No. 22-880

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

JANET 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 Sixth Circuit

BRIEF FOR THE BUCKEYE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This *amicus curiae* brief addresses the second question presented by the Petition: Whether the American Rescue Plan Act of 2021's prohibition of using federal funds to "either directly or indirectly offset a reduction in the net tax revenue" through "a change in law, regulation, or administrative interpretation…that reduces any tax," 42 U.S.C. § 802(c)(2)(A), satisfies the constitutional requirement that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

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INTEREST OF THE AMICI CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. Through its Legal Center, the Buckeye Institute engages in litigation in support of the principles of federalism and separation of powers as enshrined in the U.S. Constitution. The Buckeye Institute is dedicated to upholding the balance of power between States and the federal government that the U.S. Constitution prescribed. It is also dedicated to creating a pro-growth tax system that rewards work and encourages entrepreneurship. The "Tax Mandate" challenged in this case directly threatens Buckeye's policy priorities, including those related to federalism, clear lines of government accountability, and pro-growth tax policy.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. All parties were timely notified of the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The American Rescue Plan Act of 2021 ("ARPA") conditions federal funding to States on a vague prohibition against using federal funds to "either directly or indirectly offset a reduction in the net tax revenue" through "a change in law, regulation, or administrative interpretation…that reduces any tax…or delays the imposition of any tax or tax increase." 42 U.S.C. § 802(c)(2)(A). What precisely this language proscribes is anyone's guess, as practically any action by a State may, intentionally or not, reduce tax revenues. The Tax Mandate's radical indeterminacy mires States in uncertainty and chills the exercise of their core taxing and police powers, violating the constitutional mandate that, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The Court's review is urgently needed so that States may again exercise those powers free from federal interference and legal uncertainty.

To get a sense of the Cartesian doubt the Tax Mandate imposes on States, consider some questions it raises. For example, what does it mean to use ARPA funds to "directly or indirectly" offset a reduction in tax revenue? Even the Secretary of the Treasury admitted to Congress that this is a "thorny" issue, and "[g]iven the fungibility of money, it's a hard question

to answer."[2] To this day, Treasury has never offered a definition of an "indirect offset"—despite being pressed for an answer by multiple federal courts. Nor does the Tax Mandate define what "a *change* in law, regulation, or administrative interpretation" is. Is renewal of existing tax credits a "change" or continuation? Must States assess every administrative adjudication, zoning variance, and guidance letter for its effect on tax revenue? States can play it safe only by making no policy change that may decrease tax revenue until the funding condition expires in 2026.

The Department of the Treasury, charged with administering the Tax Mandate, and recognizing these problems, attempted to provide some answers in a 117-page regulation. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338 (Jan. 27, 2022) (codifying 31 C.F.R. §35.1 *et seq.*). These regulations not only fail to clarify the fundamental vagueness of the Tax Mandate, but also effectively appoint the Secretary as a virtual viceroy over the States, with authority to review practically every decision that might affect tax revenue—*i.e.*, potentially any exercise of tax and police powers—and discretion to approve or reject those decisions. To rub salt in the wound, the Final Rule states that the Rule does not limit the Secretary's discretion "to take action to enforce conditions or violations of law," 31 C.F.R. § 35.4(a), and that Treasury may change the regulations

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[2] The Quarterly CARES Act Report to Congress: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs, 117th Cong., at 1:11:47–1:13:30 (Mar. 24, 2021) (testimony of Secretary Yellen).

at any time without notice and comment, 87 Fed. Reg. at 4445.

When Ohio and other States accepted ARPA funding, they had no way of knowing what the Tax Mandate's condition on those funds prohibited, and that uncertainty remains today. The lower courts meanwhile, are divided on when and how a State may obtain clarity on its obligations under ARPA, and a series of decisions have given legal assurance to some States—but not all—that the Tax Mandate is unconstitutional and does not constrain their policymaking discretion. The Constitution does not tolerate this disparate treatment of the States, and the pall over the exercise of their core powers, to persist. The Court's intervention is urgently needed, and this case is an ideal vehicle for it to resolve the question of the Tax Mandate's constitutionality once and for all, restore uniformity among the States, and permit the States to exercise their core taxing and police powers free from legal doubt.

