IN THE SUPREME COURT OF THE UNITED STATES

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No. 23A502

U.S. DEPARTMENT OF THE TREASURY,
ET AL., APPLICANTS

v.

WEST VIRGINIA, ET AL.

____

APPLICATION FOR A FURTHER EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Pursuant to Rules 13.5 and 30.3 of the Rules of this Court, the Solicitor General, on behalf of the U.S. Department of the Treasury; the Secretary of the Treasury; and the Acting Inspector General of the Treasury, respectfully requests a further extension of time, to and including February 9, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals entered its judgment on January 20, 2023, and denied a timely filed petition for rehearing en banc on September 14, 2023. On December 4, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 12, 2024. The jurisdiction of this Court

would be invoked under 28 U.S.C. 1254(1). A copy of the opinion of the court of appeals, which is reported at 59 F.4th 1124, and the order denying rehearing, are attached. App., infra, 1a-42a, 43a-101a.

1. In the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, Tit. IX, Subtit. M, 135 Stat. 223 (42 U.S.C. 802 et seq.), Congress established a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. 802. The Fund provided nearly $200 billion in new federal grants to help States and the District of Columbia "mitigate the fiscal effects" of the COVID-19 pandemic. 42 U.S.C. 802(a)(1); see 42 U.S.C. 802(b)(3)(A).

Section 802(c) establishes parameters for States' "Use of funds." 42 U.S.C. 802(c)(1) (emphasis omitted). Section 802(c)(1) provides that a State may use fiscal recovery funds to cover broadly defined categories of costs incurred through December 31, 2024, including costs related to the pandemic and certain infrastructure investments. Ibid. As a corollary, in order to reinforce the requirement that States use the funds for the general purposes that Congress specified, Section 802(c)(2) establishes two "restriction[s] on [the] use" of fiscal recovery funds. 42 U.S.C. 802(c)(2) (emphasis omitted). The restriction at issue here, the offset provision, provides that:

> A State or territory shall not use the funds provided under this section * * * 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 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). If a State does not use its fiscal recovery funds in conformity with the conditions in Section 802(c), the Treasury Department may require the State to repay "an amount equal to the amount of funds used in violation of" Section 802(c), up to the total amount of fiscal recovery funds received by the State. 42 U.S.C. 802(e).

Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802. 42 U.S.C. 802(f). In May 2021, the Treasury Department published an interim final rule implementing Section 802, including the offset provision. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (May 17, 2021); see id. at 26,807-26,811, 26,823. In January 2022, the Treasury Department issued a final rule, which implements the offset provision in substantially the same manner as the interim final rule. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022); see id. at 4423-4429, 4452-4453. In brief, the Act and regulations make clear that no recoupment of funds will occur if a State cuts taxes but does not use fiscal recovery funds to pay for the cuts.

2. After accepting their allotments of fiscal recovery funds, thirteen States filed this suit, asserting that the offset provision is an unlawful condition on the grant of funds they

accepted. App., infra, 6a. The U.S. District Court for the Northern District of Alabama granted judgment to the plaintiff States and permanently enjoined enforcement of the offset provision against them. Id. at 104a. The court held that the States had Article III standing, id. at 116a-123a, and that the offset provision exceeded Congress's power under the Spending Clause because it was an "unconstitutionally ambiguous spending condition," id. at 151a; see id. at 136a-152a.

3. The court of appeals affirmed. App., infra, 1a-42a. As an initial matter, the court held that the States' suit was justiciable. Id. at 11a-22a. It determined that the States' alleged "inability to ascertain the condition imposed by the offset provision has already infringed, and continues to infringe, on the States' sovereign prerogatives as parties to a contract with the government." Id. at 12a. And it further found that the States "are subject to the threat of a recoupment action if they spend funds contrary to the offset provision." Ibid.

On the merits, the court of appeals held that the offset provision violates the Spending Clause because it found that States "cannot ascertain the condition [that the provision] imposes on Rescue Plan funds." App., infra, 22a. The court reasoned that the requirement of clarity in Spending Clause conditions is more than a "rule of construction to be used in as-applied challenges -- it is a binding constitutional command." Id. at 26a. The court then determined that two aspects of the offset provision, in

conjunction, fail to satisfy "the constitutional imperative that Congress's funding conditions be ascertainable." Id. at 30a; see id. at 29a-34a. Specifically, the court stated that "the offset provision does not provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue," id. at 30a, and that "Section 802 does not explain what constitutes an 'indirect' offset," id. at 32a.

The court of appeals also viewed the provision's supposed "novelty and scope" as "compound[ing] these problems." App., infra, 34a. And it found that the Treasury Department's regulation did not permissibly clarify the offset provision, even though it acknowledged that the regulation was "robust and resolve[d] many of the ambiguities about which the States complain." Id. at 36a; see id. at 35a-40a. In so doing, the court deemed interpretation of the offset provision to be "a major question." Id. at 37a.

4. The court of appeals denied the government's petition for rehearing en banc. App., infra, 45a. Judge Rosenbaum dissented from the denial of en banc review. See id. at 49a-101a. The dissent observed that "[t]he panel opinion didn't consider the statutory context, the statutory purpose as derived from the text, the statutory structure, or the statutory history." Id. at 50a. And, the dissent continued, the panel then "used this demonstrably implausible construction of the statutory provision at issue as its sole basis for invoking the major questions doctrine," while

"refus[ing] to even consider the Secretary's duly promulgated regulation." Ibid.

5. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The further extension of time sought in this application is needed for additional consultation with the Treasury Department regarding the potential legal and practical ramifications of the court of appeals' decision. Among other things, the Treasury Department, in conjunction with the Department of Justice, is further analyzing the expenditure of ARPA funds and the practical effects of the offset provision in the thirteen plaintiff States in this case. This assessment, in the context of the program as a whole, is particularly complex. A further extension of time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

DECEMBER 2023

APPENDIX

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[PUBLISH]

United States Court of Appeals

For the Eleventh Circuit

No. 22-10168

STATE OF WEST VIRGINIA, by and through Patrick Morrisey,
Attorney General of the State of West Virginia,
STATE OF ALABAMA, by and through Steve Marshall,
Attorney General of the State of Alabama,
STATE OF ARKANSAS, by and through Leslie Rutledge,
Attorney General for the State of Arkansas,
STATE OF ALASKA, by and through Treg R. Taylor,
Attorney General of the State of Alaska,
STATE OF FLORIDA, by and through Ashley Moody,
Attorney General for the State of Florida,
STATE OF IOWA,
STATE OF KANSAS, by and through Derek Schmidt,
Attorney General for the State of Kansas,
STATE OF MONTANA, by and through Austin Knudsen,
Attorney General of the State of Montana,
STATE OF NEW HAMPSHIRE,

STATE OF OKLAHOMA, by and through Mike Hunter,
Attorney General of the State of Oklahoma,
STATE OF SOUTH CAROLINA, by and through Alan Wilson,
Attorney General of the State of South Carolina,
STATE OF SOUTH DAKOTA, by and through Jason R. Ravnsborg,
Attorney General of the State of South Dakota,
STATE OF UTAH, by and through Sean Reyes,
Attorney General of the State of Utah,

Plaintiffs-Appellees,

versus

U.S. DEPARTMENT OF THE TREASURY,
SECRETARY, U.S. DEPARTMENT OF THE TREASURY,
ACTING INSPECTOR GENERAL OF THE
DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:21-cv-00465-LSC

Before LUCK, BRASHER, and ED CARNES, Circuit Judges.

BRASHER, Circuit Judge:

The Constitution does not give the federal government authority to require states to enact the laws or policies that Congress prefers. But it does give Congress the power of the purse. The Spending Clause of the U.S. Constitution grants Congress the power to impose taxes and borrow money to "pay the Debts and provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Although the federal government cannot control state conduct directly, Congress often uses its power to tax and spend as a work-around—offering federal funds in exchange for states establishing preferred programs or enacting favored laws.

This appeal is about one of the limits of that authority. Thirteen states sued the Treasury Secretary and related officials to challenge a tax offset provision in the American Rescue Plan Act, a coronavirus stimulus package passed by Congress in 2021. That offset provision prohibits states from using Rescue Plan funds "to either directly or indirectly offset a reduction in [their] net tax revenue" that results from a change in law that "reduces any tax." 42 U.S.C. § 802(c)(2)(A). The States argued that this "tax mandate" exceeds Congress's authority under the Constitution. The district court agreed and permanently enjoined enforcement of the offset provision. The Secretary appealed.

We must decide two questions that the district court resolved in favor of the States. First, we must decide whether the States' challenge presents a justiciable controversy. Second, if any of the States' claims are justiciable, we must decide whether the offset provision is unconstitutional. We believe the district court answered both questions correctly. Specifically, we conclude that the States' challenge is justiciable and that the condition imposed by the offset provision is not sufficiently ascertainable. Because we conclude that this claim is both justiciable and successful, we do not address the States' other claims.

I.

The seeds of this controversy were sown when Congress passed the American Rescue Plan Act of 2021, a $1.9 trillion stimulus package aimed at mitigating the economic and public health effects caused by the coronavirus pandemic. Pub. L. No. 117-2, 135 Stat. 4. President Biden signed the bill into law on March 11, 2021. The President described the legislation as a tool for "rebuilding the backbone of this country and giving people in this Nation . . . a fighting chance." Remarks on Signing the American Rescue Plan Act of 2021, 2021 Daily Comp. Pres. Doc. 220 (Mar. 11, 2021).

The Rescue Plan is a voluminous Act spanning hundreds of pages. *See* Pub. L. No. 117-2, 135 Stat. 4. Central to this appeal, the Act appropriated $195.3 billion to make payments to each of the fifty states and the District of Columbia, 42 U.S.C. § 802(b)(3)(A), which the states may use for four enumerated purposes: (1) "to

respond to the public health emergency" caused by the coronavirus pandemic or "its negative economic impacts"; (2) to support essential workers; (3) to provide "government services to the extent" that the pandemic reduced states' revenues; and (4) to invest in infrastructure, *id.* § 802(c)(1)(A)–(D).

But the Act contains some fine print—it imposes several additional restrictions on the states as a condition of receiving funds. Relevant here, states cannot "use [Rescue Plan] funds . . . to either *directly or indirectly* offset a reduction in the[ir] net tax revenue" resulting from a change in state law "during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase." *Id.* § 802(c)(2)(A) (emphasis added). To receive the federal funds, a state must certify that it needs the payment to carry out one of the Act's four enumerated purposes and will comply with this offset provision. *Id.* § 802(d)(1). States must also provide a "detailed accounting of . . . all modifications to [their] . . . tax revenue sources during the covered period." *Id.* § 802(d)(2). The "covered period" began on March 3, 2021, and "ends on the last day of the [state's] fiscal year . . . in which all [Rescue Plan] funds . . . have been" spent by the state or have been recovered by or returned to the Treasury Secretary. *Id.* § 802(g)(1). The Secretary can recoup any funds from the states used in violation of Section 802(c)'s offset provision. *Id.* § 802(e). The Act provides that funds appropriated for payments to the states will remain available through December 31, 2024. *Id.* § 802(a)(1).

Some states signed on the dotted line. But on March 31, 2021, thirteen states[1] sued in the United States District Court for the Northern District of Alabama, challenging Section 802(c)'s offset provision, or so-called "tax mandate." The complaint averred three claims: first, that Section 802(c)'s offset provision is an unconstitutionally ambiguous and coercive condition under the Spending Clause; second, that the offset provision violates the Tenth Amendment's anti-commandeering doctrine; third, that the harms alleged in the first two counts entitle the States to declaratory relief under 28 U.S.C. § 2201.

Two weeks later, while their complaint remained pending, the States sought to preliminarily enjoin the offset provision's enforcement, arguing that they needed immediate relief before submitting the certification required by Section 802(d)(1). The district court denied that motion. It concluded that the States had met the three standing requirements—injury-in-fact, causation, and redressability. It also found that the States sufficiently alleged a "credible threat" of enforcement in the form of a recoupment action. *West Virginia v. U.S. Dep't of Treasury*, No. 7:21-cv-00465-LSC, 2021 WL 2952863, at *7 (N.D. Ala. July 14, 2021). But the district court determined that there was "virtually no likelihood" that the

[1] The thirteen states were Alabama, Alaska, Arkansas, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia. The States sued the Treasury Department, Treasury Secretary, and Inspector General of the Treasury Department. We will refer to the plaintiffs as the States and the defendants as the Secretary.

Secretary would recoup any Rescue Plan funds before the ultimate resolution of the case. *Id.* at *9. Because the States could not establish a likelihood of irreparable harm during the pendency of the lawsuit, the district court did not issue a preliminary injunction.

On May 17, 2021, before the district court ruled on the States' motion for preliminary injunction, the Treasury Department issued an interim final rule to clarify the Rescue Plan's contours and scope. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786 (May 17, 2021). Recognizing that "money is fungible," the interim final rule creates a framework for deciding whether a state has improperly offset a reduction in net tax revenue with Rescue Plan funds. *Id.* at 26807–11. The rule makes clear that "failure to comply with the [offset provision's] restrictions on use . . . may result in recoupment of funds." *Id.* at 26811 (footnote omitted). And the rule provides a detailed recoupment procedure. *Id.* at 26811–12.

The rule sets the net tax revenue baseline for judging compliance with the offset provision at "fiscal year 2019 tax revenue adjusted for inflation." *Id.* at 26808. It provides a four-part process to "determin[e] whether, and the extent to which, Fiscal Recovery Funds have been used to offset a reduction in net tax revenue" as compared to the 2019 baseline. *Id.* at 26807. As part of this rubric, recipient states must "identify and value the changes in law, regulation, or interpretation that would result in a reduction in net tax revenue." *Id.* If one of these changes results in a reduction from the 2019 baseline as adjusted for inflation, then a state must "identify

sufficient funds from sources *other than* the Fiscal Recovery Funds to offset the reduction in net tax revenue." *Id.* (emphasis added). Permissible funding sources to offset a reduction in net tax revenue include "organic growth, increases in revenue (e.g., an increase in a tax rate), and certain cuts in spending." *Id.* But the rule prohibits recipient states from offsetting reductions in net tax revenue by cutting spending "in an area where" they had "spent Fiscal Recovery Funds." *Id.* at 26809.

Shortly thereafter, ten of the thirteen States[2] stipulated that they had certified their compliance with the offset provision to the Secretary, as required by Section 802(d), and had received Rescue Plan funds. Moreover, all thirteen States enacted tax-related laws (e.g., credits, exemptions, phaseouts, reductions) during the covered period.

The States moved for a permanent injunction and declaratory judgment. This time, the district court granted the States' motion and awarded them a permanent injunction. Like before, the district court concluded that the States had standing to sue. Turning to the merits, the district court reasoned that the offset provision was unconstitutionally ambiguous under the Spending Clause. Noting that (1) "[m]oney is fungible" and (2) the Act did not flesh out what "directly or indirectly" means, the district court concluded that receiving any Rescue Plan money could potentially

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[2] The ten states were Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Montana, New Hampshire, Utah, and West Virginia.

constitute an indirect offset "in [a state's] net tax revenue from a change in state law or policy." *West Virginia v. U.S. Dep't of Treasury*, 571 F. Supp. 3d 1229, 1250 (N.D. Ala. 2021). The Rescue Plan, the district court observed, left states holding the bag, with "*no guidance* on critical interpretive questions," like how they can avoid indirectly offsetting net tax revenue with recovery funds. *Id.* at 1253. The Act is therefore inherently ambiguous, and that ambiguity may disincentivize the States in a way that unconstitutionally infringes on state sovereignty.

Addressing the interim rule, the district court determined that it did not cure the Act's constitutional defects. The district court explained that the Secretary appeared to concede that a federal rule cannot remedy a statute's facial unconstitutionality. The district court also believed that the rule was still too ambiguous on certain points.

Finding that (1) the States "suffered an irreparable injury," (2) no adequate remedy at law could "compensate for that injury," (3) balancing the parties' hardships favored the States, and (4) an injunction would serve the public interest, the district court permanently enjoined the Secretary from enforcing the offset provision. *Id.* at 1255 (quotation omitted). The district court did not reach the States' coercion and anti-commandeering concerns. Nor did it enter a declaratory judgment for the States because the permanent injunction would fully rectify the harm.

The Secretary timely appealed. The Secretary also implemented a final rule on January 27, 2022, which did not materially

differ from the interim final rule. *See* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022).

II.

We will uphold a district court's decision to enter a permanent injunction unless we perceive an abuse of discretion. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020). We review underlying legal conclusions and a challenged statute's constitutionality *de novo*, but factual findings for clear error. *Id.*; *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939 (11th Cir. 2013).

III.

The States argue that the offset provision is unconstitutional for three independent reasons: first, the condition it imposes is not ascertainable under the Spending Clause; second, it is coercive under the Spending Clause; third, it violates the Tenth Amendment by unlawfully commandeering the States. Conversely, the Secretary contends that the suit is not justiciable and that, on the merits, the offset provision violates neither the Spending Clause nor the Tenth Amendment. Because we agree with the district court that (1) the suit is justiciable and (2) the condition imposed by the offset provision is not ascertainable, we do not address the States' remaining constitutional claims. We will start with the Secretary's justiciability arguments and then address the merits of the States' ascertainability claim.

A.

