No. 22-880

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF TEXAS, THE COMMONWEALTH OF VIRGINIA AND SEVEN ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the State of Texas, the Commonwealth of Virginia, and the States of Idaho, Mississippi, Montana, Nebraska, New Hampshire, South Dakota, and Utah (collectively, the *Amici* States). All of the *Amici* States have a compelling interest in protecting their sovereign authority to set tax policy within our federal system of dual sovereigns. Moreover, the States have a strong interest in setting their own tax policies without federal interference. As explained below, this Court should grant the petition to ensure the States are not subject to coercion from Congress and to preserve our system of dual sovereigns.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Our "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) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). That system gives to Congress only the powers enumerated in the Constitution; States retain plenary legislative authority over other subjects—including the power to determine their own tax policies. "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.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 577 (2012) (op. of Roberts, C.J.) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)). "Otherwise the two-government system established by the Framers would give way to a system

[1] Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel of record of their intent to file this brief at least 10 days prior to the due date for the brief.

that vests power in one central government, and individual liberty would suffer." *Id.*

The taxing power is particularly integral to State sovereignty. *Dep't of Revenue v. ACF Indus., Inc.,* 510 U.S. 332, 345 (1994). The power to tax "is indispensable to [the States'] existence," and the "power of self[-]government . . . cannot exist distinct from the power of taxation." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 199 (1824); *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 548 (1830). Federal intrusion on States' taxing power thus threatens our system of federalism and, in turn, individual liberties that "derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (quoting *New York*, 505 U.S. at 181).

Congress violated these bedrock principles and impinged on States' sovereign authority to tax in the American Rescue Plan Act (ARPA). Pub. L. No. 117-2, § 9901, 135 Stat. 4, 223 (2021). ARPA leveraged a once-in-a-century pandemic to take control of state tax policy. It offered desperately-needed funding for critical state programs that had suffered during the pandemic, including healthcare and infrastructure. But Congress failed to clearly explain the conditions that attached to ARPA funds. Rather than imposing straightforward conditions like identifying the specific objects on which the funds could be used, *see* 42 U.S.C. § 802(c)(2)(A), Congress implemented the Tax Mandate. The Mandate purports to prohibit the "use [of] funds provided . . . to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation," including by "delay[ing] the imposition of any tax or tax increase," as a condition of receiving the funds. *Id.*

That requirement is unconstitutionally ambiguous. States suffer when forced to exercise their sovereign powers to set tax policy under a sword of Damocles created by Congress. States are left without the ability to predict accurately whether the Secretary will deem their tax policy decisions to be impermissible under the ARPA or Treasury's rules, either now or at some point in the future. The institution of these sorts of ambiguous conditions is not a permissible exercise of the Spending Power. And it will predictably chill States' exercise of their sovereign authority to tax because the States cannot predict in advance when the Treasury Department will conclude the Tax Mandate has been violated—potentially exposing States that exercise their taxing power to recoupment actions worth billions of dollars.

The Tax Mandate is also unconstitutionally coercive. Congress offered $5.4 billion to Ohio, $15.8 billion to Texas, and $4.3 billion to Virginia in a time of dire fiscal need—when State budgets were stretched both by decreases in revenue and increases in expenditures brought on by the COVID-19 pandemic. The States "as a practical matter" were "unable to refuse to participate" in ARPA by rejecting those funds. *NFIB*, 567 U.S. at 680 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). Seeking to control the States taxing authority through such an offer is "economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582 (plurality op.).

The Court should grant the petition both to relieve the States from the unconstitutional infringement on their sovereignty that the Tax Mandate represents and to clarify its Spending Clause jurisprudence. The power to set taxes and spend money has always been core to the sovereign authority of the States. *See* The Federalist No.