The Court should grant the petition.

ARGUMENT

I. The Court's Review Is Urgently Needed To Clarify the Tax Mandate's Impact on States' Exercise of Their Core Police and Taxing Powers

States cannot freeze their policies in place to ensure they do not make a "change" that inadvertently violates the Tax Mandate, as interpreted by the Secretary. States must set budgets and respond in real-

time to changing conditions, and the Constitution preserves their power as sovereigns to do so. But because they all accepted ARPA funds subject to undefined federal oversight, States now exercise their core powers to set internal tax, health, and safety regulations in trepidation that doing so will violate the Tax Mandate.

States' most obvious concerns stem from the application of the phrase "indirectly offset" to changes to their tax laws. Any State that both spends ARPA funds and alters tax provisions in ways that may reduce tax revenues has arguably "indirectly offset" the revenue reduction with ARPA funds because whatever the State spends these funds on would otherwise have been funded by taxation. So how can States tell which changes (if any) are permissible and which are not? Neither Congress nor Treasury has explained. *See* § II.C, *infra* (addressing regulations). But States need certainty about the Tax Mandate's meaning to make informed decisions about legislative proposals like Ohio's House Bill 1, which would set a flat income tax.[3] Wisconsin, Kansas, Montana, Arkansas, Iowa, North Carolina, and Arizona are also currently considering changes to their tax laws that may reduce

[3] Patrick Gleason, *Rate-Cutting, Flattening Tax Reform Rolls On In Ohio, Wisconsin, Iowa, Kansas And Beyond*, Forbes, Feb. 24, 2023, https://www.forbes.com/sites/patrickgleason/2023/02/24/rate-cutting-flattening-tax-reform-rolls-on-in-ohio-wisconsin-iowa-kansas-and-beyond/.

revenues.[4] As of now, they do not know whether acting on these proposals would violate the Tax Mandate. Their only safe option is to do nothing.

Changes to tax law, however, are just the tip of the iceberg, given the Tax Mandate's sweeping language. After all, practically any exercise of State power may affect tax revenues. To wit, what qualifies as a "change in law, regulation, or administrative interpretation" subject to the Tax Mandate? Does an administrative adjudication that reduces just one individual's tax liability qualify as a "change in…administrative interpretation" such that States must prevent any Rescue Plan funds from "indirectly offset[ting]" its result? How will the Secretary view State agencies' application of existing definitions to new facts? Imagine an administrative decision that individuals with "long COVID syndrome" qualify for an existing tax credit for "disabled" persons. This decision would reduce taxes for those with long COVID, but is it a "change" in "administrative interpretation"? By what criteria will the Secretary decide? Does the answer turn on whether a Treasury bureaucrat thinks the decision is a straightforward application of the existing law defining "disabled" or a novel extension of it? If such a credit is due to expire, would renewing it be a "change in law"? Similarly, are new property tax assessments that might reduce new construction and thereby tax revenues a "change in law" subject to federal oversight?

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[4] *Id.*

These questions are not merely hypothetical. Ohio law provides for an annual sales tax "holiday" each August.[5] During that weekend, unofficially kicking off the "Back to School" period, sales of clothing items costing less than $75 and school supplies are exempt from sales and use tax. What if Ohio changes the dates to be more convenient for parents or to prevent crowding in stores? Can the State add additional supplies to the approved list, such as hand sanitizer? Either decision could lower tax revenue. If ARPA funds indirectly offset that reduction, has Ohio violated the Tax Mandate? Ohio has no way of knowing, nor does Alabama, Iowa, and at least four other States with similar sales tax holidays.[6]

Even had the Tax Mandate informed States what constitutes a relevant "change," States still may not know whether a given change is one that "reduces any tax." That phrase, on its face, extends beyond purposeful tax cuts to every potentially revenue-reducing decision. That includes prohibiting sale of otherwise-taxable Cannabidiol products, increasing access to justice by reducing filing fees, mandating increased electrical vehicle sales causing reduced gas-tax collections, and requiring licensure of a profession thereby reducing taxable services.