The Secretary contends that this case does not present a justiciable controversy and that the "posture of this suit is unprecedented." Appellants' Br. at 7. The Secretary makes two arguments on this front. First, she argues that the States lack standing to challenge the offset provision because the Secretary has not initiated a recoupment action against any of them. Thus, so the argument goes, because our interpretation of the offset provision would occur in a hypothetical context, it would constitute an improper exercise of judicial authority under Article III of the Constitution. Second, the Secretary's argument suggests that the States' challenge is moot because the Secretary's recent regulation makes it unlikely that the offset provision will be enforced against the States. The reasoning would be that, because the regulation adopts a limiting construction of the offset provision, the States are unlikely to act in a way that will result in a recoupment action going forward.

We address each of these arguments in turn. Although we recognize these arguments carry some persuasive force, we conclude that the States have standing and that the Secretary's regulation does not moot their ascertainability challenge.

1.

We start with standing. We assess Article III standing at the time the complaint is filed. *See Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1003 (11th Cir. 2020). "Standing doctrine functions to ensure, among other things, that the scarce resources of

the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). Standing "in no way depends on the merits" of the plaintiff's claim. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Instead, the "irreducible constitutional minimum of standing" requires three elements: (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) a "causal connection between the injury and the conduct complained of," and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations omitted).

Starting with injury-in-fact, the States have two theories for why they have suffered an actual and concrete harm.[3] First, the States argue that their inability to ascertain the condition imposed by the offset provision has already infringed, and continues to infringe, on the States' sovereign prerogatives as parties to a contract with the federal government. Second, the States argue that they are subject to the threat of a recoupment action if they spend funds contrary to the offset provision. We agree that these theories establish that the States have suffered an injury-in-fact.

First, we conclude that the offset provision's ambiguity has injured, and continues to injure, the States' sovereign interests. The States are challenging a so-called "unconstitutional condition" that was attached to federal funding. *See Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004). Though not "*all* contract-law rules

[3] The States also raise other grounds for injury-in-fact, which we do not reach.

apply to Spending Clause legislation," *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), we can analogize the relationship between Congress and the States in Spending Clause situations to that between contracting parties. In essence, the States say that they were coerced into accepting an offer with an unascertainable condition, they did accept the offer with the condition, and the terms of the resulting contract are presently in force and effect. Indeed, the Secretary concedes that the offset provision limits the ways in which the States can spend funds.

This injury to state sovereignty is, to be sure, intangible. But it is nonetheless concrete. States "are not normal litigants for the purposes of invoking federal jurisdiction" and may suffer injuries to their sovereignty that private parties do not. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). That the offset provision restricts the ways in which states may reduce tax receipts or change tax rates heightens its effect on state sovereignty. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (noting that the power to tax "is essential to the very existence of government").

Moreover, this injury has already occurred and is continuing. The offset provision is in effect until the "last day of the [last] fiscal year" in which a state spends the Act's funds or returns them to the Secretary. 42 U.S.C. § 802(g)(1). And, by the Act's terms, the funds are available until December 31, 2024. *Id.* § 802(a)(1). All the States have now accepted the deal with its allegedly unconstitutional condition, and that condition is a present and continuous infringement on state sovereignty. Any state that "has failed to

comply" with the offset provision is "required to repay to the Secretary an amount equal to the amount of funds used in violation of [the Act]." *Id.* § 802(e). To the extent the States seek a remedy to this sovereign injury, this litigation is not a pre-enforcement challenge. Instead, the States seek to remedy an injury that has already happened and that the States continue to experience.

We are not the first court of appeals to address this theory of state standing to sue over the offset provision, and we find the Ninth Circuit's reasoning on this point particularly persuasive. Analogizing to contract law, the Ninth Circuit reasoned that "[j]ust as a contract can be challenged under state law for containing ambiguous terms or being a product of duress, so too . . . the quasi-contractual funding offer at issue here can be challenged by Arizona at the outset for offering conditions that are unconstitutionally ambiguous or coercive." *Arizona v. Yellen*, 34 F.4th 841, 853 (9th Cir. 2022). Because the injury to state sovereignty occurs when a state must accept or reject an unascertainable funding offer, the state does "not need to first violate a condition of an allegedly unconstitutional contract to have standing to challenge it." *Id.*; *see also Henry v. Att'y Gen., Ala.*, 45 F.4th 1272, 1288 (11th Cir. 2022).

Turning to the States' second theory for an injury-in-fact, the States say that they are injured by the threat of a recoupment proceeding. The States submitted evidence that they have enacted tax cuts and related revenue laws that could reduce their net tax revenue and trigger the offset provision, which the Secretary is

committed to enforcing. This evidence, the States say, establishes their standing for a pre-enforcement challenge to the offset provision.

We also agree that the States have an injury-in-fact under this pre-enforcement theory. A plaintiff need not "expose himself to liability" to have standing to challenge the enforcement of a law. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Instead, in a pre-enforcement constitutional challenge, the injury-in-fact requirement can be satisfied by establishing "a realistic danger of sustaining direct injury" from "the statute's operation or enforcement." *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1257 (11th Cir. 2012) (quotations omitted) (analyzing a constitutional challenge to a state statute). A plaintiff must establish "(1) that he has 'an intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) that his conduct is 'arguably proscribed,' and (3) that he is subject to 'a credible threat of enforcement.'" *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119–20 (11th Cir. 2022) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162 (2014)).

We believe the States have met the test for a pre-enforcement lawsuit. There is no question that the States intend to continue cutting taxes and modifying their overall revenue. All the States enacted revenue-related laws dealing with, among other things, tax credits, exemptions, phaseouts, and reductions after March 3, 2021, the beginning of the Rescue Plan's "covered period." Moreover, the States submitted a declaration by Alabama

State Senator Albritton, who noted that state legislatures must ensure that expenditures do not exceed estimated revenues and resources. This balancing exercise requires understanding how tax receipts will affect overall revenue, and state legislators often pass tax-related laws to assist with budget balancing and to benefit constituents. There is also no dispute that the Secretary intends to enforce the offset provision against the States if she thinks they have violated it. The Secretary's interim final rule underscores that recoupment actions are still on the table if States impermissibly offset reductions in net tax revenue with Rescue Plan funds. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. at 26808 (describing how the interim final rule "implements a process for recouping Fiscal Recovery Funds" used in violation of the Act).

The Secretary argues that the offset provision does not proscribe the States' conduct because "its text makes clear" that States may cut taxes so long as they "pay" for a tax cut without using Rescue Plan funds. Appellants' Reply Br. at 2. This argument—that the offset provision is clear—goes to the merits of the States' claims, not their standing to raise them. When we assess standing, we "'must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.'" *Culverhouse v. Paulson & Co.*, 813 F.3d 991, 994 (11th Cir. 2016) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)).

Reviewing the text of the statute for standing purposes, we believe the States have shown that the offset provision arguably

proscribes their conduct. The offset provision prohibits states from using federal funds to "either directly or indirectly offset a reduction in the[ir] net tax revenue" resulting from a change in state law "during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase." 42 U.S.C. § 802(c)(2)(A). Money is fungible. By prohibiting both direct and "indirect" offsets, the provision arguably proscribes a state from accepting the money if it enacts any tax cut. The only way for the States to achieve unequivocal compliance with the Act is to refrain from cutting taxes during the covered period.

Having concluded that the States have suffered an injury-in-fact, we turn to the second and third elements of standing. The Secretary does not contest traceability and redressability, but we will address them anyway given our obligation to ensure our jurisdiction. *See, e.g.*, *Bischoff v. Osceola County*, 222 F.3d 874, 877–78 (11th Cir. 2000); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). The States' injury is "fairly . . . trace[able]" to the challenged conduct, namely, the promulgation and enforcement of the allegedly unconstitutional offset provision. *Lujan*, 504 U.S. at 560 (alteration in original). And this injury is plainly redressable. No one disputes that—absent court intervention—the States are bound to comply with the offset provision and that the Secretary intends to enforce it going forward. Like any other contracting party bound to an objectionable provision in a contract, the States' injury can be redressed by declaring that provision null and void. This is a standard remedy when a single provision of a contract is

contrary to public policy. *See* Restatement (Second) of Contracts § 178 & cmt. f (Am. L. Inst. 1981); *id.* § 183. And it redresses the States' injury by preventing the enforcement of the objectionable provision. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010) ("As for the redressability prong, if the challenged rules are stricken as unconstitutional, Harrell simply need not contend with them any longer.").

In short, the States argue that the agreement's terms are not "reasonably certain," Restatement (Second) of Contracts § 33(1), because no one knows what a "reduction in the net tax revenue" and "indirectly offset" mean. They contend that Congress cannot craft a deal that explains "only *some* of the strings attached." Appellees' Br. at 33. And they argue that, because of the offset provision's ambiguity, they cannot determine at what point a breach will occur. *See* Restatement (Second) of Contracts § 33(2). The States request a judicial remedy so that they do not have to comply with any aspect of the offset provision, which they contend is unenforceable in all respects. The States have standing to make these claims.

2.

We turn now to the Secretary's related (and somewhat implicit) argument that, even if the States had standing to file this suit initially, it has become moot. "Mootness can occur due to a change in circumstances, or . . . a change in the law." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004). The Secretary says that she has disclaimed the broad reading of the

offset provision that would stop the States from cutting taxes. Accordingly, the Secretary does not intend to enforce the provision to recoup money based on tax cuts "as long as [the States] can pay for the tax cuts using their own funds." Appellants' Reply Br. at 2. The Secretary explains that she has formalized this reading of the offset provision in a regulation.

We cannot say that the Secretary's decision to disclaim a broad reading of the offset provision moots the States' ambiguity challenge. There is no doubt that the Secretary's narrow construction of the offset provision reduces its effect on state sovereignty. But the justiciability question is not quantitative; "rather, the focus is on the qualitative nature of the [plaintiff's] injury, regardless of how small the injury may be." *See Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) (quotation omitted). Even if the Secretary gives it a narrow reading, the offset provision continues to limit how the States may use federal funds. To the extent the limitation is unascertainable, it remains an unconstitutional condition on those funds.

The Secretary cites the Eighth Circuit's decision that states do not have standing to challenge the constitutionality of the "broad interpretation" of the offset provision. *Missouri v. Yellen*, 39 F.4th 1063, 1069–70 (8th Cir. 2022). But we think this case is distinguishable. In *Missouri*, unlike in this case, the state was "not challenging the Offset Restriction as written, but rather a specific potential interpretation of the provision." *Id.* at 1069. The Secretary disclaimed that interpretation of the provision, and the court

reasoned that it could not "declare, in the abstract, what a statute does not mean." *Id.* at 1070. Here, on the other hand, the States are challenging the offset provision's ascertainability. They seek not a judicial determination of what it means, but a judicial determination that it is too ambiguous to be enforced in any respect. Even if we were to extend the Eighth Circuit's reasoning on the standing question to apply in the mootness context, the Secretary's regulation and litigating position do not moot that claim.

The Sixth Circuit has concluded that the Secretary's embrace of a narrower construction, as represented by her regulation and litigation position, mooted certain state challenges to the offset provision. *See Ohio v. Yellen*, 53 F.4th 983, 990–92 (6th Cir. 2022); *Kentucky v. Yellen*, 54 F.4th 325, 340–41 & n.11 (6th Cir. 2022). The court explained that the Secretary had disclaimed enforcement of the offset provision except in limited circumstances. *Kentucky*, 54 F.4th at 340–41. Addressing the states' injuries, the court reasoned that "because the States failed to provide evidence that they intend to specifically violate *the Rule* (and provoke recoupment), and because Treasury established that there is no realistic prospect it will enforce the States' expansive interpretation of the Offset Provision, we deem the imminent-recoupment and sovereign-authority theories moot." *Id.* at 341.

We disagree with this reasoning. A case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quotations omitted). Although the

Secretary has adopted a narrow construction of the offset provision, she has not disclaimed an intent to enforce the provision. Instead, she has done the opposite, adopting a regulation that warns the States that they must comply with a provision that they contend is unconstitutional in all respects. We see no basis in mootness doctrine to conclude that the Secretary's willingness to provide a lesser remedy (a narrower construction) to address the States' constitutional challenge moots the States' request for a more substantial remedy (facial invalidation). "Even with the Rules, the States still need injunctive and declaratory relief to avoid Treasury's enforcement of ARPA's unconstitutionally vague conditions." *Kentucky*, 54 F.4th at 362 (Nalbandian, J., concurring in part and dissenting in part).

Our answer to the mootness question would be different if the Secretary had disclaimed an intention to enforce the allegedly unconstitutional provision at all. Indeed, "this Court has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Troiano v. Supervisor of Elections in Palm Beach Cnty.*, 382 F.3d 1276, 1285 (11th Cir. 2004). But an agency cannot "cure" a standardless grant of authority by "adopting in its discretion a limiting construction." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Likewise, an executive agency's narrow construction cannot moot a plaintiff's constitutional challenge when the very constitutional problem is that the statute

provides too vague a standard. It is "the existence, not the imposition, of standardless requirements that causes" an injury. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1275 (11th Cir. 2006); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 772 (1988) (holding that a statute "placing unbridled discretion in the hands of a government official or agency" is unconstitutional). Despite the Secretary's regulation and her litigation position adopting a narrow construction of the offset provision, the States have a continuing interest in challenging the validity of the offset provision, and the Secretary has a continuing interest in defending its facial constitutionality.

Finally, as we have already explained, the States are not undifferentiated members of the public seeking to enjoin the enforcement of a law of general applicability. They are more like parties to a contract, seeking to adjudicate its terms. That contract provides funds until the end of 2024, and its obligations run until the "last day of the [last] fiscal year" in which the funds are spent or returned. 42 U.S.C. § 802(g)(1). We conclude that the States' lawsuit is not moot.

B.

We now turn to the merits of the States' constitutional claim. The States argue that the offset provision violates the Spending Clause because they cannot ascertain the condition it imposes on Rescue Plan funds. We agree.

The Spending Clause authorizes Congress to "lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This clause gives Congress a wide berth not only to tax and spend but also to exert influence on the states by attaching strings to federal funding. *See Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). Congress may, within limits, compel states to "tak[e] certain actions that [it] could not [otherwise] require them to take," and a state's acceptance of the federal funds will generally constitute consent to the conditions imposed by Congress. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

The Supreme Court's leading authority on the limits of the Spending Clause is *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). There, the Supreme Court held that, by virtue of the Spending Clause, Congress can amplify its enumerated Article I powers and influence state regulatory policy by "fix[ing] the terms on which it shall disburse federal money to the States." *Id.* at 17. In this sense, "legislation enacted pursuant to the spending power" is a species of contract. *Id.* But the Court recognized that this broad authority is not limitless, and Congress must speak "unambiguously" and "with a clear voice" when it imposes conditions on federal funds. *Id.* Specifically, Congress must speak clearly enough for "the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* The

Court explained that a state cannot knowingly accept a condition if it "is unable to ascertain what is expected of it." *Id.*

The Court elaborated on this ascertainability principle in *South Dakota v. Dole*, 483 U.S. 203 (1987). In *Dole*, the Court identified five elements that conditional funding grants must satisfy to pass constitutional muster under the Spending Clause: (1) the expenditure must "advance the general welfare"; (2) any attached condition must be "unambiguous[]"; (3) conditions must relate "to the federal interest in particular national projects or programs"; (4) conditions cannot violate another constitutional provision; and (5) conditions cannot "be so coercive . . . [that] pressure turns into compulsion." *See id.* at 207–11 (quotations omitted). If the expenditure or condition does not satisfy these elements, then it is unconstitutional.

It is against this backdrop that we turn to the merits. The Secretary makes three arguments for why the offset provision is a proper exercise of Congress's spending powers. First, the Secretary contends that the ascertainability principle set out in *Pennhurst*—and refined in *Dole*—is a rule of statutory construction, not a basis for holding a congressional spending condition facially unconstitutional. Second, the Secretary posits that the offset provision is clear enough for the States to ascertain what is expected of them as a condition of accepting funds. Third, the Secretary says that her rule provided an ascertainable condition by resolving ambiguities in the offset provision. We are not persuaded.

1.

As an initial matter, the Secretary urges us to view *Pennhurst*'s ascertainability principle and *Dole*'s "unambiguous" requirement as rules of construction, not reasons to enjoin the enforcement of a spending condition. The Secretary argues that these are merely "tool[s] of statutory interpretation" to be applied "in resolving concrete disputes." Appellants' Reply Br. at 5. We believe our precedent compels a different result. But even if it did not, we think *Dole* and basic contract principles independently demand such a result.

We will start with our precedent. We addressed the ascertainability requirement in *Benning v. Georgia*, which involved a prisoner's claim that the State of Georgia had infringed on his right to practice his religion by denying him a kosher diet and not allowing him to wear a yarmulke. *See* 391 F.3d 1299, 1303 (11th Cir. 2004). He alleged that such conduct violated section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal statute that prohibited state prisons receiving federal funds from burdening prisoners' religious freedom. *Id.* RLUIPA "applie[d] strict scrutiny to government actions that substantially burden[ed]" prisoners' religious exercise and waived Georgia's sovereign immunity in "suits filed by prisoners to enforce" the Act. *Id.* at 1304–05.

