No. 22-352

IN THE
Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

JANET L. YELLEN, in her official capacity as Secretary of the Treasury; *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

National Taxpayers Union Foundation (NTUF) provides crucial, impactful research that shows Americans how taxes, government spending, and regulations affect them. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this Court's ruling.

[1] Pursuant to Supreme Court Rule 37, all parties were timely notified and consented to the filing of this brief. Counsel for *Amici* represents that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

At the eleventh hour of negotiating the American Rescue Plan Act (ARPA), the $1.9 trillion COVID-related spending package passed in 2021, a provision was quietly inserted that ostensibly bars states from using the state aid included in the bill to "directly or indirectly" offset revenue reductions from tax cuts. Few in Congress appeared to understand at the time that this relatively obscure provision would kick off a bevy of lawsuits launched by states alleging that the law infringes on their rightful power to set tax policies for their state.

This incoherent provision requires guessing at its meaning and inhibits the ability of states to set their own tax and fiscal policies for fear of violating the provision. Missouri, like many states, challenged this intrusion into their sovereignty. Some states, like Arizona, could move forward in their challenge on the merits. But the Eighth Circuit, splitting with the Ninth Circuit and numerous district courts, held for the first time that a state's challenge to an alleged unconstitutional federal spending condition was barred for standing.

This Court has held in other contexts that states do have standing to protect their sovereign interest, and it is vitally important to do so here. Missouri's plight is one of many recent ultra vires actions by the administrative state, yet gamesmanship of standing is preventing juridical resolution of these constitutional challenges.

To be sure, Missouri, and all the states, have suffered injury under ARPA. Treasury has not

disclaimed enforcement of the provision in general or the "indirectly" clause in particular. States are recovering from the Covid shutdowns and are transitioning to new budget realities in the face of rising inflation and other economic challenges. But they cannot use all their options—especially tax cuts—to adapt to the new reality so long as the constitutionality of the ARPA provision remains in doubt. For the states faced a grim choice in 2021: either take billions of dollars in emergency aid or maintain their flexibility in the recovery. Missouri brings viable constitutional claims that should be resolved in federal court.

ARGUMENT

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (ARPA), providing massive federal aid to state and local governments during the Covid-19 pandemic.[2] But APRA Subtitle M, Section 9901, also amends 42 U.S.C. § 802(c)(2)(A) to read:

> In general.—A State or territory shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) to either directly or

[2] ARPA provides $195 billion in aid to state governments and $130 billion in aid to local governments. The state portion amounts to 22 percent of all states' annual general fund budgets ($892.9 billion in Fiscal 2021) and 9 percent of all states' total fund budgets ($2.26 trillion); the combined state and local aid amounts to 36 percent of general fund budgets and 14 percent of all funds budgets. *See* National Association of State Budget Officers, *The Fiscal Survey of States Fall 2020* at 13, https://www.nasbo.org/reports-data/fiscal-survey-of-states.

> indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

42 U.S.C. § 802(c)(2)(A). States which violate the provision "shall be required to repay to the Secretary an amount equal to the amount of funds used in violation" calculated as the "lesser of (1) the amount of the applicable reduction to net tax revenue attributable to such violation; and (2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made [to local governments]." 42 U.S.C. § 802(e).

The provision is incoherent, such that an honest person (or state government) attempting to abide by its terms is necessarily guessing at its meaning. This has resulted in paralyzing state legislative action for fear of violating the provision, undermining ARPA's purpose of action to provide pandemic relief. This chilling effect of the ARPA provision, coupled with the lack of legislative history and the limitations of any future Treasury guidance, means one of two things: either the provision is so capable of multiple meanings that it is void for vagueness, or is an exercise of such great power by Congress as to deprive states of independent action on their tax policies for five years.

The broad sweep of the term "indirectly," coupled with the inherent fungibility of money in state

budgets, means that any state that accepts ARPA aid (and the funds are of such size that no state will be to explain why its citizens must take on the federal debt to pay for ARPA but say no to their share of the allocations) is effectively surrendering the ability to cut taxes. Because the former result violates the Due Process Clause and the latter result violates the Tenth Amendment, a court should hold the ARPA provision to be unconstitutional.

Missouri challenged ARPA's Hobson's Choice. But the Eighth Circuit held the state lacked standing, part of a disturbing trend of shutting the courthouse door to challenges of broad statutes and incoherent or non-existent regulatory guidance. It also produced an illogical and incoherent Circuit split: Arizona may bring its challenge, but Missouri cannot, simply by happenstance of which Circuit they sit in. Of course, states are harmed—they must either choose to forgo billions of dollars in federal aid during a crisis or cede their sovereignty over their own budgets. This case presents an opportunity for this Court to state what it has always held: that a state asserting harm from an allegedly unconstitutional federal spending condition will be heard on the merits.