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[5] Ohio Rev. Code § 5739.02.

[6] Ala. Code §§ 40-23-211–213; Iowa Code § 423.3(68)(a)(2); Okla. Admin. Code. § 710:65-13-511; S.C. Code. § 12-36-2120(57); W. Va. Code § 11-15-9s; Fla. Dep't of Revenue, *Tax Holidays and Exemption Periods*, https://floridarevenue.com/pages/salestaxholidays.aspx.

One can imagine that a new wave of COVID-19 or another infectious disease might lead a State to prohibit property-tax assessors from making their rounds during an outbreak. That decision would "delay[] the imposition of any tax or tax increase" and so seemingly violate the Tax Mandate. Likewise, a governor, responding to the same crisis, might prohibit indoor dining, causing a drop in sales-tax revenue. Would the Tax Mandate really put States to the Hobson's choice between forgoing such health and safety regulations and violating ARPA? Less dramatically, lowering the speed limit to save lives is likely also to reduce gas-tax collections and taxable commerce. So must States make traffic regulations cognizant of Tax Mandate concerns?

These are the sort of policy decisions that form the core of States' police powers constitutionally reserved from federal oversight. The States need this Court's intervention to clarify how, if at all, the Tax Mandate limits the exercise of their core powers.

Besides questions of scope are questions of method. How are States to know whether a particular policy decision results in a "reduction" in "net tax revenue"? The statute provides no baseline against which to measure a "reduction" and no timeframe for assessing a policy's effects. If a State reduces income tax rates based on a forecast that the cut will increase tax revenue by stimulating economic growth, has that State violated the Tax Mandate? Such questions are not merely hypothetical. The Buckeye Institute's Economic Research Center performs dynamic analysis of

state budgets to model just these kinds of questions—i.e., whether decreasing tax rates will stimulate economic growth, and correspondingly increase tax revenues—and it has done so in 11 states to date. If a State reduces income tax based on The Buckeye Institute's dynamic analysis, how quickly must the forecasted growth materialize, and how must States prove the growth resulted from the rate cut?

Finally, when a "reduction" does occur, what funds, if any, may States draw on without having "indirectly offset a reduction" using ARPA funds? Can the State issue bonds or draw on a rainy-day fund to cover the difference? Are streams of tax revenue from different sources assessed separately such that a drop in say, income tax revenue, might permissibly be offset by an increase in revenue from sales tax? The Tax Mandate does not say.

Then there are equitable considerations. What, for example, will be the fate of Arizona, which conformed its own tax policy to federal law by exempting from state income tax the first $10,000 in employment aid and forgiven Paycheck Protection Program loans?[7] West Virginia made similar changes for conformity's sake.[8] These decisions reduced tax revenue. Did these States violate the Tax Mandate by following Congress's lead?

Congress has not given the States a light to legislate by. Unless and until the Court acts, States cannot

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[7] Ariz. Rev. Stat. § 48-701.
[8] W. Va. Code § 11-24-3.

see where the boundaries of federal and state power have been redrawn.

II. The Tax Mandate Is Fundamentally Vague and Therefore Unenforceable

A. Conditions on States' Receipt of Federal Funds Must Be "Unambiguous[]"

"The legitimacy of Congress' power to legislate under the spending power…rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. Accordingly, this Court has consistently emphasized that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (same). To determine whether a condition is clear enough, a court "must view the [funding offer] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds." *Arlington*, 548 U.S. at 296. "There can, of course, be no knowing acceptance if a State is unaware of the conditions *or is unable to ascertain what is expected of it*." *Pennhurst*, 451 U.S. at 17 (emphasis added). Congress therefore must provide "clear notice regarding the liability" that comes with the funding. *Arlington*, 548 U.S. at 296.