45 (James Madison). Yet Congress has used a once-in-a-century pandemic to usurp this authority. This case presents an opportunity for this Court to clarify which uses of the Spending Clause power represent "relatively mild encouragement" and which represent "a gun to the head" of States. *NFIB*, 567 U.S. at 581 (plurality op.). The ARPA's Tax Mandate is surely the latter.

ARGUMENT

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. This Court has "long recognized that Congress may use [the spending] power to grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take." *NFIB*, 567 U.S. at 576 (plurality op.) (quotation marks omitted). But this Court has also "recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives"—limits that are "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Id.* at 576–77 (plurality op.). This case calls for robust enforcement of the limits the Spending Clause places on Congress's power to control States' taxing power, which is essential to their sovereignty.

In our federal system, the several States are sovereigns distinct from the United States. The power to influence their authority by awarding or withholding money extracted by federal taxation from the States' taxpayers, if left unchecked, would swallow federalism whole. *NFIB*, 567 U.S. at 577 (plurality op.). If Congress' Spending Clause power were "limited only by Congress' notion of the general welfare, the reality, given the vast

financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)). The Spending Clause power, "if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting).

To protect the federal balance, this Court has conceived of the use of the Spending Clause power to accomplish indirectly what Congress could not accomplish directly as "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The "legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* There can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* 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 (plurality op.); *id.* at 578 (Congress may neither "command[] a State to regulate or

indirectly coerce[] a State to adopt a federal regulatory system as its own.").

To enforce the requirement that a State must "voluntarily and knowingly accept" the conditions attached to Spending Clause legislation, this Court has imposed two important conditions on such legislation. *See*, *e.g.*, *Dole*, 483 U.S. at 207 (spending power is "subject to several general restrictions articulated in [this Court's] cases"). First, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (cleaned up). Second, the offer cannot be coercive: Congress may not attach conditions to funding offers that States have no "legitimate choice" but to "accept." *NFIB*, 567 U.S. at 578 (plurality op.); *see also Dole*, 483 U.S. at 211 ("[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." (quotation marks omitted)).

The conditions the federal government placed on ARPA funds through the Tax Mandate violate both limits—and in so doing substantially harm the States by circumscribing their ability to set their own taxing policy. This Court should grant the writ to enforce those limits. States sustain serious harm when forced to make tax law under an unconstitutionally ambiguous Spending Clause condition. And if the severe condition placed on funds crucial to the States' recovery from an unprecedented global pandemic was not coercive, it is difficult to imagine what is.

I. The States are Harmed by Unconstitutionally Ambiguous Spending Clause Conditions.

As this Court has explained, the States' ability to "voluntarily and knowingly" accept spending conditions "is critical to ensuring that Spending Clause legislation" respects the separate sovereignty of the States. *NFIB*, 567 U.S. at 577 (plurality op.). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," meaning "[t]he legitimacy of Congress's 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. Where "a State is unaware of the conditions" attached to Spending Clause legislation "or is unable to ascertain what is expected of it" then, "[t]here can, of course, be no knowing acceptance" of those conditions. *Id; see also Dole*, 483 U.S. at 207. This case illustrates the importance of these principles.

A. The Tax Mandate is ambiguous and unascertainable in multiple respects, as Ohio's Petition ably shows. Pet. 30–33. The Tax Mandate prohibits States from "directly or indirectly offset[ing] a reduction'" in "net tax revenue . . . resulting from a change in law, regulation, or administrative interpretation" during the covered period, which extends for years. 42 U.S.C. 802(c)(2)(A). But it does not explain what constitutes an indirect offset. *Id.* Nor does it provide any baseline whatsoever for determining what constitutes a reduction in "net tax revenue." *Id.*

Because "[m]oney is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010), and many States must balance their budgets, the Tax Mandate's requirement that States may not indirectly reduce tax revenue is most naturally read as prohibiting any tax cut.