Georgia defended the lawsuit on the grounds that section 3 of RLUIPA was unenforceable because it was facially

unconstitutional. *Id.* at 1303. Specifically, Georgia argued that "the standard of least restrictive means is too ambiguous to allow a state an informed choice." *Id.* at 1305. We disagreed. We explained that Congress must spell out a condition "clearly enough for the states to make an informed choice." *Id.* at 1306. But we concluded that condition was ascertainable because it (1) clearly caused "states [to] incur an obligation when they accept[ed] federal funds" and (2) imposed strict scrutiny, a well understood means-end test, which was "far from ambiguous." *Id.* at 1306–07. Thus, Congress validly exercised its spending power in enacting the statute, even if it did not "specifically identify and proscribe in advance every conceivable state action that would be improper." *Id.* at 1306 (quotation omitted). We held that "[i]t is sufficient for the text of RLUIPA to link unambiguously its conditions to the receipt of federal funds and define those conditions clearly enough for the states to make an informed choice." *Id.*

The Secretary's rule-of-construction argument is inconsistent with *Benning*. To resolve that case, we followed a core tenet from *Dole*—"conditions on the state receipt of federal funds *must be unambiguous*." *Id.* at 1305 (citing *Dole*) (emphasis added). And we applied it to Georgia's argument that section 3 of RLUIPA was constitutionally invalid on its face, resolving that claim on its merits. *See id.* at 1303–04, 1313. *Benning* therefore established the proposition that the ascertainability principle is more than a precatory rule of construction to be used in as-applied challenges—it is a binding constitutional command.

We think *Benning* is dispositive, but even if it were not, we would still reject the Secretary's argument on this front. The Supreme Court's precedents leave little doubt that the ascertainability requirement is more than a rule of construction. In *Dole*, for example, the Supreme Court expressly stated that a spending condition must be "unambiguous[]." 483 U.S. at 207 (quotation omitted). Likewise in *Pennhurst*, the Court said Congress must speak "unambiguously" when it imposes conditions on federal funds. 451 U.S. at 17. Neither *Pennhurst* nor *Dole* suggests that this clarity element is hortatory.

Similarly, *Dole*'s treatment of coercion buttresses our belief that unascertainability alone can render a spending restriction facially unconstitutional. *Dole* made clear that coercion will sometimes rise to unconstitutional compulsion, which can render a spending restriction unenforceable. *See* 483 U.S. at 211. And the Supreme Court has enjoined spending conditions that flunked this coercion test. *See NFIB*, 567 U.S. at 579–81, 588 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 681–89 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.). A lack of coercion is one of the five elements that a conditional funding grant must satisfy to pass constitutional muster under the Spending Clause. The *Dole* factors are not hierarchical; none of them, not even coercion, is owed preferential treatment by the courts. All five factors are equally important and equally required. It therefore cannot be true that the presence of coercion suffices to invalidate a spending condition, but a lack of clarity does not.

Finally, we think principles of contract law are also illustrative. Here, Congress, the offeror, has contracted with the States, the offeree. It is hornbook contract law that an offeree cannot accept a bargain's terms "so as to form a contract unless the terms . . . are reasonably certain." Restatement (Second) of Contracts § 33(1). "[R]easonably certain" terms "provide a basis for determining" whether a breach occurred and "for giving an appropriate remedy." *Id.* § 33(2). Moreover, the problem of indefiniteness is not always a mere issue of construction in contract law; it may go to the validity of the contract itself. *See id.* § 33 cmt. a (noting that "determining whether a manifestation of intention is intended to be understood as an offer" may require ensuring that the agreement can "be[] given an exact meaning and that all the performances to be rendered [are] certain"); 17A Am. Jur. 2d *Contracts* § 188 (2022) ("Definiteness as to material matters is of the very essence of contract law, and impenetrable vagueness and uncertainty will not do."). An enforceable contract "must be sufficiently definite as to its essential or material terms," including "subject matter, quantity, and duration, so that the promises and performance to be rendered by each party are reasonably certain." 17A Am. Jur. 2d *Contracts* § 188 (2022) (footnotes omitted).

Accordingly, our decision in *Benning* compels today's holding that ascertainability is not merely a rule of construction, but a stand-alone constitutional requirement. Even without this precedent, however, we would hold that spending restrictions imposed by Congress must be ascertainable to be enforceable. We therefore

reject the Secretary's argument that a spending condition may be facially constitutional even if it is not ascertainable outside of an as-applied challenge.

2.

We next decide whether the condition imposed by the offset provision is ascertainable. The States argue that they do not know what it means to use federal funds to "directly or indirectly offset a reduction in the[ir] net tax revenue" caused by a tax cut. The Secretary says that the offset provision provides sufficient clarity about Congress's conditions on recovery funds. Again, we disagree with the Secretary.

A state's knowledge that strings attach to federal funds is necessary, but not sufficient, for the conditions to comport with the Spending Clause. A state must also "clearly understand . . . the obligations" of the deal and "cannot knowingly accept conditions of which [it is] 'unaware' or which" it cannot ascertain. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). When reviewing a spending condition, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Pennhurst*, 451 U.S. at 18 (quotations omitted). A law must "unambiguously" link "its conditions to the receipt of federal funds and define those conditions clearly enough for the states to make an informed choice." *Benning*, 391 F.3d at 1306. Otherwise, state recipients would not know what rules they must follow and "what

sort of penalties might be on the table." *Kentucky*, 54 F.4th at 348 (quoting *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022)).

Here, the Rescue Plan's offset provision forbids states from using recovery funds "to either directly or indirectly offset a reduction in [their] net tax revenue . . . resulting from a change in law, regulation, or administrative interpretation . . . that reduces any tax." 42 U.S.C. § 802(c)(2)(A). Certain parts of this provision are clear enough. For example, a "change in law" refers to any law passed or amended during the covered period, which the Act defines as the period between March 3, 2021, and "the last day of the [state's] fiscal year . . . in which all [Rescue Plan] funds . . . have been" spent by the state or either recovered by or returned to the Secretary. *Id.* § 802(g)(1). Likewise, the Act supplies examples of what constitutes "reduc[ing] any tax"—rate reductions, rebates, deductions, or credits. *Id.* § 802(c)(2)(A).

But there are three aspects of the Rescue Plan that give us pause. We do not address whether any of these aspects would independently violate the Spending Clause. But, when combined, we believe these three aspects of the Rescue Plan are inconsistent with the constitutional imperative that Congress's funding conditions be ascertainable.

First and most importantly, the offset provision does not provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue. The prohibition on any "reduction in the net tax revenue" presupposes a baseline against

which to measure a potential reduction. Reduced as compared to what? The Rescue Plan does not offer a baseline. Although the Secretary's rule supplies a benchmark, the Rescue Plan itself does not provide any way to determine whether net tax revenues have been reduced.

This lack of a baseline affects whether a state policymaker can understand and comply with the statute. Consider a hypothetical state sales tax cut, for example. The state legislature predicts that consumption will increase in the next fiscal year and enacts a sales tax rate reduction based on its forecast that overall tax receipts will stay the same even if the rate is lower. Suppose that the legislature is correct—consumption increased so much that year-over-year sales tax revenue stayed the same or grew despite the rate reduction. If the baseline is the total tax revenue—which grew or stayed the same—then the legislature has not violated the Rescue Plan. But if the baseline is what sales tax revenue *would have been* absent the tax cut, the legislature would have effectuated a "reduction in the net tax revenue." 42 U.S.C. § 802(c)(2)(A).

Citing *Benning*, the Secretary argues that the Rescue Plan sufficiently makes clear that the States cannot use recovery funds to finance tax cuts, even though it leaves open whether any particular tax cut may violate the provision. We disagree. In *Benning*, we held that a standard like strict scrutiny is ascertainable even though it could have difficult-to-predict applications in particular cases. *Benning*, 391 F.3d at 1306–07. But the problem here is that the offset provision provides no standard at all. As we have explained,

without a baseline, there is no way to assess whether a tax cut has caused a "reduction in the net tax revenue." 42 U.S.C. § 802(c)(2)(A). The problem is not just that the States cannot know what the offset provision means as to a *particular* tax cut; it is that the States cannot know what it means as to *any* tax cut. There is no standard akin to strict scrutiny by which to assess the States' compliance with the offset provision.

Second, the Rescue Plan's prohibition against "either directly or indirectly offset[ting]" net tax reductions with recovery funds exacerbates this ascertainability problem. *Id.*; *see Kentucky*, 54 F. 4th at 348–49. The Act does not define "directly or indirectly," so we must turn to the ordinary meaning of the words at issue. *See United States v. Silva*, 443 F.3d 795, 797–98 (11th Cir. 2006). "Indirect" means "not immediately resulting from an action or cause" or "round-about." *Indirect*, *Oxford English Dictionary* (online ed. Dec. 2022). "Direct" denotes "[p]roceeding from antecedent to consequent" and "undeviating in course." *Direct*, *Oxford English Dictionary* (online ed. Dec. 2022) An "offset" is "anything that counterbalances, compensates, or makes up for something else." *Offset*, *Oxford English Dictionary* (online ed. Dec. 2022). We therefore agree with the States that the phrase "directly or indirectly offset" seems "extraordinarily expansive." Appellees' Br. at 26. Even if we accept that everyone understands what constitutes a "direct" offset, Section 802 does not explain what constitutes an "indirect" offset.

The Secretary's illustrations of the difference between "direct" and "indirect" offsets fail to clear this fog. The Secretary suggests that she would consider a direct offset to have occurred if a "State were simply to deposit [Rescue Plan funds] into its general treasury in order to fill a revenue hole" created by a tax cut. Appellants' Br. at 13. Fair enough. But then the Secretary describes an impermissible indirect offset as follows: a State reduces expenditures by $2 billion to compensate for a tax cut of the same amount and uses $2 billion in Rescue Plan funds "to pay for those expenditures instead." *Id.* Extrapolating from the second example, an indirect offset could be boundless. Even a novice in accounting readily grasps that balancing a budget requires *offsetting* revenue shortfalls with other funds—or with expenditure cuts. Thus, because 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.

Revisiting the Secretary's second illustration, the "indirect" language reasonably extends one more degree—rather than paying for the expenditures at issue with Rescue Plan funds (one degree of separation), a state could use those Rescue Plan funds as collateral for a third-party loan, fund the expenditures with that loan, and repay the loan with Rescue Plan money. Again, despite the two degrees of separation that would now exist between the recovery funds and the offset, the Secretary could contend that an indirect offset has still occurred. In this light, the Secretary can view any Rescue Plan funds received by the States as "indirectly offset[ting]

a reduction in the[ir] net tax revenue" from a change in state law. 42 U.S.C. § 802(c)(2)(A). We simply cannot pin down when an offset becomes attenuated enough to no longer be "indirect."

The Secretary says that the "directly or indirectly" language is mere statutory gloss to put the States on notice that they cannot engage in fiscal chicanery. In this sense, the Secretary argues, Section 802(c) would "mean the same thing" with or without that phrase. Appellants' Br. at 13. But we must "give effect to Congress' express inclusions and exclusions, not disregard them." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Striving for that clarity, we remain unable to surmount the linguistic hurdle before us—because of the fungibility of money, Rescue Plan funds could conceivably "indirectly offset" any reduction in net tax revenue caused by a change in law. Thus, the States may cut taxes, but the Rescue Plan leaves them guessing whether and how they can spend Rescue Plan funds after the tax cut.

Third, we think the Rescue Plan's novelty and scope compound these problems. Though "[l]egislative novelty is not necessarily fatal," it raises a red flag. *NFIB*, 567 U.S. at 549 (opinion of Roberts, C.J.). Indeed, "lack of historical precedent" often signals a "severe constitutional problem." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quotations omitted). And we cannot ignore that Congress has aimed this novel restriction at each state's *entire* budget and every single one of its taxes. The States face billions of dollars in potential recoupment actions and must ensure that every tax and tax rate comply with

this condition. *See, e.g.*, *NFIB*, 567 U.S. at 581 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (recognizing that the amount of the budget affected by a spending restriction bears on our constitutional analysis); *Dole*, 483 U.S. at 211–12 (holding that a congressional condition on federal funds that was directed at a "relatively small percentage" of a state's federal highway funds did not violate the Spending Clause). The Rescue Plan's novelty and scope make it even more important that Congress speak with a clear voice.

Accordingly, we hold that the condition imposed by the Rescue Plan's offset provision is not ascertainable and does not provide "clear notice," *Kentucky*, 54 F.4th at 352 (quoting *Cummings*, 142 S. Ct. at 1570), about how to comply with it, rendering it unconstitutional.

3.

Having addressed justiciability and the merits, we turn now to the Secretary's last argument. The Secretary suggested at oral argument that her *rule* salvages the offset provision, even if the text of the statute is unconstitutionally unascertainable. Congress gave the Secretary discretion "to issue such regulations as may be necessary or appropriate to carry out [the Act]." 42 U.S.C. § 802(f). The Secretary's rule specifies a baseline for determining whether a "reduction in . . . net tax revenue," 42 U.S.C. § 802(c)(2)(A), has occurred. *See* 86 Fed. Reg. at 26808 ("The baseline will be calculated as fiscal year 2019 (FY 2019) tax revenue indexed for inflation in

each year of the covered period . . . ."). The rule also "establishes a step-by-step process" for deciding whether a state has directly or indirectly offset a net tax revenue reduction with recovery funds. *Id.* at 26807. There is no doubt that the rule is robust and resolves many of the ambiguities about which the States complain. But we do not believe the rule defeats the States' constitutional arguments.

As an initial matter, we are not confident that the Secretary preserved this argument for our review. The district court expressly found that the Secretary "appear[ed] to concede that, assuming that the language of the Tax Mandate is itself unconstitutionally ambiguous, the Final Rule cannot cure that ambiguity." *West Virginia*, 571 F. Supp. 3d at 1254. Likewise, on appeal, the Secretary's brief did not expressly argue that the rule could eliminate a constitutional problem with the Act. On the other hand, the Secretary relied extensively on her rulemaking power as a reason to reject the States' ambiguity challenge. For example, in the district court, the Secretary argued as a matter of justiciability that the regulation resolved the claims of the ten plaintiff States that had accepted the funds after she promulgated the interim final rule. Moreover, the States directly addressed this issue in their brief, arguing that the Secretary's rule could not cure the Act's constitutional infirmities.

Assuming that this argument was adequately raised, we cannot agree that the rule eliminates the constitutional problem with the Rescue Plan. This is so for two reasons.

First, we agree with the Sixth Circuit that we cannot be confident that Congress intended the agency to answer the questions the Act left open. *See Kentucky*, 54 F.4th at 353–54. The offset provision undoubtedly implicates questions of deep economic and political significance and alters the traditional balance of federalism by imposing a condition on a state's entire budget process. *See King v. Burwell*, 576 U.S. 473, 486 (2015); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). As we have explained, because money is fungible, one reasonable interpretation of the offset provision is that it proscribes all tax cuts during the covered period. On that reading, the Act affects the states' sovereign authority to tax, *see McCulloch*, 17 U.S. (4 Wheat.) at 370, and "intrudes into an area that is the particular domain of state law," *see Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). The choice between that reading and a narrower one is a major question, such that Congress had to speak in a "specific and detailed" way if it intended to delegate the authority to answer that question. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quotation omitted).

But Section 802(f)—the delegation provision—says nothing about the executive agency's power to define the scope of the offset provision. Instead, Congress used the same kind of catchall delegation language in this Act that the Supreme Court held to be insufficient to delegate major questions in *King*. *See* 576 U.S. at 485–86. There, the statute at issue was 26 U.S.C. § 36B, which concerned

the availability of tax credits, *see King*, 576 U.S. at 485–486, and the delegation provision of that statute permitted the Secretary to "prescribe such regulations as may be necessary to carry out the provisions of [Section 36B]," 26 U.S.C. § 36B(h). Here, the Rescue Plan allows the Secretary to "issue such regulations as may be necessary or appropriate to carry out [the Act]." 42 U.S.C. § 802(f). If the availability of a tax credit is a major question that cannot be delegated by generic language, *see King,* 576 U.S. at 485–86, then the same is true for the way the offset provision applies to the States' budget process.

Second, an agency cannot exercise legislative power or otherwise "operate independently of the statute that authorized it." *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (quotation omitted). The Constitution gives Congress, not the executive branch, the power to tax and spend through the exercise of its legislative power. It follows therefore that Congress, not an executive agency, must exercise that power constitutionally. As the Fifth Circuit explained in a similar case, "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). Allowing an executive agency to impose a condition that is not otherwise ascertainable in the law Congress enacted "would be inconsistent with the Constitution's meticulous separation of powers." *See id.* Therefore, the "needed clarity" under the Spending Clause "must come directly from the statute." *Id.* at 361.

In this respect, our conclusion that the offset provision does not impose an ascertainable condition is similar to a conclusion that it provides no intelligible principle to guide an agency. Congress can delegate power to an agency only if it "lay[s] down by legislative act an intelligible principle to which [the agency] . . . is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). When Congress does not provide an intelligible principle, an agency cannot cure the "unconstitutionally standardless delegation of power by declining to exercise some of that power." *Whitman*, 531 U.S. at 473. Instead, "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority." *Id.*

We think the ambiguity of the offset provision presents a similar problem. Just as an agency cannot choose its own intelligible principle, it cannot provide the content that makes a funding condition ascertainable. "There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *United States v. Butler*, 297 U.S. 1, 73 (1936).

To be clear, we do not question an agency's authority to fill in gaps that may exist in a spending condition. The Supreme Court has explained that, when a state accepts federal funds, the state necessarily agrees "to comply with, and its liability is determined by, the legal requirements in place when the grants were made."

Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 670 (1985). These "legal requirements" include existing regulations. *See id.* But the problem we confront here is not whether Congress left a gap that an agency may fill; it is the lack of an ascertainable condition in the statute. The Constitution does not allow the Secretary to "suppl[y] content without which the Offset Provision literally could not function." *Kentucky*, 54 F.4th at 354. Even assuming an agency can resolve some ambiguity in a funding condition, the condition itself must still be ascertainable on the face of the statute.

C.

