it does, but almost exclusively by analogy (at 14-18) to the spending condition in RLUIPA. But the RLUIPA analogy merely illustrates the Tax Mandate's comparative constitutional infirmities.

As this Court has recognized: "RLUIPA forbids the states from imposing substantial burdens on religious exercise absent a compelling government interest accomplished by the least restrictive means necessary to serve that interest. This standard is not new to Georgia or any state." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Because RLUIPA imposes compliance with the strict scrutiny standard used countless times by courts in innumerable cases, state officials can "clearly understand" what RLUIPA's condition does and how it is likely to apply in different factual contexts.

This is a judicially administrable standard, just like a "best efforts" or "good faith" clause in a contract. Even if the application of strict scrutiny to a particular fact pattern would not be immediately obvious to a state official, the presence of a judicially administrable standard and extensive relevant case law is sufficient for a State to "knowingly and voluntarily" consent, much like a contracting party could consent to a contract with a "best efforts" clause.

By contrast, the Tax Mandate gives no such standard, and is inscrutable to policymakers. This is for two main reasons. First, because money is fungible, the scope of when ARPA spending can be said to have "indirectly offset" a tax cut is indeterminate. Second, the statute provides no baselines for when a reduction in net tax revenue occurs and has innumerable key gaps.

The hopelessly impenetrable scope of "indirectly offset" is explained above. But in addition to that key flaw, the Tax Mandate itself is riddled with holes. For example, the statute does not explain or further define the meaning of "reduction in the net tax revenue of such State … resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax." 42 U.S.C. §802(c)(2)(A). The language gives no baseline for what amounts to a "reduction," does not explain how to consider multiple, simultaneous changes in law, or how to consider what to do when outside factors cause revenue to drop. The Treasury may claim to "know" the answers to these questions, but they are found nowhere in the statute.

Compared to RLUIPA, nothing in the statute cabins the Treasury's discretion or provides a standard to evaluate possible recoupment and guide state conduct in these or other areas. Thus, while RLUIPA adopted the well-known, well-worn strict scrutiny standard that provides clarity as to its applications, the Tax Mandate promulgated an unprecedented standard for which there is no case law or analog that could provide "clear notice" as to what it means. State officials that were forced to evaluate the Tax Mandate had no way to know what they are signing on to, as the Secretary's RLUIPA own analogy makes plain.

D. The Secretary Distorts The Proper Inquiry

Seeking to evade the Tax Mandate's obvious ambiguity, the Secretary attacks straw men. States is not arguing that Congress must "'proscribe in advance every conceivable state action that would be improper." Secretary Br.7 (quotation marks omitted). Rather, the Supreme Court's Spending Clause precedents operate essentially on two successive levels—with the Secretary's arguments failing at both.

At the fundamental level, the essential parameters of a condition imposed by Congress need to be sufficiently clear such that States can ascertain the principal terms of the proposed "deal." "The legitimacy" of any attempt by Congress to impose conditions "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a State … is unable to ascertain what is expected of it." *Id.*

This is a limitation on Congress's Spending Clause power to protect the fundamental federal, dual-sovereign character of our Republic.

The failure of Congress *in Pennhurst* to provide clarity of central terms thus meant that the entire provision at issue "simply d[id] not create substantive rights" at all. *Id.* at 11. So too here: because the Tax Mandate leaves the fundamental contours of the "deal" offered to the States hopelessly ambiguous, Congress has exceeded its powers and the Tax Mandate simply fails outright to create any obligations on the States.

Where, unlike here, Congress has provided sufficiently clarity for the States to accept the essential "deal," a second-order principle kicks in to address ambiguity in the content of the deal. Under it, Congress need not supply every conceivable detail, but the issue instead is whether Congress provided "clear notice regarding the liability at issue." *Arlington*, 548 U.S. at 296.

The issue in *Arlington* was not the fundamental contours of the condition at issue—the States had ample notice that accepting federal funds put them on the hook for attorneys' fees as part of costs to prevailing parties in IDEA suits, and so the first-order *Pennhurst* principle was not at issue. *Id.* at 296-98. But because the requisite "clear notice" was lacking as to the ancillary detail of whether "costs" and "attorneys' fees" also included expert fees, there was no such condition that could be imposed under the Spending Clause. *Id.*

The Court thus made clear that whatever Congress may have intended with respect to the content of spending clause conditions is not controlling: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend *but what the States are clearly told regarding the conditions* that go along with the acceptance of those funds." *Id.* at 304 (emphasis added). In essence, the Supreme Court has imposed a *contra proferentem* construction principle for spending conditions, where the States can only be bound by what the text establishes unambiguously with "clear notice."

Because the Tax Mandate fails to provide the requisite clarity as to its fundamental terms, it fails outright under *Pennhurst*. But even if it did not, the Secretary does not make any effort to construe the Tax Mandate under *Arlington*'s rule of construing the condition narrowly such that it only imposes mandates that for which there is "clear notice." Thus, even if the parameters of the historically unprecedented Tax Mandate were somehow only an ancillary detail, the Secretary has failed to offer any construction of it that could pass constitutional muster under *Arlington*.

CONCLUSION

This Court should affirm the district court's decision enjoining the Tax Mandate.

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Respectfully submitted,

MARK BRNOVICH
ATTORNEY GENERAL

s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
2005 N. Central Avenue
Phoenix, AZ 85004
Telephone: (602) 542-5025
Facsimile: (602) 542-4377
Counsel for the State of Arizona

Also supported by:

LAWRENCE G. WASDEN
Idaho Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

LYNN FITCH
Mississippi Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

HERBERT H. SLATERY III
Tennessee Attorney General

KEN PAXTON
Texas Attorney General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the Brief of *Amici Curiae* States of Arizona, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Tennessee, and Texas is proportionately spaced, has a typeface of 14 point in Century Schoolbook font and contains 5,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Drew C. Ensign
Drew C. Ensign

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* States of Arizona, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Tennessee, and Texas with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 1, 2021, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign