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, RICHARD K. DELMAR, IN HIS OFFICIAL CAPACITY AS ACTING INSPECTOR GENERAL OF THE DEPARTMENT OF THE TREASURY, AND THE U.S. DEPARTMENT OF THE TREASURY,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The COVID-19 pandemic devastated the American economy. In response, Congress passed the American Rescue Plan Act of 2021, which offered $195 billion in aid to the States. Pub. L. No. 117-2, 135 Stat. 4. The States had no choice but to accept; refusing the money would have given other States and their citizens a significant competitive edge in emerging from the pandemic. Ohio accepted around $5.4 billion. But accepting the money meant agreeing to the Rescue Plan's "Tax Mandate," which bars States from using Rescue Plan funds to "directly or indirectly offset a reduction in … net tax revenue … resulting from a change in law, regulation, or administrative interpretation." 42 U.S.C. §802(c)(2)(A).

This case presents two questions, the first of which has divided the circuits and the second of which is of immense importance to the States and the Treasury.

1. Do courts have jurisdiction over the States' constitutional challenges to the Tax Mandate?

2. Is the Tax Mandate unconstitutional?

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REPLY

The Spending Clause permits Congress to place conditions on the States' receipt of federal money. But Congress may impose conditions *only* through unambiguous terms in non-coercive offers. *See South Dakota v. Dole*, 483 U.S. 203, 207–08, 211 (1987).

These principles doom the Tax Mandate—a condition hidden away within the American Rescue Plan Act. The Mandate forbids States from using Rescue Plan funds to "directly *or indirectly* offset" any "reduction in [their] net tax revenue" caused by a tax cut. 42 U.S.C. §802(c)(2)(A) (emphasis added). That language is vacuous; given the fungibility of money, there is no way of ascertaining whether Rescue Plan funds were used to "indirectly offset" lost tax revenue. *See West Virginia v. Treasury*, 59 F.4th 1124, 1143–46 (11th Cir. 2023); Pet.App.54a–63a. Yet each State was compelled to accept these vacuous terms; States had to agree to the Mandate to obtain the billions of dollars available through the Rescue Plan, and any State that rejected that money would have put itself and its citizens at an immense competitive disadvantage in recovering economically. Because the Tax Mandate is an ambiguous term attached to a coercive offer, it is unconstitutional twice over.

Both circuits to have reached the merits have held the Mandate unconstitutional on the ground that it denies the States the clear terms to which they are constitutionally entitled. *See West Virginia*, 59 F.4th at 1140–48; *Kentucky v. Yellen*, 54 F.4th 325, 346–47 (6th Cir. 2022). But the circuits are split regarding whether and when the States may challenge the Mandate. *Compare West Virginia*, 59 F.4th at 1135–38 *and Arizona v. Yellen*, 34 F.4th 841, 853 (9th Cir.

2022), *with Kentucky*, 54 F.4th at 335–46 *and* Pet. App19a–24a, *with Missouri v. Yellen*, 39 F.4th 1063, 1067–70 (8th Cir. 2022).

The Secretary (which is how this brief will refer to the defendants collectively) concedes that the jurisdictional issue is the subject of a circuit split. *See* BIO. 14–15. And her actions confirm that she considers the merits question whether the Mandate is constitutional to be important: in both cases where a circuit has held the Tax Mandate unconstitutional, the Secretary has petitioned for *en banc* review. *See id*. The Sixth Circuit denied *en banc* review already. *Kentucky v. Yellen*, __ F.4th __, 2023 WL 3221058 (6th Cir. 2023) (order denying rehearing *en banc*). The Eleventh Circuit will likely follow suit. So it is a matter of time before the Secretary petitions this Court to decide the jurisdictional and merits questions presented by Ohio's case. Indeed, the Secretary's Brief in Opposition silently concedes the point by failing to deny it. And while the Secretary would prefer that the Court await one of her petitions before agreeing to resolve these questions, waiting will harm the States further. Because they must expend their Rescue Plan funds by 2025, delaying review will leave States with little time to make tax policy free from the "pall" cast by the Tax Mandate. Pet.App.43a.

The Court should grant Ohio's petition. At minimum, it should hold this case and consider it alongside the Secretary's forthcoming certiorari petitions in cases presenting the same issues.

I. The Court should grant certiorari to resolve the acknowledged split.

The question of whether and when States may bring challenges to the Tax Mandate divides the circuits.