Because we hold that the condition imposed by the Rescue Plan's offset provision violates the Spending Clause for its lack of ascertainability, we need not address the States' coercion and Tenth Amendment claims. But we must still decide whether the district court abused its discretion in permanently enjoining enforcement of the offset provision.

After finding a statute unconstitutional, we must ask whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). When striking unconstitutional provisions, we must "refrain from invalidating more of the statute than is necessary." *United States v. Booker*, 543 U.S. 220, 258 (2005) (quotation omitted). And we must retain the sections "that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in

enacting the statute." *Id.* at 258–59 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)) (citations omitted). Everyone agrees that the offset provision is severable from the rest of the Act, and we accept the parties' concession on this point.

To obtain a permanent injunction, the moving party must show that (1) it has suffered irreparable harm; (2) remedies at law will not provide adequate compensation for the injury; (3) on balance, an equitable remedy is warranted; and (4) a permanent injunction will not disserve the public interest. *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). The district court can exercise "a range of choice" when deciding whether to grant a permanent injunction, so long as it does not misapply legal standards or rely on clearly erroneous facts. *Broadcast Music, Inc. v. Evie's Tavern Ellenton, Inc.*, 772 F.3d 1254, 1257 (11th Cir. 2014) (quotation omitted). Applying this standard, the district court did not abuse its discretion in concluding that a permanent injunction is warranted.

First, the States have suffered irreparable harm. The Rescue Plan's offset provision has affected the States' sovereign authority to tax by binding them to a deal with ambiguous terms and placing them on the hook for billions of dollars in potential recoupment actions. Second, money damages cannot adequately compensate the States because the federal government generally enjoys immunity from suit. *See Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Third, the States' inability to promulgate their own tax policies—and the attendant financial consequences—outweigh any

inconvenience to the Secretary from the district court's injunction. Fourth, the injunction serves the public interest. Enforcing the Spending Clause's limitations helps preserve state sovereignty and the "two-government system established by the Framers." *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.). Allowing Congress to run roughshod over the States' sovereign rights would threaten dual sovereignty and would be a step toward "vest[ing] power in one central government." *Id.*

All four elements weigh in favor of granting a permanent injunction. The district court did not misapply the law nor base its determination on clearly erroneous facts. It did not abuse its discretion. We also agree with the district court that the permanent injunction fully redresses the States' harm in this case—declaratory relief is unnecessary. We reiterate, however, that the permanent injunction applies *only* to Section 802(c)(2)(A), which is severable from the remaining provisions of the Act.

IV.

The district court is **AFFIRMED.**

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10168

STATE OF WEST VIRGINIA, by and through Patrick Morrisey,
Attorney General of the State of West Virginia,
STATE OF ALABAMA, by and through Steve Marshall,
Attorney General of the State of Alabama,
STATE OF ARKANSAS, by and through Leslie Rutledge,
Attorney General for the State of Arkansas,
STATE OF ALASKA, by and through Treg R. Taylor,
Attorney General of the State of Alaska,
STATE OF FLORIDA, by and through Ashley Moody,
Attorney General for the State of Florida,
STATE OF IOWA,
STATE OF KANSAS, by and through Derek Schmidt,
Attorney General for the State of Kansas,
STATE OF MONTANA, by and through Austin Knudsen,
Attorney General of the State of Montana,
STATE OF NEW HAMPSHIRE,

STATE OF OKLAHOMA, by and through Mike Hunter,
Attorney General of the State of Oklahoma,
STATE OF SOUTH CAROLINA, by and through Alan Wilson,
Attorney General of the State of South Carolina,
STATE OF SOUTH DAKOTA, by and through Jason R. Ravnsborg,
Attorney General of the State of South Dakota,
STATE OF UTAH, by and through Sean Reyes,
Attorney General of the State of Utah,

Plaintiffs-Appellees,

versus

U.S. DEPARTMENT OF THE TREASURY,
SECRETARY, U.S. DEPARTMENT OF THE TREASURY,
ACTING INSPECTOR GENERAL OF THE
DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 7:21-cv-00465-LSC

Before WILLIAM PRYOR, Chief Judge, WILSON, JORDAN, ROSENBAUM, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, BRASHER, and ABUDU, Circuit Judges.*

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, IT IS ORDERED that this appeal will be not be reheard en banc.

* Judge Jill Pryor recused herself and did not participate in the en banc poll.

BRASHER, Circuit Judge, concurring in the denial of rehearing en banc:

This appeal is about Section 802(c) of the American Rescue Plan Act. *See* American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4. The Rescue Plan appropriated over two hundred billion dollars to the states to mitigate the economic and public health effects of the coronavirus pandemic. The Rescue Plan has some important provisos. Relevant here, states that accept relief funds cannot "either directly or indirectly offset a reduction in the[ir] net tax revenue" that occurs because of a tax cut. 42 U.S.C. § 802(c)(2)(A). Thirteen states sought a declaratory judgment and an injunction to prevent the Secretary of the Treasury from enforcing the offset provision. The states argued that the offset provision violated the Spending Clause and the Tenth Amendment's anti-commandeering doctrine, and the district court permanently enjoined the offset provision's enforcement.

The Supreme Court has said that Congress can add a condition to states accepting federal funds only if it speaks "unambiguously" and "with a clear voice" so that the States can "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). After a straightforward application of the Supreme Court's Spending Clause jurisprudence and this Court's related precedent in *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), the panel held that the tax offset provision was unconstitutionally unascertainable under the Spending Clause, without addressing the states' coercion

and Tenth Amendment claims. *West Virginia v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023). The main problem, we said, is that "the offset provision does not provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue . . . . Reduced as compared to what?" *Id.* at 1144. This problem is exacerbated by the fungibility of money and the provision's expansive prohibition on even "indirectly" offsetting a tax cut with Rescue Plan funds. The panel also held that the Secretary's interim final rule could not salvage the offset provision's constitutional defects. *Id.* at 1146–49. So we affirmed the decision of the district court.

A majority of the active judges on this Court has determined not to hear this case en banc. This result is hardly surprising. *See* Fed. R. App. P. 35(a). The only other circuit court to have reached the merits of this dispute, the Sixth Circuit, has agreed with the panel opinion that the Rescue Plan's offset provision is "impermissibly vague under the Spending Clause." *Kentucky v. Yellen*, 54 F.4th 325, 330 (6th Cir. 2022). And almost every district court to have considered the issue has reached a similar conclusion. *See Texas v. Yellen*, 597 F. Supp. 3d 1005, 1012–15, 1019 (N.D. Tex. 2022); *Ohio v. Yellen*, 547 F. Supp. 3d 713, 740 (D. Ohio 2021). Although the government asked the Sixth Circuit to reconsider its decision, it did not petition for review in the Supreme Court. So the issue seems to be resolved.

Because the unconstitutionality of the offset provision seems settled, I'll pretermit the usual back-and-forth with my

dissenting colleague. The panel issued its opinion in January, and it is now September. My dissenting colleague has used some of that time to write her own opinion, which was presumably complicated by the government's failure to make the statutory-interpretation arguments on which she relies. *E.g.*, Oral Argument Trans. No. 22-10168 at 9:46 (government conceding that "[t]he statute doesn't answer how you calculate a reduction"). I'm not persuaded, but I don't see a need to further delay the case to prepare my own point-by-point rebuttal. So I'll let the panel opinion speak for itself.

ROSENBAUM, Circuit Judge, dissenting from the denial of rehearing en banc:

A builder arrives on site to build a new three-bedroom house. She carries with her a complete complement of all her tried and trusty tools. But when she gets down to building, she and her crew pull out only a flathead screwdriver and attempt to use that—and only that—to build the house. Worse still, after a bit, she and the crew decide to stop using even that tool, even though the plans call for the use of more flathead screws. Instead of turning to her other tools for the rest of the project, she simply declares, "It's impossible to build this house!" Then, she refuses to consult the home-building expert of the company that designed the house and instead firebombs the building site.

The panel opinion here engaged in the statutory-interpretation equivalent of what this builder did. The Supreme Court has told us that "before concluding that a [statute] is genuinely ambiguous, a court *must* exhaust *all* the 'traditional tools' of construction." *Kisor v. Wilkie,* 139 S. Ct. 2400, 2415 (2019) (emphases added).[1] Yet charged with construing part of the American Rescue

[1] *Kisor* addresses the problem of ambiguity in agency regulations. But the Court was clear that its approach to ambiguity in regulations was precisely the same as its approach to ambiguity in statutes. *See Kisor*, 139 S. Ct. at 2415 (citing *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984), for the proposition that the Court has "adopt[ed] the same approach" of exhausting all the "traditional tools" of construction for statutory interpretation); *see also Abramski v. United States*, 573 U.S. 169, 179 (2014) (noting that courts "*must* . . . interpret the relevant words [of a statutory provision] not in a vacuum, but with reference to the statutory context, structure, history, and

Plan Act ("Rescue Plan") (in which Congress authorized participating states to receive billions of dollars in COVID-19-related financial relief), the panel opinion looked up the dictionary definitions of three of the 80-plus words[2] in the statutory provision, found that those definitions in isolation did not answer the question before the Court, and threw in the towel, proclaiming the provision unascertainable. The panel opinion didn't consider the statutory context, the statutory purpose as derived from the text, the statutory structure, or the statutory history. And it didn't even bother to look up all the significant words in the statutory text before declaring defeat. Nor did the panel opinion's strained finding of ambiguity comport with common sense. In fact, it's demonstrably implausible.

Then, the panel opinion used this demonstrably implausible construction of the statutory provision at issue as its sole basis for invoking the major questions doctrine. As a result, the panel opinion refused to even consider the Secretary's duly promulgated regulation. And it did this even though the Rescue Plan expressly endowed the Secretary of the Treasury with the authority to promulgate rules as necessary under the governing statute.

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purpose" of the law, "not to mention common sense." (cleaned up) (emphasis added)).

[2] And that doesn't include a word count of the statutorily defined phrase in the provision, which, as I explain later, also requires statutory interpretation. *See* 42 U.S.C. § 802(g)(1).

These errors have extraordinary implications for the law and our Circuit precedent. The first—declaring a statutory provision unascertainable or ambiguous without emptying the statutory-interpretation toolbox—directly contravenes what the Supreme Court has told us about how we must conduct statutory interpretation. It also introduces confusion and uncertainty into our statutory-interpretation methodology. The second—wheeling out the major-questions-doctrine big gun both to make sure an ascertainable statutory provision is really dead and to sideline the expert Congress charged with administering the provision—effects an impermissible judicial snatch-and-grab of congressional power. Indeed, the panel opinion's extension of the major questions doctrine upsets the separation of powers, effectively giving courts an unconstitutional veto on Congress's policy decisions any time courts disagree with Congress's legislation and the legislation authorizes the expenditure of large amounts of money.

Even worse, these errors are unforced. Had the panel opinion cracked the statutory-interpretation toolbox open and exhausted all its tools, the panel opinion would have concluded that the Rescue Plan provision at issue is ascertainable.

Yet even today, though Judge Brasher's opinion concurs separately in the denial of rehearing en banc, it offers no substantive response to the errors I point out in the panel opinion he authored. Instead, the Brasher Concurrence says simply that the

"government conced[ed] that '[t]he statute doesn't answer how you calculate a reduction."[3] Conc. at 3. But that's no answer.

Of course, we greatly appreciate the parties' briefing and arguments and closely consider them. But we have never let the parties decide the case for us. To the contrary, we have always explained that "the Government cannot concede away the proper interpretation of a statute." *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 547 n.6 (11th Cir. 2019).[4] And that is especially the

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[3] The Brasher Concurrence also blames its failure to respond substantively on the fact that "[t]he panel issued its opinion in January, and it is now September." Conc. at 2–3. And to be sure, speed in the issuance of opinions is important. But so is getting the answer right under the law. That's why the only thing unusual about the amount of time the en banc process has taken here is that it's been significantly shorter than usual. *See, e.g.*, *Laufer v. Arpan LLC*, 65 F.4th 615 (11th Cir. Apr. 12, 2023) (en banc) (denying rehearing en banc rehearing on panel opinion issued on March 23, 2022); *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138 (11th Cir. Aug. 3, 2022) (en banc) (denying rehearing en banc on panel opinion issued on Sept. 17, 2020); *Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. July 20, 2022) (en banc) (denying rehearing en banc on panel opinion issued on Nov. 20, 2020); *United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730 (11th Cir. Dec. 22, 2021) (en banc) (denying rehearing en banc on panel opinion issued on Sept. 17, 2019). *See also* Robin S. Rosenbaum, *Foreword*, 77 U. Miami L. Rev. 885, 886–87 (2023) (noting that en banc is "[a] lengthy process"). In any case, and most respectfully, the fact that "it is now September" hardly seems like a good reason not to respond substantively.

[4] *See also United States v. Colston,* ("Concessions of law . . . are never binding on [the court of appeals]."); *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235, 1255 (11th Cir. 2015) (Carnes, J., dissenting) (acknowledging that "[t]he interpretation of a statute is a question of law, . . . and we are not obliged to accept a party's concession on such questions"); *Rumsfeld v. F. for Acad. & Institutional*

case when we're talking about invalidating a provision in a multi-billion-dollar act of Congress. It's also another reason why en banc rehearing is warranted here: so we can ask the parties about these errors and benefit from the parties' thoughts on them.

In short, the panel opinion is profoundly wrong and will have serious consequences for our jurisprudence. I respectfully dissent from the denial of rehearing en banc.

I organize this opinion in three substantive parts. In Section I, I explain the relevant statutory background and the question at issue in this case. Section II shows that our statutory-interpretation toolbox readily provides the answer to the question here. And in Section III, I discuss why invocation of the major questions doctrine is inappropriate and how this case's extension of the doctrine upsets the separation of powers.

I.

A. Statutory Background

By March 2021, roughly a year into the COVID-19 pandemic, the pandemic had wreaked havoc on American families, companies, and the economy. To "mitigate the fiscal effects stemming from the public health emergency with respect to [COVID-19]," 42 U.S.C. § 802(a)(1), Congress enacted the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. As part of the

Rts., Inc., 547 U.S. 47, 56 (2006) (stating that courts need not "accept an interpretation of a statute simply because it is agreed to by the parties.").

Rescue Plan, Congress allocated $219.8 billion to states, territories, and tribal governments.

No state was required to accept Rescue Plan funds. But if a state chose to do so, the money came with conditions: any state receiving Rescue Plan funds had to use the federal money in ways that the statute permitted and had to refrain from using the funds in ways the law prohibited. *See* 42 U.S.C. § 802(c).

The Rescue Plan set forth five broad categories of permissible uses for the funds: (1) "to respond to the [COVID-19] public health emergency . . . or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality," *id.* § 802(c)(1)(A); (2) "to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State . . . that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work," *id.* § 802(c)(1)(B); (3) "for the provision of government services" up to a certain amount, *id.* § 802(c)(1)(C); (4) "to make necessary investments in water, sewer, or broadband infrastructure," *id.* § 802(c)(1)(D); and (5) "to provide emergency relief from natural disasters or the negative economic impacts of natural disasters, including temporary emergency housing, food assistance, financial assistance for lost wages, or other immediate needs," *id.* § 802(c)(1)(E). Unsurprisingly, given the Rescue Plan's express statement of its purpose, each of these areas addressed a financial

concern exacerbated by COVID-19. And none permitted a state to use the money to fund state tax cuts.

In case any state missed that last point, the Rescue Plan explicitly made it in the section of the statute delineating prohibited uses of Rescue Plan funds. As relevant here, the Rescue Plan directed that no state could use Rescue Plan funds "to either directly or indirectly offset a reduction in the net tax revenue of such State . . . resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise)" or to delay "the imposition of any tax or tax increase." *Id.* § 802(c)(2)(A). This provision—section 802(c)(2)(A)—is the one that is at the center of our case.

The Rescue Plan then emphasized the limited purpose of its funds for COVID-19-related uses, not for states to fund their own tax cuts. It required, "for a State . . . to receive a payment . . . , the State shall provide the Secretary with a certification, signed by an authorized officer of such State . . . , that such State . . . requires the payment . . . to carry out the activities specified in subsection (c) of this section and will use any payment under this section . . . , in compliance with subsection (c) of this section." *Id.* § 802(d)(1). And if any state violated these rules, the Rescue Plan required the Secretary to recoup "an amount equal to the amount of funds used in violation of [subsection (c)] . . . ." *Id.* § 802(e).

B. The Lawsuit

Three weeks after the Rescue Plan became law, thirteen states sued. They argued that section 802(c)(2)(A)—the prohibition on using Rescue Plan money to fund state tax cuts—was unconstitutional because it allegedly required the states to either give up control of a "core function of their inherent sovereign powers"—their taxing authority, namely, the power to lower taxes—or "forfeit massive and much-needed aid that represent[ed] approximately 25% of Plaintiff States' annual general budgets." Pointing to the language "directly or indirectly" in section 802(c)(2)(A), the States asserted that the standard the Rescue Plan imposed for determining whether a use of funds violated the prohibition on tax cuts was unascertainable. So, the States argued, the Secretary could seek to recoup money for any tax cut whatsoever, regardless of whether the State used Rescue Plan money to fund it. In short, the States said that the law was impermissibly overbroad, impermissibly vague, or both.

C. The Regulation

No long after the States sued, the Secretary promulgated a regulation establishing a step-by-step process for determining "whether, and the extent to which, [Rescue Plan] funds have been used to offset a reduction in net tax revenue" under Section 802(c)(2)(A).[5] 87 FED. REG. 4338-01, 4423 (Jan. 27, 2022). The rule sets out a four-step process for determining whether a state's

[5] The interim rule was announced in May 2021 and was finalized in January 2022 with no material change. 87 FED. REG. 4338-01 (Jan. 27, 2022).

expenditure of Rescue Plan money violates the tax-cut-funding prohibition.