As this Court recently explained, the limits on Congress's Spending Clause authority are "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012); *see also Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 655 (1999) ("A vital safeguard for the federal balance is the requirement that, when Congress imposes a condition on the States' receipt of federal funds, it must do so unambiguously." (quotation marks omitted)) (Kennedy, J., dissenting).

The requirement that federal funding conditions be unambiguous is one of several related clear-statement rules that preserve the vertical separation of powers. *See generally* Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statements Rules*, 2004 Mich. St. L. Rev. 123, 132 (2004). Such rules "acknowledg[e] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *United States v. Bass*, 404 U.S. 336, 349 (1971). For these reasons, the Court has refused "to give the

state-displacing weight of federal law to mere congressional *ambiguity*." *Gregory*, 501 U.S. at 464 (cleaned up).

B. The Tax Mandate Is Anything But Unambiguous

The Tax Mandate imposes a fundamentally ambiguous condition on States' receipt of ARPA funds. It therefore violates the Spending Clause and impermissibly intrudes on States' exercise of the internal police and taxing powers the Constitution withholds from the national government. *See* U.S. Const. art. I, § 8, cl. 1. The open questions discussed above illustrate that, when the States accepted ARPA funds, they could not have been "cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207. Congress failed to set forth any clear condition.

As shown above, the Tax Mandate fails to define the critical phrases "indirectly offset," "change in law, regulation, or administrative interpretation," and "reduces any tax." Having accepted needed funds in the midst of an unprecedented public-health emergency, the States now have not an inkling of an idea of what "the consequences of their participation" will be. *See Dole*, 483 U.S. at 207. As the Sixth Circuit observed in a companion case, the Tax Mandate is marked by a startling "lack of inherent content." *Kentucky v. Yellen*, 54 F.4th 325, 350 (6th Cir. 2022).

In short, the only thing the Tax Mandate's language communicates clearly is that it imposes some kind of condition on funding offered to States. But the

Constitution requires that, "when the Federal Government takes over...local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quotation marks omitted). Because the Tax Mandate fails to provide such clarity, it is unconstitutional.

C. Treasury's Regulations Are Irrelevant and Inadequate

Treasury's regulations attempting to provide content to the Tax Mandate cannot and do not fix the problem.

As a constitutional matter, funding conditions must be clear prior to acceptance "so that the States can knowingly decide whether or not to accept those funds." *Pennhurst*, 451 US. at 24. Treasury's Final Rule was promulgated *after* Ohio and other States accepted ARPA funds, too late to contribute to a knowing decision.

More fundamentally, no agency action could ever cure an ambiguous spending condition. The Constitution assigns the power to spend for the general welfare to Congress alone, *see* U.S. Const. art. I, § 8, cl. 1, so it follows that Congress alone must decide what conditions, if any, accompany its spending. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001) (rejecting the proposition that "an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of

the statute"). Also, a legislative condition is more permanent than a regulatory one, and only legislative decisionmakers are electorally accountable. These safeguards for States are especially necessary when a condition impinges on their core tax and police powers.

And nothing prevents Treasury from changing the rules of the game after a State has already played its hand. Regulations are subject to change with little or no notice. *See* 5 U.S.C. § 553(a) & (b) (listing exceptions to notice and comment). Indeed, Treasury claims that the Final Rule here was exempt from notice and comment as a "matter relating to agency…grants" and for "good cause." 87 Fed. Reg. at 4445 (quoting 5 U.S.C. § 553). In Treasury's view, it may unilaterally rewrite States' obligations under the Tax Mandate at the drop of a hat. Whether or not that position is consistent with the Administrative Procedure Act, it underscores that agency rulemaking cannot backfill Congress's failure to enact unambiguous and durable conditions on States' acceptance of federal funds.