A. The circuits are split regarding the Final Rule's effect on Article III jurisdiction.

1. The Tax Mandate injures Ohio in three ways. Pet.13.

First, the Tax Mandate inflicts an "imminent recoupment" injury. Because the Mandate arguably forbids States that cut taxes from spending Rescue Plan funds, and because Ohio cut taxes, Ohio is subject to a potential recoupment action by the Secretary. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014).

Second, the Mandate inflicts "sovereign-authority" injuries. By denying Ohio the unambiguous and noncoercive terms to which States are constitutionally entitled in Spending Clause legislation, the Mandate interfered with Ohio's sovereignty before Ohio accepted Rescue Plan funds. Post-acceptance, Ohio continues to suffer a sovereign-authority injury, since it must comply with a spending condition that Congress lacked authority to impose. Pet.App.41a–46a; *West Virginia*, 59 F.4th at 1137–38.

Third, Ohio's having to monitor and prove its compliance with the Tax Mandate inflicts a "compliance-cost" injury.

2. Whether and when these injuries satisfy the injury-in-fact requirement of Article III depends on the

circuit. More precisely, it depends on what the circuit makes of a regulation that the Treasury promulgated after the States sued. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26786-01, 26810 (May 17, 2021). That regulation—the "Final Rule"—announces a framework for identifying Tax Mandate violations. The circuits are split on whether the Final Rule deprives courts of Article III jurisdiction over challenges to the Tax Mandate. (Additionally, the Ninth Circuit held that Arizona had standing to challenge the Tax Mandate, though its opinion does not consider the Final Rule. *Arizona*, 34 F.4th at 848–53 & n.2.)

In the Eleventh Circuit, the Final Rule does not deprive the States of Article III jurisdiction. In *West Virginia v. Treasury*, the circuit held that States sustained *at least* the imminent-recoupment and sovereign-authority injuries before the Final Rule's promulgation, giving them Article III standing to sue. 59 F.4th at 1136–38. The Eleventh Circuit further held that the States are continuing to suffer *at least* the sovereign-authority injury as long as they remain subject to the Tax Mandate; the Final Rule does not, and cannot, alleviate the Mandate's "present and continuous infringement on state sovereignty." *Id.* at 1136. Because the States continue to suffer this injury notwithstanding the Final Rule, that rule did not moot their challenges.

Ohio would have prevailed under the Eleventh Circuit's rule. But it lost in the Sixth Circuit, under logic the Eleventh Circuit rejected expressly. *Compare id.* at 1139, *with Kentucky*, 54 F.4th at 338–41 *and* Pet. App.14a–23a. In the Sixth Circuit's view, the Final Rule cured the imminent-recoupment and sovereign-authority injuries, mooting any case seeking to

vindicate those injuries. Pet.App.17a–21a. States might overcome mootness by proving a compliance-cost injury. But that injury, the Sixth Circuit held, must be proved with evidence *precisely* identifying the costs sustained from having to monitor and demonstrate compliance with the Mandate. *Kentucky*, 54 F.4th at 342–43. Ohio introduced no such evidence, so the Sixth Circuit deemed its challenge moot. Pet.App.23a.

Ohio presumably would have lost in the Eighth Circuit, too. That Court eschewed mootness, and held that Missouri never even had standing to challenge the Tax Mandate. Even though the Treasury promulgated the Final Rule *after* Missouri sued, the Eighth Circuit determined that the rule extinguished the imminent-recoupment and sovereign-authority injuries at the case's outset. *Missouri*, 39 F.4th at 1069–70. (The Eighth Circuit did not address the compliance-cost theory.)

In sum, three circuits took three different approaches to Article III jurisdiction in Tax Mandate challenges. In the Eleventh Circuit, the continuing nature of the sovereign-authority injury means the Final Rule does not moot States' challenges. In the Sixth Circuit, these challenges are moot unless record evidence specifically demonstrates ongoing costs—the sovereign-authority injury is not enough. And in the Eighth Circuit, the Final Rule means the States *never had* Article III standing to sue.

B. The Secretary concedes the split.

1. The Secretary concedes there is a circuit split, at least between the Sixth and Eleventh Circuits. *See* BIO.14–15. That is reason enough to hear the case: two circuits are split concerning the important

question of whether, and in what circumstances, States may pursue challenges to the Tax Mandate. That question is important by itself. *See* S. Ct. R. 10. And it is even more important considering that it will affect the States' ability to challenge Spending Clause legislation more broadly.