First, the state must identify and value all modifications of law, regulation, or administrative interpretation that lower net tax revenue, "as it would in the ordinary course of its budgeting process." *Id.* "The sum of these values in the year for which the government is reporting is the amount that it needs to 'pay for' with sources other than [Rescue Plan] funds . . . ." *Id.*

Second, the state must compare its net tax revenue recorded for any given year after the fiscal year ending 2019 to the amount of net tax revenue recorded for the fiscal year ending 2019. If the later year's net tax revenue is greater than that for the fiscal year ending 2019—adjusted annually for inflation—then the state has complied with the prohibition. *Id.* The regulation also includes a safe harbor: if the total decrease in net tax revenue is *de minimis*—meaning less than one percentage point—then the state has also complied. *Id.*

Third, if the amount of net tax revenue recorded is less than for the fiscal year ending 2019 (and falls outside the safe harbor)—adjusted annually for inflation—then the state must identify sources of funds that offset the reduction, such as spending cuts or tax increases. *Id.*

And fourth, recipient states must calculate "the value of revenue reduction remaining . . .—that is, how much of the tax change has not been paid for." *Id.* So if a state's tax revenue goes down in one area, but the state's spending goes down by the same

amount or the state increases taxes elsewhere to account for that decrease, then the state has complied. *Id.* If a shortfall remains, though, the formula isolates that shortfall in net tax revenue resulting from a tax cut or delayed tax increase that the state's non-Rescue Plan budget does not pay for. In other words, it identifies any portion of Rescue Plan funds that the state received that it used to cover a shortfall in net tax revenue caused by a tax cut or delayed tax increase.

Besides promulgating this rule, the Secretary also responded to some states' expressed concerns that predicting the effect that a state's change in tax code would have on tax revenue was hard to do. She pointed out that states already took this sort of information into account in their existing fiscal and budgeting processes. *Id.* at 4424 ("By incorporating existing budgeting processes and capabilities, states and territories will be able to assess and evaluate the relationship of tax and budget decisions to uses of [Rescue Plan] funds based on information they likely have or can readily obtain. This approach ensures that recipient governments have the information they need to understand the implications of their decisions regarding the use of [Rescue Plan] funds[.]").

D. The Panel Opinion

The district court permanently enjoined the Secretary from recouping Rescue Plan money that states spent funding tax cuts in violation of the law. *West Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124 (11th Cir. 2023). And the panel opinion affirmed.

In reaching this conclusion, the panel opinion discussed the dictionary definitions of three words in section 802(c)(2)(A)—the Rescue Plan's prohibition on using Rescue Plan funds for state tax cuts—and declared the provision unascertainable. After considering only these three dictionary definitions, the panel opinion said, as relevant here, that the prohibition on funding tax cuts with Rescue Plan funds (1) didn't provide a standard by which to measure whether tax revenue had increased or decreased, so states couldn't know whether their actions violated the provision; and (2) didn't define "direct or indirectly offset," and a broad definition of "indirectly offset" could apply to anything. *Id.* at 1144–45. The panel also opined that the Rescue Plan's "novelty and scope" compounded these perceived problems. *Id.* at 1145–46.

Having declared the Rescue Plan's prohibition on the use of Rescue Plan money to fund state tax cuts unascertainable, the panel opinion then refused to consider the merits of the Treasury regulation to clear up any alleged ambiguity. *Id.* at 1146. To justify this decision, the panel opinion incorrectly reasoned that the prohibition on using Rescue Plan money to fund state tax cuts could be read to prohibit states from making any tax cuts whatsoever. *Id.* at 1147. And because any "choice" between that (implausible) interpretation and a narrower one was a question for Congress, the panel opinion concluded, the major questions doctrine came into play. *Id.* at 1146–47. As a result, the panel opinion removed the Secretary's ability to weigh in on the provision with regulations. *Id.* Continuing, the panel opinion said that Congress couldn't delegate to the Executive the power to place conditions on grants because

Congress, not the Executive, has the power of the purse, and a delegation of that nature would infringe on the separation of powers. *Id.* at 1147–48. Ironically, though, as I explain below, the panel opinion effectively allowed the Judiciary to act as a veto on Congress's policy determination that Rescue Plan money was to be used for addressing only pandemic-related expenses, not for funding state tax cuts.

Further in line with a judicial rewrite of the statute, after declaring the tax-cut-prohibition provision invalid, the panel opinion affirmed the district court's injunction of the prohibition but left the rest of the Rescue Plan intact. *Id.* at 1149. In other words, the panel opinion enabled states to accept and spend billions of dollars in Rescue Plan money and freed them from their corresponding and voluntarily accepted Rescue Plan obligation to spend those funds to address only pandemic-exacerbated conditions, not to fund state tax cuts.

II.

I first explain why the panel opinion was wrong to declare the prohibition on using Rescue Plan money to fund state tax cuts (section 802(c)(2)(A)) unascertainable. But because our statutory-interpretation exercise arises in the context of a Spending Clause challenge, I begin with a brief discussion of that constitutional provision.

Article I, Section 8, of the Constitution contains what is known as the Spending Clause. That section gives Congress the power to "lay and collect Taxes, Duties, Imposts, and Excises, to

pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art I, § 8.

The Spending Clause endows Congress with "broad power . . . to set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568 (2022). In describing these powers, the Supreme Court has said that when Congress enacts legislation under the Spending Clause, that legislation "is 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). But for spending-power legislation to be valid, it must allow states to knowingly and voluntarily "accept[] the terms of the 'contract.'" *Id.*

That means, as relevant here, that a state must be able to ascertain what conditions Congress has placed on the federal funds it offers. *Id.* So "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (meaning ascertainably). *Id.*

That brings us to one of the reasons I write today: the issue of ambiguity. In recent years, the Supreme Court has had a lot to say about ambiguity (or lack of it) in the law. The bottom line is this: "before concluding that a [statute] is genuinely ambiguous, a court *must* exhaust *all* the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (emphases added). Those tools include examining the text, "statutory context, structure, history, and purpose" of

the law, "not to mention common sense." *Abramski*, 573 U.S. at 179 (cleaned up).

The Supreme Court has repeatedly reminded us that statutory interpretation is not for quitters. In *Kisor*, the Court said that "a court cannot wave the ambiguity flag just because it found the [statute] impenetrable on first read." 139 S. Ct. at 2415. Indeed, the Court has recognized that "hard interpretive conundrums, even relating to complex [statutes], can often be solved." *Id.* at 2415. As the Court has remarked, while "[d]ifficult ambiguities in statutory text will inevitably arise, … [c]ourts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the 'common understanding' of words." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021). Even if "discerning the only possible interpretation" of a law "requires a taxing inquiry," that does not render the law ambiguous. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (discussing a regulation). Rather, "if a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the law at issue." *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) (cleaned up).

The Supreme Court could not be clearer in commanding courts that they must empty the statutory-interpretation toolbox before concluding a statute is genuinely ambiguous. Yet the panel opinion barely even cracked the toolbox's lid before slamming it shut and locking it. As I've noted, the panel opinion looked at only

three dictionary definitions for isolated words, gave up, and declared the provision unascertainable. Had the panel opinion rolled up its sleeves and exhausted the statutory-interpretation toolbox, it could not have found the prohibition on using Rescue Plan money to fund state tax cuts ambiguous.

As it turns out, Congress set forth an ascertainable standard when it prohibited states that choose to accept Rescue Plan funds from using those funds "to either directly or indirectly offset a reduction in the net tax revenue of such State . . . resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase." 42 U.S.C. § 802(c)(2)(A). At the risk of ruining the ending, I disclose that standard up front: states may not use Rescue Plan funds to ultimately pay for a reduction in the state's net tax revenue (as compared to the state's net tax revenue in the state's last full fiscal year before the United States declared the COVID-19 emergency) caused by a tax cut or delayed tax implementation. When we examine the text, "statutory context, structure, history, and purpose" of the law, "not to mention common sense," *Abramski*, 573 U.S. at 179 (cleaned up), as the Supreme Court has told us to do, they necessarily reveal this standard.

A. The Text

In statutory interpretation, of course, we always begin with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016). The statute here provides,

> A State . . . shall not use [Rescue Plan] funds . . . to either directly or indirectly offset a reduction in the net tax revenue of such State . . . resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (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).

The Rescue Plan defines some terms, one of which is relevant to our interpretation of section 802(c)(2)(A): "covered period." As the Rescue Plan explains, "covered period" refers to the period that starts on March 3, 2021 (when the Rescue Plan was enacted), and "ends on the last day of the fiscal year of [the participating] State . . . government in which all funds received by the State . . . from a payment made under this section . . . have been expended or returned to, or recovered by, the Secretary." 42 U.S.C. § 802(g)(1). This definition provides important information that comes into focus once we look at other text in section 802(c)(2)(A). So I discuss it more later. But for now, the important point is that we must read this definition together with the rest of section 802(c)(2)(A)'s prohibition on using Rescue Plan money to fund state tax cuts, since section 802(c)(2)(A) incorporates the definition of "covered period" into its text.

As for the definitions of the rest of the words in section 802(c)(2)(A), we give terms their "ordinary public meaning" at the

time the statute was adopted. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1741, 738–39 (2020). I consider the meaning of the words in the order they arise in section 802(c)(2)(A).

The statute begins, "A state . . . shall not." We've said that "the verb 'shall' in a statute is a command." *United States v. Peters*, 783 F.3d 1361, 1364 (11th Cir. 2015). So "shall not" is a command to not do something—that is, a prohibition. In this case, it's a prohibition on the "use" of something. And since the next part of the statute refers to only Rescue Plan funds ("A State . . . shall not use [Rescue Plan] funds"), the plain text of section 802(c)(2)(A) tells states that it is a prohibition on only how they may spend Rescue Plan funds, not on how they may spend money from any other source.[6]

Next up, we have the phrase "to either directly or indirectly offset." To discern the meaning of this phrase, we consult dictionaries in use when Congress enacted the Rescue Plan in 2021. *Thompson v. Regions Sec. Servs., Inc.*, 67 F.4th 1301, 1306 (11th Cir. 2023). No dictionaries appear to define the entire phrase. So we turn to the meanings of the individual words in the phrase. *United States v. Dominguez*, 997 F.3d 1121, 1124 (11th Cir. 2021).

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[6] In fact, section 802(c)(2)'s heading is "Further restriction on use of funds," referring to Rescue Plan funds and underscoring the point that section 802(c)(2) is a limitation on how *Rescue Plan funds* may be spent. *See United States v. Bryant*, 996 F.3d 1243, 1257 (11th Cir. 2021) ("Titles are permissible indicators of meaning." (cleaned up)).

"Directly" means "[i]n a straightforward manner." *Directly*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Indirectly" occupies the rest of the field that "directly" doesn't cover: "deviating from a direct line or course : not proceeding straight from one point to another : proceeding obliquely or circuitously," "not straightforward and open," and "not directly aimed at or achieved." *Indirect*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY (Sept. 12, 2023), https://unabridged.merriam-webster.com/unabridged/indirect [https://perma.cc/T7BK-4GTC]. As for "offset," according to *Black's Law Dictionary*, that means "[s]omething (such as an amount or claim) that balances or compensates for something else." *Offset*, BLACK'S LAW DICTIONARY (11th ed. 2019).

So to "directly or indirectly offset" means to compensate, or pay, for a loss with no intermediate steps, or to make up for that loss with intermediate steps between the initial action and the result. And when we put this together with the prohibitory language at the beginning of the provision, it's clear that Congress was instructing states that they could not use Rescue Plan funds directly—or circumvent the prohibition on the use of Rescue Plan funds by using those funds indirectly—to effectively pay for something.

So what does the statute prohibit states from using Rescue Plan funds to pay for? The rest of section (c)(2)(A) tells us: "a reduction in the net tax revenue of such State . . . resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (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." That's a mouthful, so let's break it down.

We all know what a "reduction" is, but in the interest of completeness, here's a dictionary definition: "a decrease in size, amount, extent, or number." *Reduction*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY (Sept. 12, 2023), https://unabridged.merriam-webster.com/unabridged/reduction [https://perma.cc/HT9R-9SFS]. Two things about the meaning of "reduction" become important in our analysis. First, as the definition indicates, "reduction" is inherently a comparative word. For something to be a decrease, or smaller, we must compare it to something else that is bigger. Second, and along the same lines, something that doesn't already exist can't be reduced. So when we speak of a "reduction," the thing we are comparing it to must already exist. The comparative nature of the word "reduction" is key as we proceed further through the text.

In the meantime, though, we consider the phrase "net tax revenue." Start with "tax revenue"—the "total income produced" from taxes. *Revenue*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY (Sept. 12, 2023), https://unabridged.merriam-webster.com/unabridged/revenue [https://perma.cc/NX3U-XAMK].

Then add the adjective "net." "Net" means "[t]he final amount remaining after all other amounts have been taken away; esp., an amount of money remaining after a sale, minus any deductions for expenses, commissions, and taxes." *Net*, BLACK'S LAW

DICTIONARY (11th ed. 2019). Taken together, "net tax revenue," followed by "of such State," refers to the total tax income that a state collects, minus any losses or expenses.

It's worth noting that "net" does a lot of work in this phrase. It indicates that Congress was talking about the total tax revenue *after* all accounting has been done. In other words, Congress was not concerned with tracing specific Rescue Plan dollars through their expenditure lives. Rather, Congress sought to ensure only that, after all was said and done, none of the participating state's total Rescue Plan allotment *ultimately* funded state tax cuts—whatever other detours the Rescue Plan funds may have taken along the way. Indeed, had Congress wanted states to ensure that none of the Rescue Plan funds touched a tax cut at all on their spending journey, it could have eliminated the word "net" from the statute and simply prohibited offsetting directly or indirectly any reductions in tax revenue. But Congress did not do that.

And there's something else important about the concept of "net tax revenue." "Net tax revenue" is tangible and can be measured only after it is collected. In this way, "net tax revenue" is different from "expected net tax revenue," which is theoretical and does not yet exist. No one would use the terms "expected net tax revenue" and "net tax revenue" interchangeably. And Congress did not refer to the state's "expected net tax revenue"; it said the state's "net tax revenue." Congress could have used the term "expected net tax revenue" if that's what it meant. But it didn't.

That brings us back to the comparative nature of the word "reduction." Again, a reduction can occur only relative to something that already exists. And because section 802(c)(2)(A) refers to a "reduction in the net tax revenue," the baseline "net tax revenue" against which any "reduction" must be compared must refer to a participating state's net tax revenue from sometime before the "covered period." After all, anything after the "covered period" began would not yet exist at the start of the "covered period," so we couldn't have a "reduction" in comparison to it.

As for the "covered period," we know that began on March 3, 2021, and continues until the last day of the state's fiscal year in which it spends or returns all Rescue Plan funds, or the Secretary recovers those funds. 42 U.S.C. § 802(c)(2)(A). In other words, the "covered period" extends to only that time during which Rescue Plan funds are outstanding.

And because the definition of "covered period" speaks of each state's fiscal year ("ends on the last day of the fiscal year of such State"), we know Congress directed states to measure in terms of their own fiscal years. So in sum, we know the baseline against which a state's "net tax revenue" in its fiscal year during the "covered period" is measured must be the state's own fiscal year that ended at a time before the "covered period" began.

Of course, another phrase modifies "net tax revenue of such State": "resulting from a change in law, regulation, or administrative interpretation during the covered period . . . ." *Id.* § 802(c)(2)(A). "Resulting from" means "[o]ccur[s] or follow[s] as

a consequence of something . . . ." *Result from*, OXFORD DICTIONARY (Sept. 12, 2023), https://premium.oxforddictionaries.com/us/definition/american_english/result [https://perma.cc/DTS9-YEA5] That means only that net tax revenue of the participating state that comes because of "a change in law, regulation, or administrative interpretation during the covered period."

The next clause—"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"—modifies "a change in law . . . during the covered period." This clause limits the applicability of section 802(c)(2)(A)'s prohibition on the use of Rescue Plan funds so that it applies to only those changes in a law, a regulation, or an administrative interpretation that reduce a tax or the imposition of a previously determined tax.

When we put it all together, then, the text of section 802(c)(2)(A) tells us several things. First, Congress prohibited the use of Rescue Plan funds and only Rescue Plan funds—not other sources of state funding. Second, the prohibition extended to only ultimately using those Rescue Plan funds to pay for state tax cuts or delay the imposition of state taxes that resulted in a reduction to net tax revenue, meaning that, when it comes to state tax cuts and delayed tax implementation, Congress was unconcerned with the individual routes expenditures of Rescue Plan allotments took, as long as the end result was not an overall reduction in net tax revenue caused by a state's tax cut or delayed implementation of a tax. Third, we measure whether a reduction in net tax revenue has

occurred because of a tax cut or delayed tax implementation—that is, our baseline—by reference to sometime before "the covered period" began, meaning before March 3, 2021. Fourth, we know from section 802(c)(2)(A) and the definition of "covered period" that our unit of measurement is the net tax revenue of the participating state in its own fiscal year.

So the baseline against which section 802(c)(2)(A) prohibits states from reducing their net tax revenue for a fiscal year in the "covered period" is the state's net tax revenue for its own fiscal year that ended sometime before March 3, 2021.

These observations about section 802(c)(2)(A)'s text alone address most of the panel opinion's ascertainability concerns about the statute.