In any event, Treasury's Final Rule fails to provide the certainty and clarity required of funding conditions. It tries and fails to answer some of the questions raised above, while refusing to answer others. For example, the Final Rule's 117 pages include a complex page-long formula at 31 C.F.R. § 35.8(b) that, along with an additional seven preamble pages, attempts to define how Treasury will determine what constitutes a Tax Mandate "violation." That purported guidance leaves States with no "explanation on how to (1) calculate a 'reduction' in net tax revenue, (2) determine whether such a reduction resulted from

a tax cut, and (3) tell what particular conduct constitutes an 'indirect' offset." *Kentucky v. Yellen*, 54 F.4th at 363 (Nalbandian, J. concurring in part and dissenting in part). And even if the regulatory formula were crystal clear, an adjacent provision renders it inconsequential by stating that no part of the Rule "shall limit the authority of the Secretary to take action to enforce conditions or violations of law, including actions necessary to prevent evasions of this subpart." 31 C.F.R. § 35.4(a). So much for providing guidance.

Among the questions Treasury refused to answer is "whether covered changes must be broad-based policies or whether administrative decisions applicable to individuals would be considered covered changes." 87 Fed. Reg. at 4425. Treasury responded that an administrative decision applicable to just one individual is a covered change if it "result[s] from a change in law, regulation, or administrative interpretation" (*i.e.*, a covered change), *id.*, which is equivalent to saying that a decision is a covered change if it is a covered change. In the end, the Final Rule tells States only that a violation of the Tax Mandate is whatever the Secretary says it is.

Ultimately, the Final Rule only confirms the all-encompassing sweep and fundamental ambiguity of the Tax Mandate. It establishes a proto-receivership under which State governments and their budget offices are mere functionaries reporting to a federal superintendent. It requires States to quantify every policy decision that they make, and then identify an offset for any decisions that reduce revenue to the satisfaction of the Treasury Department. And, despite all that, it indicates that the Treasury will be monitoring

the States and—at its discretion—may determine that an unsuspecting State is evading the restrictions and seek recoupment of funds, notwithstanding compliance with the onerous procedures it has put in place. This regime is inimical to constitutional federalism.

III. The Court's Review Is Inevitable, and This Case Presents an Ideal and Timely Vehicle

Two courts of appeals have ruled that the Tax Mandate is unconstitutionally vague, affirming permanent injunctions against enforcement of the Tax Mandate with respect to thirteen States. *W. Virginia by & through Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1140 (11th Cir. 2023); *Kentucky v. Yellen*, 54 F.4th 325, 358 (6th Cir. 2022). Meanwhile, the remaining States are still subject to the Tax Mandate's uncertain requirements. Those States and their citizens should not have to bear this uneven application of the law. It is practically inevitable that the Court will review the constitutionality of the Tax Mandate, and there is no reason, after so much percolation on that issue in the lower courts, for this Court to delay its review.

This case presents a clean and timely vehicle for the Court to resolve the issue once and for all. The State of Ohio has consistently challenged the Tax Mandate's constitutionality from day one, and its circumstances are identical to those of other states whose exercise of core powers lays beneath a cloud of uncertainty. Although the Court below held Ohio's

challenge to be moot, that determination was intertwined with its view of the merits, in particular its acceptance of the view that Treasury's rulemaking could cure or at least obviate the injury inflicted by the statutory Tax Mandate. *See* Pet.App.16a–18a. And the question of mootness is itself independently worthy of review. Not only has it split the appeals courts, *see* Pet.23–25, but it is also indisputably important, given the apparent injury a State suffers when federal law casts a pall over the exercise of its core police and taxing powers. If the Court does grant review on the mootness question, which it should do, it should also grant review on the Tax Mandate's constitutionality so as to provide the States the certainty of law that they desperately need.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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