I. STATES HAVE STANDING TO PROTECT THEIR SOVEREIGN INTERESTS.

Multiple states immediately filed suit to challenge the tax limits provision in ARPA, and National Taxpayers Union Foundation closely tracked and offered *amicus curiae* analysis in each case. *See*, *e.g.*, Joe Bishop-Henchman, *Six Lawsuits Filed to Challenge ARPA Ban on State Tax Cuts*, NTUF (June

3, 2021) .[3]; Travis Nix, *NTUF Files New Brief in ARPA Case Defending State's Ability to Provide Tax Cuts*, NTUF (Oct. 31, 2022).[4] Without taxpayer standing, only the states can protect the interests of their citizens in challenging this provision. *See Mass. v. Mellon*, 262 U.S. 447, 487 (1923) (disallowing taxpayer standing); *cf. Flast v. Cohen*, 392 U.S. 83, 85 (1968) (limited taxpayer standing to challenge violations of the Establishment Clause).

This Court has long held states have standing to protect their sovereign (or sometimes described as "quasi-sovereign") interests. That is because "[w]ell before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction." *Mass. v. Env't'l Prot. Agency*, 549 U.S. 497, 518 (2007) ((discussing and applying *Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)); *cf. Neb. v. Wyo.*, 515 U.S. 1, 19 (1995) (recognizing Wyoming's standing to challenge a federal water law decree).

The Founders understood that the federal courts would need to resolve such cases. In The Federalist 80 (McLean ed.) , Alexander Hamilton wrote that federal judicial authority "ought to extend to" several types of cases: first, "to all those which arise out of the laws of the United States"; second, "to all those which concern the execution of the provisions expressly contained in the articles of Union;" and third, "to all those in which

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[3] https://www.ntu.org/library/doclib/2021/06/Six-Lawsuits-Filed-to-Challenge-ARPA-Ban-on-State-Tax-Cuts.pdf.

[4] https://www.ntu.org/foundation/detail/ntuf-files-new-brief-in-arpa-case-defending-states-ability-to-provide-tax-cuts.

the United States are a party."[5] Applying the rubric of The Federalist 80, ARPA is a law of the United States, presents important Tenth Amendment questions, and the federal officials in charge of enforcing ARPA are properly parties. The Founders would therefore likely be very comfortable with the federal courts hearing the ARPA challenges for resolution of the important constitutional questions.

This Court in *Massachusetts v. EPA* hung much of its standing analysis based on specific Congressional authorization of such suits in the environmental laws. *See Mass.*, 549 U.S. at 518. But just last term this Court noted that "there can be 'little question' that" a "rule does injure the States," when "they are 'the object of' its requirement." *W. Virginia v. Env't'l Prot. Agency,* 597 U.S. ___, 142 S. Ct. 2587, 2606 (2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)). Just so here: ARPA directly regulates the permissible activities of the states and so each state has injury-in-fact to protect their sovereignty.

The Eighth Circuit incorrectly focused on this Court's decision in *Lujan* to reject standing in this case. *Lujan* summarized Article III standing as "the 'Cases' and 'Controversies' that are of the justiciable… 'serv[ing] to identify those disputes which are appropriately resolved through the judicial process.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Ark.,* 495 U.S. 149, 155 (1990)) (bracket in *Lujan*). But it's important to note how attenuated the *Lujan* litigant's injuries were. They claimed "the lack of consultation with respect to certain funded activities abroad

[5] https://avalon.law.yale.edu/18th_century/fed80.asp

'increas[ed] the rate of extinction of endangered and threatened species.'" *Id.* at 562. All the *Lujan* challengers had was a "some day" intent to revisit Sri Lanka to see endangered species. *See id.* at 564. And even then, the ability for a federal court to redress the injury was attenuated, since it had to do with disagreeing on federal environmental policy rather than a direct injury. In other words, the *Lujan* litigants had a general grievance about the government, not direct harm. *See id.* at 573-74.

By contrast, Missouri—along with all 50 states—have injuries traceable to a federal law mandating they either (depending on how one reads a vague statute) give up flexibility in tax policy or pass on *billions* of dollars in emergency aid. The executive branch, through Secretary Yellen, responds that the states' feared broad reading of the provision is not how they will enforce it, but future Treasury Secretaries may decide differently and the statute permits retrospective clawing back of past funds. The Secretary's response that she reads the statute's scope differently is a *merits* argument, not a basis for preventing federal courts from being the arbiters of the scope of the ARPA provision.

The ARPA provision forces people "of common intelligence [to] necessarily guess at its meaning and differ as to its application," which thereby "violates the first essential of due process of law." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). The law neither enumerates the practices that are required or prohibited, nor details the procedures to be followed by those responsible for enforcing the provision. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304 (2008). As a result, the statute deprives ordinary

people of the "fair notice of the conduct a statute prescribes" and fails "to guard[] against arbitrary or discriminatory law enforcement." *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1212 (2018); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.").

Refraining from an activity to avoid the legal consequences that a statute would impose for engaging in it constitutes a sufficient injury to give a party standing to challenge that statute. This Court has held "that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979)). All a plaintiff need only be subject to a law and under threat of enforcement. *Id.* at 158. No "actual arrest, prosecution, or other enforcement action" is needed for a preenforcement challenge. *Id.* (collecting cases).