Take the panel opinion's complaint that the prohibition on using Rescue Plan money to fund state tax cuts (section 802(c)(2)(A)) "does not provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue." *West Virginia*, 59 F.4th at 1144. In elaborating on this concern, the panel opinion gives an example. *Id.* It supposes that a state legislature "predicts that consumption will increase in the next fiscal year and enacts a sales tax rate reduction based on its forecast that overall tax receipts will stay the same even if the rate is lower." *Id.* Under the panel opinion's hypothetical, the state's prediction turns out to be correct, so "year-over-year sales tax revenue stayed the same or grew despite the rate reduction." *Id.* The panel opinion worries that "if the baseline [against which we compare whether a

reduction in net tax revenue occurred] is what sales tax revenue *would have been* absent the tax cut, the legislature would have effectuated a 'reduction in the net tax revenue.'" *Id.*

This concern is demonstrably invalid. We know for two reasons that the baseline cannot be what the state predicted sales-tax revenue would have been before it enacted its budget, which is what the panel opinion's example suggests. First, the state's predicted sales-tax revenue would be a part of "expected net tax revenue," meaning it would be a hypothetical number, not actual and measurable "tax revenue." So in this scenario, the state's predicted sales-tax revenue would not exist before the "covered period" began. And we know that doesn't fly under section 802(c)(2)(A)'s text. Second, section 802(c)(2)(A) speaks in terms of "net tax revenue," or *total* tax revenue *after* expenses; it does not require tax-by-tax accounting, like the panel opinion's consideration of a cut to only the rate of the "sales tax revenue" suggests. So a state could permissibly cut the sales-tax rate—in fact, it could even eliminate it altogether—as long as it paid for any cut with a source of funds other than Rescue Plan money (or spending cuts or some combination of the two). That's because the text tells us the baseline must be the actual "*net* tax revenue" of a "fiscal year" that was complete before the "covered period," meaning before March 3, 2021.

The panel opinion's protestation that "the phrase 'directly or indirectly offset' seems 'extraordinarily expansive'" fares no better. *West Virginia*, 59 F.4th at 1145. For starters, that's not our call to make; it's Congress's. *See Diamond v. Chakrabarty*, 447 U.S. 303, 315

(1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms."). And in any case, the "directly or indirectly" text is not as broad as the panel opinion paints it. The panel opinion complains that the phrase "directly or indirectly" would allow the Secretary to find a state in violation of section (c)(2)(A)'s prohibition any time it makes a tax cut, regardless of whether the state ultimately pays for that tax cut with Rescue Plan funds. *See West Virginia*, 59 F.4th at 1145. In fact, the panel opinion boldly states that "one reasonable interpretation of [section 802(c)(2)(A)] is that it proscribes all tax cuts during the covered period." *Id.* at 1147.

Not so. That interpretation of section 802(c)(2)(A) is anything but "reasonable." The panel opinion stakes its doomsday interpretation that all tax cuts could be prohibited on the fungibility of money combined with the purported breadth of the phrase "indirect[] offset." *Id.* at 1145. Put them together, the argument goes, and a state's use of any Rescue Plan funds could eventually be connected downstream to any tax cut.

But the panel opinion has it backwards: the fungibility of money is exactly what makes the panel opinion's proposed interpretation implausible under the text. That's so for two reasons: the statutory text plainly limits the prohibition to (1) the use of Rescue Plan funds—and only Rescue Plan funds (not any and all sources of state income)—to (2) pay at the end of the day for a shortfall in only "net tax revenue"—not "any" tax revenue—that a tax cut or delayed tax implementation causes.

By now, we know that "net tax revenue" means the total tax revenue *after* accounting for all sources of income and all liabilities. It is a recognition that money is fungible and all that matters is whether a reduction in *net* tax revenue *ultimately* exists—that is, after all the calculations, in a year when a state has made a tax cut or delayed a tax's implementation. In other words, section 802(c)(2)(A) isn't interested in and doesn't care about any stops dollars may make along the way in a state's budget plan. All that matters is the bottom line: whether, after all the accounting is done, a state that has made tax cuts has a shortfall in net tax revenue that it's not possible to ultimately account for with sources of income or spending cuts other than Rescue Plan funds.

Contrary to the panel opinion's conclusion, section 802(c)(2)(A) does not even arguably purport to prohibit states from cutting taxes. If Congress sought to make Rescue Plan funds contingent on the elimination of all tax cuts,[7] Congress would have used far simpler language. But Congress didn't do that.

To interpret "directly or indirectly" as encompassing more than this—as including all tax cuts or spending increases anywhere in the budget, regardless of whether Rescue Plan money ultimately pays for them—is nonsensical. *See Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 147 n.11 (2011) (rejecting, in the context of SEC Rule 10b-5, that use of "indirectly" within the phrase "directly or indirectly" "broaden[s] the meaning of 'make'"). Indeed,

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[7] Because that's not what Congress did, I offer no comment on the constitutionality or unconstitutionality of any such proposal.

it is contrary to the provision's plain text and renders section 802(c)(2)(A) meaningless. *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) ("[W]e must normally seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.'"(citation omitted)).

The panel opinion also says the Rescue Plan's "novelty and scope compound" the first and second purported problems it raises. *West Virginia*, 59 F.4th at 1145. In the panel opinion's view, "Congress has aimed [section 802(c)(2)(A)'s] novel restriction at each state's *entire* budget and every single one of its taxes." *Id.*

I've already explained the flaws in the panel opinion's perceived first and second purported problems. And the exposure of those flaws shows why the panel opinion's complaint that section 802(c)(2)(A)'s restriction is "aimed . . . at each state's *entire* budget and every single one of its taxes" is just wrong.

Once again, the text of the prohibition on using Rescue Plan money to fund state tax cuts, by its terms, precludes the use of only *Rescue Plan* funds—not any other sources of income—to fund only state tax cuts. So states may cut whatever taxes they please, as long as they ultimately pay for those tax cuts using sources other than Rescue Plan funds. It's just not an accurate or even fair representation to say, as the panel opinion does, that section 802(c)(2)(A) imposes restrictions on "each state's *entire* budget and every single one of its taxes," *id.* Worse still, the panel opinion uses this incorrect and unreasonable description of section 802(c)(2)(A) as a

springboard to conclude later in the panel opinion that the major questions doctrine precludes us from being able to consider the Secretary's regulation to fill in any details. More on that later. For now, it's enough to point out that the panel opinion's pronouncements about the "novelty and scope" of the Rescue Plan are fallacious.

As for the meaning of section 802(c)(2)(A), the takeaway is simply this: that provision, by its terms, precludes states from using Rescue Plan funds to pay ultimately for state tax cuts that result during the "covered period" in a reduction in the state's net tax revenue as compared to its net tax revenue for a fiscal year that ended sometime before March 3, 2021.

The only question the text alone does not answer is which pre-March 3, 2021, fiscal year serves as the baseline. But as I explain below, our other tools readily provide the answer to that single remaining question.

B. The Rest of the Toolbox

The remaining tools in our statutory-interpretation toolbox include consulting the context, structure, history, and purpose of the provision, along with "common sense." *Abramski*, 573 U.S. at 179; *see also Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019) ("'[A] judicial interpreter [should] consider the entire text, in view of its structure and of the physical and logical relation of its many parts,' when interpreting any particular part of the text."). So when deciding whether the Rescue Plan's language is plain, we must "read the words in their context and with a view

to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotation marks and citations omitted); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (citing A. Scalia, A MATTER OF INTERPRETATION 37 (1997) ("In textual interpretation, context is everything.")).

As the Court has explained, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997). After all, "[t]o strip a word from its context is to strip that word of its meaning." *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring). And when we consider context here, we can see that the baseline Congress imposed for determining whether a state used Rescue Plan money to pay for tax cuts after March 3, 2021, is the net tax revenue of the state's most recent full fiscal year before the United States declared the COVID-19 emergency. We know this because at least two other parts of the Rescue Plan Act, including its purpose as derived from its text, and common sense tell us so.

Start with the Rescue Plan's purpose as derived from its text. Section 802(a), entitled "Appropriation," grants $219.8 billion to "make payments . . . to States . . . to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)." 42 U.S.C. § 802(a)(1). In this section, Congress expressly announced the purpose of the Rescue Plan money: "to mitigate the fiscal effects [on the States] stemming

from" the pandemic. As relevant here, "mitigate" means "[t]o make less severe or intense; to make less harmful, unpleasant, or seriously bad." *Mitigate*, BLACK'S LAW DICTIONARY (11th ed. 2019). As for "fiscal," *Black's Law Dictionary* defines that as "1. [o]f, relating to, or involving financial matters <fiscal year>. 2. [o]f, relating to, or involving public finances or taxation <the city's sound fiscal policy>." *Fiscal*, BLACK'S LAW DICTIONARY (11th ed. 2019). Plugging these definitions into subsection (a) reveals Congress's intent to help the states lessen or compensate for the negative effects of the pandemic on the states' public finances.

So when we read section 802(c)(2)(A) in light of the Rescue Plan's purpose, there's only one way to discern "the fiscal effects [on the States] stemming from the public health emergency" using "net tax revenue" during a state's fiscal year as the comparative unit. And that is to compare a state's net tax revenue during the pandemic (the "covered period") to that state's net tax revenue for the last full fiscal period before the United States declared the COVID-19 emergency on January 31, 2020—that is, the state's fiscal year 2019. That's so for two reasons.

First, as I've mentioned, we know from the statutory text that the unit of measurement we're talking about is a state's fiscal year because the definition of "covered period" says so. It would be odd (to say the least) to measure the "covered period" by fiscal years, a standard gauge for financial health, but net tax revenue by a different stick. A period of less than a fiscal year would also tell

us little, if anything, about the state's financial condition before the pandemic hit.

Second, the best "net tax revenue" indicator of a state's financial health before the pandemic hit is the state's "net tax revenue" in the fiscal year that ended immediately before the pandemic began. Given the Rescue Plan's stated purpose to mitigate the effects of the pandemic (not enrich the states), it would make no sense to select some other pre-pandemic fiscal year. For the same reason, it would be illogical to use a baseline of a state's 2020 fiscal year, given that by the end of the states' fiscal years 2020, we were well into the throes of the COVID-19 emergency. So the measure of net tax revenue for a state's fiscal year 2020, as compared to a state's net tax revenue for fiscal years during the "covered period," would not reveal the fiscal effects of the pandemic on the states that Congress intended the Rescue Plan funds to mitigate.

And we construe statutes "in context, and with a modicum of common sense." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting); *see also United States v. Bryant*, 996 F.3d 1243, 1252 (11th Cir. 2021). After all, "[c]ontext also includes common sense, which is another thing that 'goes without saying.'" *Biden*, 143 S. Ct. at 2379 (Barrett, J., concurring). In fact, we've described "the commonsense reading of the relevant statutory text" as "the anchor for statutory interpretation." *Bryant*, 996 F.3d at 1252 (citation and quotation marks omitted).

Here, the only fiscal year consistent with the rest of the Rescue Plan's context, not to mention common sense, is each state's fiscal year 2019.

To be sure, not all states' fiscal years are the same.[8] But that doesn't matter to our analysis because Congress chose the state's fiscal year as the unit of measure. And nothing prohibited Congress from doing so. In any case, every state calculates its net tax revenue each fiscal year.[9] So using as a baseline a number that states already have at their disposal makes eminent sense.

But it's not just the Rescue Plan's purpose and our common sense that compel the conclusion that Congress directed the use of the states' fiscal year 2019 net tax revenue as the baseline in section 802(c)(2)(A). Rather, reading section 802(c)(2)(A) in the context of the subsection in which it appears—subsection (c) "Requirements"—also independently shows that the baseline is the last full fiscal year of the state before the United States declared the COVID-19 emergency.

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[8] Forty-six states begin their fiscal year on July 1; one starts April 1, one September 1, and one October 1. *FY 2023 State Budget Status*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 12, 2023), https://www.ncsl.org/fiscal/fy-2023-state-budget-status [https://perma.cc/JHV9-EHTF].

[9] Not only that, but Congress specifically accounted for the fact that "[u]nlike the federal government, nearly every state is required to balance its budget" when it wrote the Rescue Plan. H.R. REP. NO. 117–7, at 397 (2021) (The Committee on Oversight's Findings and Recommendations).

Subsection (c) identifies the conditions by which the state must abide if it accepts funds under the Rescue Plan. Indeed, subsection (c)(1) says as much: "*Subject to paragraph (2)*, and except as provided in paragraphs (3), (4), and (5), a State . . . shall only use the funds provided under a payment made under this section . . . to cover costs incurred by the State . . . " in the five ways set out in the statute. 42 U.S.C. § 802(c) (emphasis added).

A few things about subsection (c) stand out. First and foremost, subsection (c)(1) expressly "subject[s]" the list of authorized uses of Rescue Plan funds it sets forth to the limitations in subsection 802(c)(2). *Id.* § 802(c)(1) ("Subject to paragraph (2), . . . a State . . . shall only use the funds provided under a payment made under this section . . . ."). So we must read subsection 802(c)(2)(A) in conjunction with subsection (c)(1). That is, we must read subsections (c)(1) and (c)(2) together, not each in isolation, as the panel opinion considered subsection (c)(2).

When we do that, we can see that subsection 802(c)(1)(C)(i) authorizes the spending of Rescue Plan funds to provide government services equal to "the amount of the reduction in revenue of such State . . . due to the COVID-19 public health emergency relative to revenues collected in *the most recent full fiscal year of the State . . . prior to the emergency*." *Id.* § 802(c)(1)(C)(i) (emphasis added). In other words, this subsection expressly tells us the baseline by which to measure "reduction in revenue . . . due to the COVID-19 public health emergency." And the measure it designates is "the most recent full fiscal year of the State . . . prior to the

[COVID-19] emergency." This baseline, of course, makes perfect sense for reasons I've already noted: (1) it is a number that is readily accessible to each state; (2) it is a number that encompasses a regular financial interval that is large enough to provide a picture of a state's finances; and (3) because of its proximity in time to the start of the pandemic, it provides the best snapshot for determining how the pandemic affected the state's finances.

So when we read subsections (c)(2)(A) and (c)(1) together, as subsection (c)(1) commands us to do, subsection 802(c)(1) independently reveals that the baseline that subsection (c)(2)(A) refers to is the "most recent full fiscal year of the State . . . prior to the emergency." *Id.* After all, it would be strange to measure the effect of the COVID-19 emergency on state finances using different state fiscal years for purposes of authorizing distribution of Rescue Plan monies and for purposes of prohibiting expenditures of Rescue Plan monies. And it would be stranger still to do that in the same general subsection, subsection 802(c). So the reference in subsection (c)(2) to "reduction in the net tax revenue of such State" necessarily refers back to the "reduction in revenue of such State . . . due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State . . . prior to the emergency" in subsection (c)(1)(C)(i).

To be sure, another court (though not the panel opinion), addressed this same issue and invoked what it described as the "typical presumption . . . that when Congress omits specific language in one provision that it includes in another, the omission implies a

difference in meaning between the two provisions." *Kentucky v. Yellen*, 54 F.4th 325, 351 n.18 (6th Cir. 2022). Relying solely on this rule of construction, the Sixth Circuit concluded that the Rescue Plan's failure to include the phrase "reduction in revenue of such State . . . due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State . . . prior to the emergency" in subsection (c)(2) when it included it in subsection (c)(1)(C)(i) suggests that Congress intended that the baseline in subsection (c)(2) must be different from that in subsection (c)(1)(C)(i). *Id.* Most respectfully, I think that analysis is simply not correct.

First, the Sixth Circuit made this statement in a footnote, without conducting any other statutory analysis.

Second, the "typical presumption" that the Sixth Circuit invoked is not absolute. Indeed, any rule of construction "may be overcome by the strength of differing principles that point in other directions." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012).

Third, every other applicable principle requires the opposite conclusion—and strongly so. For starters, "[t]he text must be construed as a whole." *Id.* at 167. And as I've explained, reading section (c)(1)(C)(i) in conjunction with section (c)(2)(A), as section (c)(1) instructs us to do—and particularly in light of the Rescue Plan's purpose and statutory scheme—leads to only one plausible answer: section 802(c)(2)(A)'s baseline is each state's fiscal year 2019.

Not only that, but other key canons support the same answer. In that department, "[a]n interpretation that validates outweighs one that invalidates." *Id.* at 66. Reading subsection (c)(2)(A)'s baseline as the same as that set forth in subsection (c)(1)(C)(i) validates rather than invalidates the tax-cut-funding prohibition.

Relatedly, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Id.* at 247. Indeed, the Supreme Court has explained that "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012) (quoting *Parsons v. Bedford*, 28 U.S. 433, 448–49 (1830)). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* at 563 (citing *Hooper v. Cal.*, 155 U.S. 648, 657 (1895)). For that reason, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal citation omitted).

We've also noted that "[p]roper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power." *Benning v. Georgia*, 391 F.3d 1299,

1303 (11th Cir. 2004) (citation and internal alteration omitted). Here again, reading subsection (c)(2)(A)'s baseline as the same as the state fiscal year set forth in subsection (c)(1)(C)(i) avoids placing its constitutionality in doubt.

And the fourth reason the Sixth Circuit's analysis does not stand up is the Rescue Plan's history—the remaining tool in our statutory-interpretation toolbox. "[S]pecifically with respect to this Act, rigorous application of [the presumption invoked by the Sixth Circuit] does not seem a particularly useful guide to a fair construction of the statute." *King*, 576 U.S. at 491 (discussing the Affordable Care Act). Like the Affordable Care Act, the Rescue Plan was the product of reconciliation, "a complicated budgetary procedure . . . which limited opportunities for debate and amendment." *Id.* at 491–92; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat 4 (Mar. 11, 2021) ("Purpose"). Congress specifically relied on reconciliation to act "expeditiously" and avoid having the bill "languish indefinitely in the Senate, putting the health and well-being of millions of American families at risk." H.R. REP. NO. 117–7, at 2 (2021).