But the absence of any clarity in the Tax Mandate renders the phrase ambiguous and prevents States from being able to ascertain which tax cuts may run afoul of the Tax Mandate and expose them to recoupment actions. At a minimum, "the phrase directly or indirectly offset seems extraordinarily expansive." *West Virginia v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1145 (11th Cir. 2023) (quotation marks omitted).

So too the term "reduction in net tax revenue." 42 U.S.C. 802(c)(2)(A). The Tax Mandate provides no standard against which to measure such a reduction, though it necessarily presupposes some baseline. The Tax Mandate does not explain whether it means a reduction in net tax revenue against state law as it existed before the changed provision, against the last year's tax revenue, or some other baseline. And it fails to explain whether expected tax receipts or actual tax receipts are relevant to that calculation. This failure is particularly important because the economic dislocation associated with the COVID-19 pandemic created significant uncertainty in projections that many States rely on during their budgeting process.

This Court need not rely on the States' representations or on determinations reached by the lower courts to determine the Tax Mandate is ambiguous. Instead, Secretary Yellen herself testified to Congress that the Tax Mandate is ambiguous. She explained that the Tax Mandate raises a "host of thorny questions." U.S. Senate Comm. on Banking, Housing, & Urban Affairs, *The Quarterly CARES Act Report to Congress: Committee Hearing*, 1:10:00–1:13:36 (Mar. 24, 2021), https://tinyurl.com/45mf9ayh. When asked "what is directly or indirectly offsetting a tax cut," the Secretary could not answer. *Id.* "Given the fungibility of money, it's a hard

question to answer," she said. *Id.* Reading the Tax Mandate is no less challenging for States, which are entitled to know "the consequences of their participation" before they "exercise their choice" to accept federal money. *Pennhurst*, 451 U.S. at 17.

The States' inability to ascertain the scope of the Tax Mandate's ambiguous provisions harm them. As the Eleventh Circuit concluded, ARPA's ambiguous offer caused sovereign injury to the States' ability to set their own taxing policy, a harm that "has already occurred and is continuing." *West Virginia*, 59 F.4th at 1136. The "States have now accepted the deal with its allegedly unconstitutional condition, and that condition is a present and continuous infringement on state sovereignty." *Id.* "The problem is not just that the States cannot know what" the Tax Mandate "means as to a *particular* tax cut; it is that the States cannot know what it means as to *any* tax cut." *Id.* at 1144. "[B]ecause money is fungible, the Secretary could always assert a plausible argument that a state, after a tax cut, committed an unlawful indirect offset of the attendant revenue shortfall." *Id.* at 1145.

Or, as the Ninth Circuit explained, States have been harmed when "an allegedly unconstitutional offer is made to them," *Arizona v. Yellen*, 34 F.4th 841, 852 (9th Cir. 2022), because they "will face serious consequences in losing control over [their] taxing policies and being held to a funding offer that [they] do not understand," *id.* at 853. Nor is this sovereign injury intangible. "ARPA's vague conditions chill the States from enacting . . . tax cuts" because "they fear imminent recoupment action for exercising their sovereign-taxing authority." *Kentucky v. Yellen*, 54 F.4th 325, 361 (2022) (Nalbandian, J., concurring in part and dissenting in part). Simply put,

because of the Tax Mandate, the States cannot confidently exercise their sovereign taxing authorities without fear of a recoupment action. "The only way for the States to achieve unequivocal compliance with the Act is to refrain from cutting taxes during the covered period." *West Virginia*, 59 F.4th at 1138.

B. The Sixth Circuit erred when it concluded that Treasury rulemaking rendered this case moot. Rather, Treasury's regulations highlight the ambiguity of the statute, and this Court should grant certiorari to vindicate the States fundamental sovereign interests in their taxing authority. Pet. App. 11–15a.

"'A case might become moot" only "'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968)). That "heavy burden," *id.*, rests on the Treasury Department. A case becomes moot when the party asserting mootness demonstrates that "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172, (2013) (quoting *Knox v. Service Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). But "[a]s 'long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* (quoting *Knox*, 567 U.S. at 307).