Judicial resolution of this case is not only good policy, it is a key part of our constitutional order. Invalidating vague laws upholds the Due Process Clause and upholds the separation of powers. *See, e.g.*, *Sessions*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in the judgment), *citing Jordan v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting) ("Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and

diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it."). *See also Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 17 (1981) ("Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

ARPA is a temporary, but monumental, shift in the balance between federal and state power and Missouri's request that the federal courts review the statute's constitutionality is proper. Missouri's predicament is just another in a long line of actions by the executive branch to try to make its actions unreviewable. For example, President Biden used executive authority to forgive a large portion of federal student loans at great cost to taxpayers. *See* The White House, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022)[6]; Andrew Lautz, *LATEST: Biden Student Debt Cancelation Could Cost Taxpayers Around $400 Billion*, NTUF (Aug. 25, 2022).[7] Yet the administration actively modified the program's parameters to defeat standing. *See* Corey

[6] https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[7] https://www.ntu.org/foundation/detail/latest-biden-student-debt-cancelation-could-cost-taxpayers-around-400-billion.

Turner, *A look inside the legal battle to stop Biden's student loan relief*, NPR (Sept. 30, 2022)[8] ("Neither the White House nor the Department of Education had previously said borrowers would have the opportunity to opt out of debt relief."). Similar tough questions about standing also arose in state actions as well. *See*, *e.g.*, *Whole Woman's Health v. Jackson*, 595 U.S. ___, 142 S. Ct. 522 (2021).

This Court should take Missouri's case as a chance to clarify the doctrine on standing, at least as applied to invasions of state sovereignty by the federal government. ARPA's reach is severe and inhibiting core state action on setting tax and fiscal policy. The sooner the federal courts resolve the constitutional questions, the better.

II. THE ARPA PROVISION INHIBITS CORE STATE ACTION.

States who took ARPA funds now face harm from a not-disclaimed Treasury Department enforcement of a statute that they consider to be unconstitutional. In evaluating standing, the Court should assume *arguendo* these allegations to be true to determine if Missouri has demonstrated a concrete and particularized injury. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

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[8] https://www.npr.org/2022/09/30/1126083883/bidens-plan-to-cancel-some-student-debt-turns-into-a-legal-fight

Under Treasury's framework adopted by regulation, each state, including Missouri, must now provide evidence in the form of a report to the Treasury Department that the tax cuts were "paid for" by other than federal funds. If Treasury is unpersuaded, the federal government will recoup the funds. In contemplating any tax changes, these states must now consider this pending federal intervention and the lack of clarity as to its scope, and this in turn has had a chilling effect in deterring support for state tax cuts or reducing their size. Taxpayers deserve better.

It is a real risk that the Treasury Department, under the current Secretary or a future one, will enforce the provision against Missouri. Without judicial relief, the state faces a choice of potential recoupment or avoiding taking certain tax policy actions. States are making this choice now, and are consequently being harmed now.

This Court recently held that a threatened loss of federal funds is "a sufficiently concrete and imminent injury to satisfy Article III." *Dep't of Com. v. N.Y.*, 588 U.S. ___, 139 S. Ct. 2551, 2565 (2019). In the one state challenge to a federal spending program that was dismissed on standing grounds, the challenge was to the constitutionality of the spending program itself on behalf of the citizens of the state, and not a challenge to a condition Congress placed on the grant of funds to the state. *See Mellon*, 262 U.S. at 485 (denying standing to Massachusetts but also stating "[w]e need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but

we are clear that the right to do so does not arise here.").

In past cases involving state allegations of unconstitutional conditions, not even dissenting justices have suggested a lack of standing as a basis to dismiss the action. Indeed, the dissenters in the Affordable Care Act case specifically rejected a standing-based argument as unsound. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 696-97 (2012) (Scalia, J., dissenting) (holding that declining to hear the case on standing grounds "would be particularly destructive of sound government [because i]t would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing. The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails."). *See also id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (rejecting the state challenge to the federal statute on grounds other than standing). And the dissenters in *South Dakota v. Dole* also recognized the harms to states when Congress regulates state activity. *S. Dakota v. Dole*, 483 U.S. 203, 212 (1987) (Brennan, J., dissenting) (dissenting on the ground that the 21st Amendment reserves to the states the power to set alcohol policy and that a condition on a federal grant abridges that right); *Id.* (O'Connor, J., dissenting) (dissenting on the ground that drinking age is not reasonably related to transportation policy). Even when states lose on the merits, it is plain they had standing to bring their claims. *See*, *e.g.*, *S. Carolina v. Baker*, 485 U.S. 505 (1988) (upholding a federal

statute of taxing state bonds with no justice raising standing as an issue).

Congressional conditions on state use of federal funds are not insulated from judicial review. Indeed, whether a condition is legitimate or not "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" which is judicially cognizable. *Pennhurst*, 451 U.S. at 17. Missouri must accept the term of the contract for the condition to be valid, and the state is here before this Court saying it does not. Missouri demonstrated harm.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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