As a result, the Rescue Plan "does not reflect the type of care and deliberation that one might expect of such significant legislation." *King*, 576 U.S. at 492. But as the Supreme Court noted in *King*, "we must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*; *see also Clark v. Uebersee Finanz Korporation,*

A.G., 332 U.S. 480, 488 (1947) (noting that when "[w]e are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole[,] [o]ur task is to give all of it . . . the most harmonious, comprehensive meaning possible").

When we employ all the tools in our statutory-interpretation toolbox, section 802(c)(2)(A) is not ambiguous, vague, or unascertainable. Rather, the only fair reading of section 802(c)(2)(A)'s prohibition on using Rescue Plan money to fund state tax cuts is that it prohibits a participating state from using Rescue Plan funds to ultimately pay for a reduction in net tax revenue stemming from a tax cut or delayed imposition of a tax during the "covered period." And the last fiscal year ending before the United States declared the COVID-19 emergency on January 31, 2020, provides the baseline against which a state must compare its net tax revenue during the covered period.

That is certainly enough to satisfy *Pennhurst* and its progeny's interpretation of the constitutional ascertainability requirement. There is no question that the condition on spending Rescue Plan funds is "explicitly obvious" within the statute, and it provides a participating state with "the freedom to tailor compliance according to its particular . . . interests and circumstances." *Benning*, 391 F.3d at 1307 (citations omitted). "Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible." *Id.* (citation omitted)); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985) ("*Pennhurst* does not suggest that the

Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance." (emphasis in original)).

Thus, the panel opinion's failure to heed the Supreme Court's mandate to exhaust the statutory-interpretation toolbox before declaring a statutory provision ambiguous or unascertainable led the panel opinion to incorrectly declare section 802(c)(2)(A) unascertainable. As a court, we should have corrected this error. The panel opinion's refusal to consider anything but three dictionary definitions in isolation defies both Supreme Court and our statutory-interpretation jurisprudence. And it also invalidates a perfectly constitutional choice that Congress lawfully made. We lack the power to do that. But because the panel opinion does it anyway, it violates the separation of powers by invading the province of the legislature.

III.

Yet the panel opinion was just warming up. The real action occurred next. In a usual *Chevron* analysis, when a statute contains an ambiguity, we consider any regulations the Secretary charged with administering the statute promulgated to construe that ambiguity. *Chevron*, 467 U.S. at 842–43. But that's not what happened here, even though the Secretary promulgated a rule implementing section 802(c)(2)(A). Rather, the panel opinion relied on its invalid construction of section 802(c)(2)(A) as its sole basis for concluding that that provision raises a "major question" that the Secretary cannot permissibly answer.

As an initial note, when we give section 802(c)(2)(A) its only plausible construction, we don't need to consider the Secretary's regulation to answer the question presented here. As I've explained, our statutory-interpretation toolbox shows us that section 802(c)(2)(A) bears only one plausible interpretation: it prohibits a participating state from using Rescue Plan funds to ultimately pay for a reduction in net tax revenue as compared to the state's net tax revenue in the last fiscal year ending before the United States declared the COVID-19 emergency.

But that's what makes the panel opinion's invocation of the major questions doctrine—an idea that some notable critics have referred to as a "get-out-of-text-free card[]," *Env't Prot. Agency*, 142 S. Ct. at 2641 (Kagan, J., dissenting)—all the more troubling here.

I'm getting ahead of myself, though. To play the major-questions-doctrine card, the panel opinion first laid down this incorrect proposition: "[O]ne reasonable interpretation of [section 802(c)(2)(A)] is that it proscribes all tax cuts during the covered period. On that reading, the [Rescue Plan] affects the states' sovereign authority to tax, and intrudes into an area that is the particular domain of state law." *West Virginia*, 59 F.4th at 1147 (citations omitted).

But we've already established that there is nothing "reasonable" about an interpretation of section 802(c)(2)(A) that claims it "proscribes all tax cuts during the covered period." *See supra* at 25. As a reminder, that interpretation necessarily ignores the words

"funds provided under this section" (meaning Rescue Plan funds) and "net tax revenue" in section 802(c)(2)(A). *See id.*

Yet the panel opinion relied solely on this invalid interpretation of section 802(c)(2)(A) to justify its invocation of the major questions doctrine. It said, "The choice between that [(erroneous)] reading and a narrower one is a major question, such that Congress had to speak in a 'specific and detailed' way if it intended to delegate the authority to answer that question." *West Virginia*, 59 F.4th at 1147.

That, of course, is just wrong. Congress didn't "intend[] to delegate the authority to answer that question" because that question is fictional. There is no "choice" that can be made between the panel opinion's implausible "reading" of section 802(c)(2)(A) that prohibits states from making any tax cuts and the so-called "narrower one" that prohibits states from using Rescue Plan money to fund only tax cuts or delayed tax implementations that result in a reduction in "net tax revenue." As we all know by now, the only plausible interpretation of section 802(c)(2)(A) is that it doesn't prohibit all tax cuts; rather, it precludes states from using Rescue Plan funds—and only Rescue Plan funds—to pay for shortfalls in "net tax revenue" caused by a tax reduction or a delayed tax increase. Again, states are free to make any tax cuts they desire. They just can't use Rescue Plan money to fund those tax cuts. Instead, states must pay for those tax cuts as they would have in the absence of Rescue Plan money—that is, with other income sources or spending cuts.

Once the false all-tax-cuts-prohibited card falls, so does any basis for invoking the major questions doctrine. Because section 802(c)(2)(A) can plausibly bear only the narrower interpretation this opinion explains, by definition, no choice between a broad and narrow reading of the provision exists. And the whole major-questions-doctrine house of cards comes crashing down.

In other words, the panel opinion wrongly invoked the major questions doctrine based on a faulty premise. After all, there's no reason to ponder whether we can even consider the Secretary's regulations when the statutory text provides only one plausible answer to the only question presented. That's game over.

Or at least it should have been. Compounding its mistake, though, the panel opinion then relied on its erroneous interpretation as the sole basis to extend the use of the major questions doctrine into previously uncharted territory. In this respect, the panel opinion, citing *King*, said that "[i]f the availability of a tax credit is a major question that cannot be delegated by generic language, . . . then the same is true for the way the offset provision applies to the States' budget process." *Id.* at 1147 (citing *King*, 576 U.S. at 485–86). Even setting aside the faulty premise on which the panel opinion incorrectly invoked the major questions doctrine, the panel opinion's decision to extend the major questions doctrine to the Secretary's regulations implementing section 802(c)(2)(A) is wrong for at least four other reasons.

First, the Secretary's rule applying section 802(c)(2)(A) does not come within the category of cases the Supreme Court

identified as subject to the major questions doctrine when the Court relied on that doctrine to invalidate the Internal Revenue Service's rule implementing the Affordable Care Act's tax credit in *King*. In *King*, the Supreme Court invoked the major questions doctrine after reasoning that "[t]he tax credits [at issue there] [we]re among the [Affordable Care] Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for missions of people. Whether those credits [we]re available on Federal Exchanges [wa]s thus a question of deep 'economic and political significance' that [wa]s central to th[e] [Affordable Care Act] statutory scheme . . . ." 576 U.S. at 485–86. On top of that, the Supreme Court continued, "[i]t [wa]s especially unlikely that Congress would have delegated [a key reform in the Affordable Care Act] to the IRS, which has no expertise in crafting health insurance policy of this sort." 576 U.S. at 486, 497.

Those circumstances just don't apply here. In *King*, the Affordable Care Act provided no answer to whether tax credits were available on Federal Exchanges—and any answer to that question had significant economic and political effects. In other words, exhaustive review of the statutory provision at issue in *King* left the Court with a major question. But here, the Rescue Plan itself answers the questions this case poses—those are, whether section 802(c)(2)(A) puts states on notice as to whether they may make tax cuts during the covered period if they receive Rescue Plan funds, and if so, how will the federal government measure whether a state that makes tax cuts during the "covered period" has used Rescue Plan money to fund those tax cuts.

As we know, section 802(c)(2)(A) responds to those questions by recognizing that states may make tax cuts as long as they don't pay for those tax cuts with Rescue Plan money and by establishing the state's own fiscal year 2019 net tax revenue as the baseline against which net tax revenue in years when a state receives Rescue Plan money and makes tax cuts is to be measured. And unlike in *King*, there is no other open question that requires considering the regulations. Even the panel opinion fails to identify any other question at issue in this case. It should go without saying that if no question remains, there can be no major question to which we may apply the major questions doctrine. For this reason alone, the panel opinion's comparison of section 802(c)(2)(A) to the tax-credit provision in the Affordable Care Act cannot be valid.

Besides that, unlike the healthcare insurance policy question that the Affordable Care Act purported to delegate to the IRS to answer by regulation, here, Congress's delegation falls well within the Secretary's wheelhouse: the Secretary's regulation concerns grants of Treasury funds that her own department wholly administers. And unlike the delegation resulting in the Affordable Care Act tax-credit regulation, the Secretary's regulatory authority here affects the same people or entities—in this case, states—as the statute does: those that have elected to participate in the Rescue Plan program. In short, applying the major questions doctrine here is not the same thing at all as applying it in *King*.

Second, the circumstances here don't resemble any other cases in which the Supreme Court has relied on the major

questions doctrine. In *West Virginia v. Environmental Protection Agency*, the Court defined the thrust of the major questions doctrine as addressing the recurring problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." 142 S. Ct. at 2609. In its analysis, the Court collected cases analyzing major questions, citing some "common threads" in applications of the doctrine. *Id.* at 2607–09

The Court found delegation issues where an agency repurposed a statute to serve a new aim not articulated by Congress. *See e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (rejecting the Food and Drug Administration's assertion that its authority over "drugs" and "devices" included the power to regulate tobacco products); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (rejecting the Attorney General's assertion that the power to revoke a physician's registration to prescribe Schedule II drugs where "inconsistent with the public interest" did not include the power to revoke licenses for assisting suicide where legal under state law); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (invalidating OSHA's vaccinate-or-test mandate because OSHA had "never before adopted a broad public health regulation of this kind").

Another category of major-questions cases involved agency invocation of "extravagant statutory power over the national economy," affecting a broad swath of the economy not previously regulated by the agency. *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573

U.S. 302, 324 (2014) (declining to uphold the EPA's definition of "air pollutant" where it would give EPA permitting authority over "a significant portion of the American economy").

Finally, the Court cited cases in which agencies both repurposed a statute *and* regulated a broad swath of the economy previously untouched. *See e.g.*, *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (rejecting the Center for Disease Control's assertion that its power to prevent the spread of communicable diseases included the power to impose a rent moratorium); *see also Biden*, 143 S. Ct. at 2373–75 (striking down the Secretary of Education's student loan forgiveness measures where the waivers and modifications would "fundamental[ly] revis[e]" the federal student financial aid scheme, and the measures would cost taxpayers hundreds of billions of dollars).

None of these threads are present here. The Secretary did not repurpose the Rescue Plan. Rather, she implemented regulations consistent with Congress's command under the provision prohibiting use of Rescue Plan money to fund state tax cuts, and she did so shortly after Congress enacted the Rescue Plan. Nor did the Secretary rely on an old statute or authority to take unprecedented action affecting a large swath of the American economy not previously regulated. To the contrary, the Secretary promulgated the regulation mere months after the Rescue Plan was enacted, and the regulation affects only the states that had voluntarily agreed to take Rescue Plan money. Not only that, but the regulation pertains

to only how states spend Rescue Plan *money*, not any other sources of income the states may have.

Third, the panel opinion does not explain how this case is otherwise so extraordinary as to require the application of the major questions doctrine's termination of a statutory provision with extreme prejudice. The panel opinion refers to the "novelty and scope" of the Rescue Plan and says that section 802(c)(2)(A) "undoubtedly implicates questions of deep economic and political significance and alters the traditional balance of federalism by imposing a condition on a state's entire budget process." *West Virginia*, 59 F.4th at 1146.

But as I've just explained, section 802(c)(2)(A) leaves no question this case asks unanswered. How does prohibiting states that have voluntarily chosen to receive Rescue Plan funds from using those funds to pay for state tax cuts raise "questions of deep economic and political significance" that Congress did not already answer when it enacted the Rescue Plan? And what are these "questions of deep economic and political significance"?

The panel opinion doesn't say. And it doesn't explain how the Rescue Plan's limited prohibition on using Rescue Plan money to fund state tax cuts "impos[es] a condition on a state's entire budget process" that "alters the traditional balance of federalism." After all, even states that choose to participate in the Rescue Plan remain free to make any tax cuts they desire and to pay for those tax cuts in their budget in any way they wish, as long as they don't

ultimately use federal Rescue Plan money to cover the cost of the state tax cuts.

What's more, the purported "novelty and scope," standing alone, of the Rescue Plan are the wrong focus in any major-questions analysis. Rather, though the major questions doctrine concerns itself with cases involving questions of "'such magnitude and consequence' on a matter of 'earnest and profound debate across the country,'" the doctrine focuses on whether Congress itself has clearly conveyed a policy decision directly through its legislation or has clearly delegated any such decision to an agency (as opposed to Congress's failure to directly make a decision in its legislation or to clearly delegate a specific decision to an agency). *Biden*, 143 S. Ct. at 2374 (quoting *Env't Prot. Agency*, 142 S. Ct. at 2616, 2620). And here, Congress *did* speak. As Section II of this opinion shows, it spoke clearly in section 802(c)(2)(A), fully answering the questions before us. So the major-questions doctrine's concern about ensuring that Congress—and not an agency—makes significant decisions does not arise here.

And *fourth*, section 802(c)(2)(A), which allows states to receive federal funding subject to a specified condition, is precisely the type of legislation that the Supreme Court has repeatedly upheld under the Spending Clause. *See*, *e.g.*, *Bennett*, 470 U.S. at 659 (upholding a federal grant system that prohibited states from using funds provided "merely to replace state and local expenditures"); *Brock v. Pierce Cnty.*, 476 U.S. 253, 254 (1986) (upholding the Secretary of Labor's right to recoup misspent funds granted under the

Comprehensive Employment and Training Act); *Bell v. New Jersey*, 461 U.S. 773, 782 (1983) (holding that the Elementary and Secondary Education Act "contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused"). There is nothing new or materially different about section 802(c)(2)(A) of the Rescue Plan.

In short, the major questions doctrine has no application in this case, and the panel opinion wrongly invoked it to invalidate statutorily discernible congressional intent.

One final point: As I've mentioned, the only questions at issue here are whether section 802(c)(2)(A) puts states on notice as to whether they may make tax cuts during the covered period if they receive Rescue Plan funds, and if so, how the federal government will measure whether a state that makes tax cuts during the "covered period" has used Rescue Plan money to fund those tax cuts. Section II of this dissent shows that the answer to those questions is that states that receive Rescue Plan money may cut taxes, but they can't use Rescue Plan money to pay for those tax cuts. And we determine whether a state has violated this prohibition by comparing its net tax revenue during the given fiscal year of the covered period to its net tax revenue during the state's fiscal year 2019. As for the mechanics of implementing section 802(c)(2)(A)'s unambiguous prohibition, that question is not before us in this case because no state claims that the Secretary violated section 802(c)(2)(A) in enforcing that section's prohibition on spending Rescue Plan money to fund state tax cuts during the covered period.

Still, though, 42 U.S.C. § 802(f) empowers the Secretary "to issue such regulations as may be necessary or appropriate to carry out [the Rescue Plan]." And any regulation that sets out the step-by-step details of carrying out Congress's command in section 42 U.S.C. § 802(c)(2)(A) would fall into that category. As it turns out, that's precisely what the Secretary's regulation does, and under *Chevron*, we owe it deference.

For starters, in the Rescue Plan, Congress expressly authorized the Secretary to "issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. § 802(f). Not only that, but the Secretary promulgated the regulation here through notice and comment.[10] Specifically, the Secretary first issued her regulation as an interim final rule, 86 FED. REG. 26786, 26807–11 (May 17, 2021), and then later, after responding to

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[10] To be sure, given the emergency situation, the Secretary relied on an expedited procedure. *See* 86 FED. REG. 26786, 26818; *see, e.g.*, *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1262 (11th Cir. 2020) (applying *Chevron* deference to two interim final rules promulgated without regard to notice requirements "due to the burgeoning economic crisis" caused by the pandemic); *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1289–90 (11th Cir. 2021) (dispensing with the notice-and-comment requirement for a vaccine mandate regulation because of "the ongoing pandemic"). As relevant here, the Administrative Procedure Act provides for an exception to the notice-and-comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). That happened here.

comments, and with no material changes, she issued it as a final rule, 87 FED. REG. 4338-01, 4423–29 (Jan. 27, 2022).