The court of appeals primarily relied on Treasury's construction of the Tax Mandate in regulations and briefing to conclude that this case was moot. In doing so the court of appeals held that there was no "reasonable possibility" Treasury would "adopt Ohio's broad view of" the Tax Mandate. Pet. App. 18a. Treasury's construction

of the Tax Mandate in regulations does not moot this case for at least three reasons.

First, as several courts of appeals have concluded, a regulation cannot provide the clarity the Spending Clause requires after Congress passes legislation. *See West Virginia*, 59 F.4th at 1139. After all, "the ability to place conditions on federal grants ultimately comes from the Spending Clause, which empowers Congress, not the Executive, to spend for the general welfare." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021); *see also Kentucky*, 54 F.4th at 353-54; *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560-61, 567 (4th Cir. 1997) (en banc) (per curiam). These holdings are consonant with this Court's instruction that "if *Congress* desires to condition the States' receipt of federal funds" those conditions must be unambiguous. *Dole*, 483 U.S. at 207 (emphasis added).

Second, the Treasury Department's atextual rule-making does not obviate the States' harms. The Treasury regulations treat inflation-adjusted 2019 figures as a baseline for calculating a reduction in net tax revenue. 31 C.F.R. §§ 35.3, 35.8(b)(3), (c)(1). That interpretation is implausible since Congress used different language to expressly incorporate a 2019 baseline into a neighboring subsection. *See* 42 U.S.C. § 802(c)(1)(C) ("reduction in revenue . . . relative to revenues collected in the most recent full fiscal year of the State . . . prior to the emergency"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The

Treasury rule likewise includes a safe-harbor provision that purports to exempt changes to state law that result in less than a one percent decrease in State revenue. 31 C.F.R. §§ 35.8(b)(2). But that safe harbor appears nowhere in the statute and is likewise an implausible interpretation. The statute itself requires States to report all changes that may reduce revenue. 42 U.S.C. § 802(d)(2)(A).

Third, the Treasury Department's regulations do not resolve the Tax Mandate's ambiguities in any event. Whatever the effect of the rulemaking, it provides that "[n]othing in this part 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). Even if they abide by the terms of the Treasury Department's rule, the States still cannot be confident that the Secretary will not retroactively determine that they have evaded the Tax Mandate and seek recoupment of funds. As Judge Nalbandian recognized, "the Rules do not limit ARPA's enforcement; they instead provide the Secretary broad enforcement discretion." *Kentucky*, 54 F.4th at 363 (Nalbandian, J., concurring in part and dissenting in part). "[T]he Rules still narrow the range of permissible tax policies the States may enact, which in turn takes a toll on the States' citizens and economies." *Id.*

II. The Coercive Nature of ARPA Funds Demonstrates the Need to Invigorate the Limits of Congress's Power Under the Spending Clause.

Congress enacted ARPA to "mitigate the devastating economic effects of COVID-19." Pet. App. 2a. Ohio, like all other States, suffered significantly: in 2020, its tax revenues came in $1.1 billion below estimates, and its need for state services to combat the global pandemic

"ballooned." Pet. App. 118a, 82a. Accordingly, when Congress offered $5.4 billion to Ohio, $15.8 billion to Texas, and $4.3 billion to Virginia for COVID-19 relief,[2] the significant size of the offer—in the context of the acute fiscal crisis caused by the pandemic—left States with no meaningful choice but to accept the funds. In that context, the surrender of a core aspect of state sovereignty cannot be justified because the offer was coercive. It is "much more than 'relatively mild encouragement'—it is a gun to the head." *NFIB*, 567 U.S. at 581 (plurality op.) (quoting *Dole*, 483 U.S. at 211). The Tax Mandate therefore exceeds Congress's power under the Spending Clause and threatens the role of the States in our federal system.