In any event, the split is deeper than this. Indeed, the Secretary never denies the analytical split between the Sixth and Eleventh Circuits on the one hand, and the Eighth Circuit on the other, regarding how to analyze the Final Rule's effect on justiciability. BIO.12; *see also* Pet.24–25. The Sixth and Eleventh Circuits assessed the Final Rule's relevance through a mootness lens, while the Eighth considered the issue through a standing lens. The Secretary dismisses the significance of this distinction. BIO.12. But this Court has said the differences between "initial standing to bring suit" and "postcommencement mootness" are quite important. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 174 (2000). Rightly so. Whereas the plaintiff has the burden of proving standing to sue, the party urging mootness has the burden of proving mootness. Pet.24–25. It thus matters a great deal whether Article III jurisdiction in these cases is resolved through a standing or mootness rubric.

The Secretary speculates that the Eleventh Circuit might grant *en banc* review and align itself with the Sixth Circuit. BIO.14–15. That would not even resolve the just-discussed analytical split, and is unlikely regardless. The Sixth Circuit, by a seemingly lopsided vote, rejected a similar invitation to rehear a Tax Mandate challenge *en banc*. *See Kentucky*, 2023 WL 3221058 (order denying rehearing *en banc*) (noting only four dissenting judges). The Secretary offers

no reason to think its *en banc* petition in the Eleventh Circuit will fare any better. Indeed, even though the Secretary petitioned for *en banc* review on March 31, the circuit has yet to call for a response. Nor does the Secretary offer any support for the proposition that the unlikely possibility of *en banc* review in a split-entrenching case counsels against granting a writ of certiorari.

The Secretary, in urging the Court not to resolve the circuit split, notes that the Court previously denied Missouri's certiorari petition in *Missouri v. Yellen*. BIO.8. For two reasons, however, the Court's denying certiorari in *Missouri* is uninformative. First, Missouri's petition did not present the square split of authority that Ohio's does; the Court denied review three days before the Eleventh Circuit definitively established, and then acknowledged, the circuit split. *See Missouri v. Yellen*, 143 S. Ct. 734 (2023) (denying cert.); *West Virginia*, 59 F.4th at 1124. Second, this is a better vehicle. Missouri "was 'not challenging the Offset Restriction as written, but rather a specific potential interpretation of the provision.'" *West Virginia*, 59 F.4th at 1139 (quoting *Missouri*, 39 F.4th at 1069). In contrast, Ohio is challenging the Offset Restriction as written, making this a better vehicle for addressing the *merits* question regarding the Tax Mandate's constitutionality.

2. The Secretary tries but fails to diminish the split's importance. "The fact that" similar disputes have not arisen before, she says, "confirms" the question's "limited significance." BIO.15.

That is a peculiar position for the Secretary to take, as she is seeking *en banc* review of the jurisdictional issue, *see* Petn. for *En Banc* Review at 2 n.1,

West Virginia v. Treasury, No. 22-10168, Doc.104-1 (Mar. 6, 2023), and will presumably petition for a writ of certiorari once the *en banc* petition fails. Regardless, the issue is certainly important. Spending Clause legislation is the primary means by which the federal government has seized control over issues constitutionally assigned to the States. The States, and the legal profession more generally, are beginning to recognize this. *See, e.g.*, Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 124–50 (2021). So the question of when and how the States may sue to resist the federal government's spending-based encroachments is critically important.

3. Finally, the Secretary argues that the Sixth Circuit correctly resolved Ohio's case. BIO.8–11. That is no reason to deny a petition seeking resolution of a question that is the subject of a circuit split. This case presents an opportunity to provide guidance on an important issue of federal law; Ohio is not seeking mere error review.

Regardless, the Secretary's arguments for affirmance fail. She fails to show that any of Ohio's asserted injuries—let alone all three—are insufficient for Article III purposes.

Imminent-recoupment. The Secretary acknowledges that parties have standing to sue for an injunction of laws that "arguably proscribe[]" their actual or planned conduct. *Susan B. Anthony List*, 573 U.S. at 163. But she denies that Ohio faces any credible threat of enforcement. BIO.9–10. First, she denies that the Mandate arguably proscribes tax cuts. That is simply wrong; the Mandate's vague language arguably empowers the Secretary to recoup Rescue Plan

funds from any State that cuts taxes, as at least ten judges have concluded. *See Kentucky*, 2023 WL 3221058 at *2 (Bush, J., statement regarding denial of rehearing *en banc*); *West Virginia*, 59 F.4th at 1143–46; *Kentucky*, 54 F.4th at 348–53; *West Virginia v. Treasury*, 571 F. Supp. 3d 1229, 1250–55 (N.D. Ala. 2021); Pet.App.56a–62a.