A. The States were coerced into taking ARPA funds because of the unprecedented economic pressures created by the COVID-19 pandemic, which made the funds especially important to State budgets and left the States particularly vulnerable to federal coercion. The sheer size of the offer of funds and the context in which the offer was made left States no meaningful choice but to accept the funds and the conditions that came with them.

The COVID-19 pandemic was "far from the typical case," *NFIB*, 567 U.S. at 579 (plurality op.), as it caused tremendous economic and financial harm to American citizens. The Centers for Disease Control estimates that the virus infected more than 100 million people and killed more than 1.1 million.[3] The unemployment rate at the

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[2] U.S. Dep't of Treasury, "Allocation for States: Coronavirus State and Local Fiscal Recovery Funds," (last visited Apr. 11, 2023), https://tinyurl.com/3jp2e38b.

[3] Centers for Disease Control, *COVID Data Tracker Weekly Review* (last updated Apr. 11, 2023), https://tinyurl.com/5n8hc35a.

beginning of the pandemic reached levels not seen since the 1930s, and the majority of those who lost their jobs were in low-income families.[4] And over 400,000 small business closed during the first year of the pandemic alone. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26786 & n.6 (May 17, 2021).

The pandemic—especially before federal aid—also caused tremendous economic and financial harm to States. "In responding to the public health emergency and its negative economic impacts," the States saw a substantial spike in the demand for and cost of government services, "often amid substantial declines in revenue due to the economic downturn and changing economic patterns during the pandemic." 86 Fed. Reg. at 26786. Faced with the prospect of millions of their citizens losing their jobs, seeking care in overwhelmed hospitals, or dying, States had little choice but to accept whatever conditions Congress placed on rescue funding. That is textbook coercion. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587 (1937) (Congress lacks any power to "drive the state Legislatures under the whip of economic pressure into" doing "the bidding of the central government").

B. This Court should invigorate the limits of Congress's Spending Clause power in response to the ARPA's egregious intrusion on state sovereignty. Congress not only forced every State to surrender its sovereign taxing authority; it went a step further by delegating the authority seized from the States to the Secretary of the Treasury. Although the Secretary has promised not to stringently police the power Congress delegated

[4] Center on Budget and Policy Priorities, *Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships* (last visited Apr. 11, 2023), https://tinyurl.com/3rh5rnzk.

to Treasury, Pet. App. 17a–18a, the Secretary's discretionary decision not to exercise her delegated authority to superintend state tax policy does not cure the unconstitutional coercion and delegation. That is especially true given that the current federal administration has punished States with alacrity for their policy choices by withdrawing COVID-19 relief funding.[5]

The Treasury Department's regulation announcing that it would not enforce the Tax Mandate as if it barred tax cuts *per se* provides no protection for States either. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338 (Jan. 27, 2022). That regulation gives the Secretary broad authority to act on any "evasions" of the Tax Mandate that she concludes, with the benefit of hindsight, may have taken place. 31 C.F.R. § 35.4(a). States therefore remain exposed to retrospective enforcement by the Secretary.

At bottom, the Tax Mandate coerces States not to cut taxes, irrespective of economic, social, and fiscal changes subsequent to the ARPA. States had no choice but to accept the offer of funds in light of the serious economic and fiscal pressures created by the pandemic. Congress decided to use that opportunity to premise the receipt of funds—funds Congress had collected from the taxpayers living in the States to which the offer was being made—on the surrender of States' control over their own tax policy. That exceeds the scope of Congress's power under the Spending Clause. Little would remain of the Framers' limits on Congress's legislative power if the Spending Clause permitted Congress to oust States of their

[5] *See* David Lawder, *U.S. Treasury threatens to claw back Arizona funds over anti-masking school grants,* Reuters (Jan. 14, 2022), https://tinyurl.com/2tftt3zx.

core sovereign authority. This Court should grant the petition and rebuff Congress's overreach.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2023

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