The Secretary further argues that the Final Rule definitively establishes the Secretary's approach to enforcing the Mandate, ensuring that Ohio will not face any recoupment action for a tax cut it has enacted or plans to enact. BIO.9–10. Not so. The Final Rule provides little in the way of guidance; it arguably proscribes just about any tax cut, just as the Mandate does. *Kentucky*, 54 F.4th at 363 (Nalbandian, J., concurring in part and dissenting in part). Indeed, despite purporting to narrow the Mandate's broad terms, the Final Rule gives the Secretary almost-limitless authority to initiate recoupment proceedings in response to any expenditures that she thinks constitute "evasions" of the Tax Mandate. *See* 31 C.F.R. §35.4(a); 86 Fed. Reg. at 26821.

Sovereign authority. The Secretary declares that "requiring States to honor the obligations voluntarily assumed as a condition of federal funding … simply does not intrude on their sovereignty." BIO.10 (brackets omitted) (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 (1983)). This argument knocks down a straw man. Ohio has not argued that compliance with a federally imposed condition always constitutes an injury. Rather, the injury flows from the fact that Ohio's taxing authority is limited by a condition from which the State has a constitutional right to be free. Congress can use Spending Clause terms to impose conditions on the States only if it does so "unambiguously," so

that States can "exercise their choice" whether to participate in the federal program "knowingly, cognizant of the consequences of" doing so. *Dole*, 483 U.S. at 207 (quotation omitted). Ohio was injured when Congress denied it that opportunity, and it is injured every day it must comply with an unascertainable limit on its taxing authority. That the State was coerced into accepting this unascertainable limit further magnifies the injury. *West Virginia*, 59 F.4th at 1136.

Compliance costs. Finally, the Secretary repeats the Sixth Circuit's conclusion that, because Ohio must monitor and report its compliance with the Rescue Plan generally, it suffers no injury from having to monitor and report compliance with the Mandate. BIO.10. "That is a non-sequitur to end all non-sequiturs." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 55 n.5 (2023) (prelim. print). The additional burden of monitoring and reporting compliance with the Mandate imposes additional costs. The Secretary faults Ohio for not introducing evidence quantifying the costs. But Ohio did not need to introduce such evidence. The Rescue Plan and the Final Rule both require States to monitor and report compliance with the Mandate. Monitoring and reporting imposes at least *some* additional costs. Those additional costs constitute an injury in fact. The Secretary responds that Ohio cannot "claim a legally cognizable injury based on its reallocation of resources toward the routine administrative task of ensuring compliance with conditions on the use of federal funds it has voluntarily accepted." BIO.11. It cites no authority for this proposition. There is none. Even a "trifle" spent—and Ohio will necessarily spend at least that monitoring and reporting compliance—creates an injury in fact. *United States v. Students Challenging Regulatory*

Agency Procedures 412 U.S. 669, 689 n.14 (1973) (quotation omitted).

II. The Court should decide whether the Tax Mandate is unconstitutional.

If the Court grants certiorari to decide the jurisdictional question, it should also agree to decide the merits question whether the Tax Mandate is unconstitutional. Pet.31–35. The Secretary disagrees in a single, cursory paragraph, arguing that "the Court ordinarily does not decide merits questions 'in the first instance' where, as here, the court of appeals resolved the case on threshold grounds." BIO.15–16 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

Ohio already explained why that ordinary procedure ought not govern here. Pet.33–35. First, because the States must expend all of their Rescue Plan funds by 2025, every State will benefit from immediate clarity on the question whether the Secretary may enforce the Mandate. Pet.34. Second, the merits and jurisdictional questions overlap significantly, as the Mandate's ambiguity bears on both the law's constitutionality and Ohio's sovereign-authority injury. *Id.* Finally, the Court will not have to take a "first view" of the merits, *Zivotofsky*, 566 U.S. at 201 (quotation omitted), in any meaningful sense. Pet.34–35. Two circuits have held the Tax Mandate unconstitutional in thoroughly reasoned opinions. And the District Court's opinion below is especially scholarly. Additional proceedings will not aid this Court's resolution of the merits.

III. At minimum, the Court should hold this case pending resolution of the Secretary's forthcoming petitions.

The Court should grant Ohio's petition and set the case for argument in the fall, as this would facilitate a speedy resolution of the vitally important, time-sensitive merits question. But at minimum, the Court should hold this case pending the resolution of the Secretary's forthcoming certiorari petitions in *Kentucky* and *West Virginia*. Ohio's petition suggested this possibility. Pet.35–36. The Secretary did not object.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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