When an agency uses the notice-and-comment rulemaking procedure, it is "a 'significant' sign that a rule merits *Chevron* deference." *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57–58 (2011). Together with Congress's express statutory delegation of rulemaking authority to the Secretary in the Rescue Plan, this indicates that Congress "would have intended, and expected, courts to treat [the regulation] as within . . . its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

With the preliminary boxes checked, I consider the content of the Secretary's regulation. And when we look at that, we see that the only differences between the regulation and section 802(c)(2)(A) are (1) the Secretary's allowance for a safe harbor for states with a de minimis (less than one percent) reduction to their net tax revenue resulting from a tax cut or delayed tax implementation during the covered period, 87 FED. REG. 4338-01, 4427 (Jan. 27, 2022), and (2) the Secretary's allowance for recipients to report "actual values" or "estimated values produced by a budget model" for covered changes that reduce tax revenue, *id.* at 4426. Otherwise, the Secretary's regulation merely reduces to a four-step procedure precisely what section 802(c)(2)(A) requires: mathematically determining whether a state has used Rescue Plan funds to pay for a tax cut during the covered period, that resulted in a reduction to the state's net tax revenue during the covered period,

compared to the state's fiscal year 2019 net tax revenue. The regulation's near identicality to section 802(c)(2)(A) certainly renders it a permissible implementation of section 802(c)(2)(A).

IV.

The American Rescue Plan Act provided states with the opportunity to choose whether they wished to accept federal monies to relieve COVID-related economic conditions in ways that the Rescue Plan specified. As relevant here, the Rescue Plan demanded one thing in return for those billions of dollars in aid: states could not use Rescue Plan money to fund state tax cuts that resulted in a reduction in net tax revenue as compared to the state's net tax revenue from fiscal year 2019. By the terms of the Rescue Plan itself, nothing in the Rescue Plan prevented the participating states from making tax cuts; they just couldn't use Rescue Plan money to ultimately fund those cuts. The Rescue Plan makes that condition perfectly ascertainable to anyone who conducts a thorough statutory analysis employing all the statutory-interpretation tools in our toolbox.

But the panel opinion quit its statutory analysis after consulting only the dictionary definitions of three words in isolation from the rest of section 802(c)(2)(A). That's no way to conduct statutory analysis. And it's hard to imagine that this Court would stand for such a slapdash analysis in any other case. Yet the Court gives the panel opinion a pass even though it's clear the panel opinion's methodology flunks Statutory Interpretation 101.

And here, that undeserved pass has real consequences. The panel opinion's failure to comport with Supreme Court jurisprudence on statutory interpretation led the panel opinion to wrongly invalidate section 802(c)(2)(A)'s ascertainable condition. Worse, the panel opinion's demonstrably incorrect construction of section 802(c)(2)(A) to prohibit states participating in the Rescue Plan from making any tax cuts whatsoever also served as the panel opinion's sole justification for its inappropriate application and expansion of the major questions doctrine. Ironically, even as the panel opinion invalidated a perfectly valid congressional enactment, it invoked the separation of powers to (incorrectly) justify its actions.

As a result, states may now spend Rescue Plan money to fund state tax cuts that result in a reduction in net tax revenue, as compared to the state's fiscal year 2019 net tax revenue, in violation of Congress's express command. I respectfully dissent from the denial of rehearing en banc.

FILED
2021 Nov-15 PM 04:32
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

State of West Virginia, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	7:21-cv-00465-LSC
	)	
United States Department of Treasury, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF OPINION

I. Introduction

On March 31, 2021, Plaintiffs West Virginia, Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, and Utah (hereinafter, "the Plaintiff States") brought this action against the United States Department of the Treasury ("Treasury"), Treasury Secretary Janet Yellen in her official capacity ("the Secretary"), and Treasury Inspector General Richard Delmar in his official capacity (collectively, "the Defendants"). The Plaintiff States seek to invalidate and enjoin a provision of the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2, § 9901, 135 Stat. 4 (2021) (codified at 42 U.S.C. §§ 802 *et seq.*).

The ARPA is a $1.9 trillion economic stimulus bill that was passed by Congress and signed into law by President Biden on March 11, 2021. It was enacted to hasten the United States' recovery from the economic impact of the COVID-19 pandemic and accompanying recession. The ARPA distributes roughly $195.3 billion directly to the States for specified purposes. 42 U.S.C. § 802(b)(3)(A). However, before a State can receive those funds, it must certify to the Secretary that it will comply with multiple conditions that the ARPA imposes. *Id.* § 802(d)(1). The Plaintiff States contend that one of those conditions—what this opinion will refer to as the "Tax Mandate"—exceeds Congress's power under the Spending Clause of Article I, Section 8 of the U.S. Constitution because it is ambiguous, coercive, and unrelated to the ARPA's purpose. The Plaintiff States also claim that the Tax Mandate violates the Tenth Amendment to the U.S. Constitution and the anti-commandeering doctrine because it intrudes into their sovereignty by prohibiting States from reducing taxes for the next three years. Their Complaint seeks a declaration from this Court stating as much and an order permanently enjoining enforcement of the Tax Mandate against them. (*See* doc. 1).

The Court has previously entered one opinion and order in this case, denying the Plaintiff States' motion for a preliminary injunction of the Tax Mandate during the pendency of this litigation. This opinion considers three motions that are

currently pending. The Wisconsin Legislature has moved to intervene as a plaintiff in this lawsuit. (Doc. 58.) Additionally, the existing parties have filed warring motions, the resolution of which will conclude this litigation: the Plaintiff States' motion for a final judgment that would declare the Tax Mandate unconstitutional and permanently enjoin its enforcement (doc. 75) and the Defendants' motion to dismiss the Plaintiff States' Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted (doc. 76).

After providing background information on the ARPA, the Tax Mandate, and events that occurred after its enactment, the Court will consider whether it continues to have subject matter jurisdiction over this action, concluding that it does. The Court will then explain why the Wisconsin Legislature is not entitled to intervene as a plaintiff in this action. Finally, the Court will discuss why the Plaintiff States' motion for a final judgment and permanent injunction is due to be granted and the Defendants' motion to dismiss is due to be denied. Accordingly, the Court will permanently enjoin the Secretary from seeking enforcement of the Tax Mandate against the Plaintiff States.[1]

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[1] This lawsuit by thirteen Plaintiff States is one of six around the country with nearly identical complaints. Four cases have already been decided with vastly different results. In two of the four, district courts in Missouri and Arizona dismissed the complaints, finding that those States lack of standing. *See Arizona v. Yellen*, 2021 WL 3089103, at *6 (D. Ariz. July 22, 2021), appeal filed, No. 21-16227 (9th Cir. July 26, 2021); *Missouri v. Yellen*, 2021 WL 1889867, at *5 (E.D. Mo. May 11, 2021), appeal filed, No. 21-2118 (8th Cir. May 18, 2021). In Ohio, however, a district court ruled

II. Background

The COVID-19 pandemic has caused ongoing economic harm to individuals, businesses, and state and local governments. To ease the financial strain, in March 2020, Congress provided $150 billion in direct assistance for state, local, and Tribal governments under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). *See* Pub. L. No. 116-137, § 5001, 134 Stat. 281, 501 (2020) (codified at 42 U.S.C. § 801). However, economic distress continued. Accordingly, on March 11, 2021, the 117th Congress passed, and President Joseph Biden signed, the ARPA, which appropriated approximately $1.9 trillion to provide relief to address the impact of the COVID-19 pandemic. *See* 42 U.S.C. § 802 *et seq*. Out of the roughly $1.9 trillion that the ARPA allocates for pandemic relief, around $195.3 billion is tapped for the States. *Id.* § 802(b)(3)(A). These funds represent an average of about 25% of the thirteen Plaintiff States' annual budgets. (Doc. 1 ¶¶ 45–57.) In Arkansas, for instance, anticipated ARPA funding represents 29% of the State's annual budget. (*Id.*

that Ohio had standing to sue and granted its motion for a permanent injunction solely on the ground that the Tax Mandate is unconstitutionally ambiguous under the Spending Clause. *See Ohio v. Yellen*, 2021 WL 2712220, at *22 (S.D. Ohio July 1, 2021), appeal filed, No. 21-3787 (6th Cir. Sept. 3, 2021). Similarly, a district court in Kentucky ruled that Tennessee and Kentucky possessed standing, but it granted their motion for a permanent injunction solely on a different ground: that the Tax Mandate is unconstitutionally coercive under the Spending Clause. *See Kentucky v. Yellen*, 2021 WL 4394249, at *9 (E.D. Ky. Sept. 24, 2021). A lawsuit brought by Texas, Louisiana, and Mississippi challenging the Tax Mandate remains pending. *See Texas, et al. v. Yellen*, No. 2:21-cv-00079-Z (N.D. Tex.).

¶ 117.) For West Virginia and Arkansas, it represents over 25% (*id.* ¶ 47, 53); for Alabama, over 21% (*id.* ¶ 50); and Kansas, over 20% (*id.* ¶ 56).

The federal funds come with certain strings attached. To qualify for the funding, a State must "provide the Secretary with a certification, signed by an authorized officer of such State . . . that such State . . . requires the payment . . . to carry out the activities specified in subsection (c) . . . and will use any payment under this section . . . in compliance with subsection (c)." 42 U.S.C. § 802(d)(1). The Secretary is to "make the payment required for the State . . . not later than 60 days after the date on which th[at] certification . . . is provided to the Secretary." *Id.* § 802(b)(6)(A)(i).

As the above language suggests, the conditions are set forth in subsection (c). In that section, Congress specified that States must use ARPA funds to respond to the negative economic impacts of the COVID-19 pandemic in one of four specific ways: (1) providing assistance to "households, small businesses, and nonprofits" and "impacted industries such as tourism, travel, and hospitality"; (2) responding "to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers"; (3) making up for pandemic-related reductions in state government revenue; and (4) paying for "necessary investments in water, sewer, or broadband infrastructure." *Id.* §

802(c)(1)(A-D). The States must use the funds by December 31, 2024. *Id.* § 802(c)(1).

The ARPA also contains two restrictions on the States' use of the federal funds. One limitation (not challenged here) provides that a State may not deposit ARPA funds "into any pension fund." *Id.* § 802(c)(2)(B). The other limitation (the Tax Mandate) provides as follows:

> (2) FURTHER RESTRICTION ON USE OF FUNDS. —
>
> (A) 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 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.

Id. § 802(c)(2)(A). The phrase "directly or indirectly offset" is not defined in the ARPA. The ARPA requires any State that receives funds to "provid[e] a detailed accounting" to the Secretary of "all modifications to the State's . . . tax revenue sources" for the covered period, as well as "such other information as the Secretary may require for the administration of" the Tax Mandate. *Id.* § 802(d)(2). The Secretary can recoup funds that she interprets were used in violation of the Tax Mandate. *Id.* § 802(e)(1). The Tax Mandate's "covered period" extends from March 3, 2021, until all funds "have been expended or returned to, or recovered by,

the Secretary." *Id.* § 802(g)(1). The ARPA also authorizes the Secretary "to issue such regulations as may be necessary or appropriate to carry out" the applicable statutory provisions. *Id.* § 802(f).

On March 16, 2021, twenty-one State attorneys general wrote a letter to the Secretary, seeking guidance as to the scope of the Tax Mandate. (Doc. 21–1 at 4.) The letter listed several tax cuts proposed by legislatures in various States and asked if those cuts would expose the States to ARPA recoupment. The letter included the following concern:

> The import of [the ARPA's] prohibition against "offsetting" reductions in state tax revenue is unclear, but potentially breathtaking. This provision might have been intended merely to prohibit States from *expressly* taking COVID-19 relief funds and rolling them directly into a tax cut of a similar amount. But its prohibition on "indirectly" offsetting reductions in tax revenue, combined with the list of prohibited kinds of tax reductions (rate cuts, rebates, deductions, credits, or "otherwise"), could also be read to prohibit tax cuts or relief of any stripe, even if wholly unrelated to and independent of the availability of relief funds. After all, money is fungible, and States must balance their budgets. So, in a sense, *any* tax relief enacted by a state legislature after the State has received relief funds could be viewed as "using" those funds as an "offset" that allows the State to provide that tax relief.

(*Id.* at 5.)

The Secretary responded on March 23, 2021, writing as follows:

> Nothing in the Act prevents States from enacting a broad variety of tax cuts. That is, the Act does not "deny States the ability to cut taxes in any manner whatsoever." It simply provides that funding received

> under the Act may not be used to offset a reduction in net tax revenue. If states lower certain taxes but do not use funds under the Act to offset those cuts—for example, by replacing the lost revenue through other means—the [Tax Mandate] is not implicated.

(*Id.* at 12.) The Secretary's letter did not respond to the States' questions regarding the specific tax modification proposals pending in the States.

On March 31, 2021, the Plaintiff States, believing the Tax Mandate to be unconstitutional, sued for declaratory and injunctive relief in this Court. The Plaintiff States alleged in their Complaint that they are or were actively considering various forms of tax relief for individuals and small businesses, whether directly related to state pandemic-relief efforts or through unrelated policy measures. (Doc. 1 ¶¶ 76–83.) They claim that the Tax Mandate has cast significant uncertainty over these efforts as it is unclear whether States can pass any tax relief measures throughout the covered period without running afoul of the Tax Mandate and thus being forced to repay some or all of the federal funds to the Treasury. The Plaintiff States' Complaint alleges that the Federal Tax Mandate is unconstitutional for two reasons: (1) it violates the Spending Clause of the U.S. Constitution by being coercive, ambiguous, and unrelated to the ARPA's purpose (Count 1); and (2) it violates the Tenth Amendment to the U.S. Constitution in that it commandeers state taxing authority (Count 2).

On April 13, 2021, the Plaintiff States moved in this Court, pursuant to Federal Rule of Civil Procedure 65, for an order preliminarily enjoining enforcement of the Tax Mandate, while keeping the remainder of the ARPA intact, while this lawsuit is pending. (Doc. 21.) The Defendants responded in opposition to the motion, claiming that this Court does not have jurisdiction because the Plaintiff States lack standing and their claims are not yet ripe, and that, on the merits, the Plaintiff States failed to show that a preliminary injunction is warranted. (Doc. 54.) The Plaintiff States, as well as numerous amici, replied in support of their motion. (Docs. 59, 41, 42, 43, 44, and 48).

On May 13, 2021, while the motion for a preliminary injunction was still pending, the Wisconsin Legislature moved to intervene as a Plaintiff in this lawsuit pursuant to Federal Rule of Civil Procedure 24. (Doc. 58.) The Wisconsin Legislature attached a Proposed Complaint in Intervention (doc. 58-1) and a proposed motion to join in the Plaintiff States' motion for a preliminary injunction (doc. 58-2). The Plaintiff States consented to the Wisconsin Legislature's request (*see* doc. 58 at 2), but the Defendants opposed it (doc. 67).

On May 17, 2021, the Secretary published a 66-page Interim Final Rule (hereinafter the "Final Rule") in the Federal Register, which expounded on the ARPA, including the Tax Mandate. *See* 86 Fed. Reg. 26786–824. Relevant here, the

Final Rule states that "because money is fungible," even ARPA funds "not *explicitly or directly* used to cover the costs of changes that reduce net tax revenue . . . may be used in a manner inconsistent with the statute by *indirectly* being used to substitute for the State's or territory's funds that would otherwise have been needed to cover the costs of the reduction." *Id.* at 26807 (emphasis added).

The Final Rule creates a framework for identifying illegal offsets under the Tax Mandate. First, every fiscal year during the covered period, States use their ordinary budget-scoring process to "identify and value" anticipated legislative and administrative actions that might reduce net tax revenue. *Id.* If there are such reductions, the State must "pay for" them with sources other than ARPA funds. *Id.* However, if the State's covered changes are anticipated to decrease revenue by one percent or less of the State's 2019 inflation-adjusted revenue, the decreases are deemed "de minimis" and will not be subject to recoupment. *Id.* at 26807–08. A State also falls within a safe harbor from the Tax Mandate if its actual tax revenue for a fiscal year exceeds its inflation-adjusted 2019 tax revenue. *Id.* at 26807, 26809. If neither the de minimis exception nor the safe harbor applies, and the State's actual tax revenue in the reporting year is less than the State's inflation-adjusted 2019 tax revenue, the State will identify any sources of funds that have been used to permissibly offset the total value of covered tax changes. *Id.* at 26807. These include

any tax changes that increase tax revenue and any spending cuts in "areas" where the State is not spending ARPA funds. *Id.* at 26808. The State then subtracts those permissible offsets from the total value of revenue-reducing changes calculated in the first step to determine what portion of the revenue-reducing changes has not been paid for. *Id*. at 26807, 26809–10, 26823. The State is then potentially subject to recoupment for that amount or the difference between the State's actual tax revenue and its inflation-adjusted 2019 tax revenue, whichever is greater. *Id.* If there are amounts that could be subject to recoupment, the Treasury will provide notice to the State and the State will have an opportunity to respond. *Id.* at 26808.

To determine which spending cuts are "covered," the Treasury's supervision must extend beyond how States are spending ARPA funds to also cover how States are spending State funds. Spending cuts in "areas" where States spent ARPA funds are not "covered spending cuts" and thus cannot offset a decrease in revenue. *Id*. at 26810. Even a spending cut that a State thinks would qualify as covered in one year may become an uncovered spending cut years later. The Treasury promises to "monitor changes in spending throughout the covered period," and if a spending cut in one year is, years later, "replaced with [ARPA] Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury may consider such change to be an evasion of the restrictions of the offset provision and

seek recoupment of such amounts." *Id*. Ultimately, "all relevant facts and circumstances" are considered when the Treasury determines whether a State has violated the Tax Mandate. *Id*.

On July 14, 2021, this Court denied the Plaintiff States' motion for a preliminary injunction. (Doc. 71; *West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863 (N.D. Ala. July 14, 2021)). With regard to the jurisdictional question, this Court determined that the Plaintiff States alleged facts sufficient to establish standing and that their claims are ripe because they properly alleged several different injuries in fact: they were not offered a clear understanding of the deal that Congress is offering because of the Tax Mandate's ambiguity; their sovereignty was intruded upon by having to choose between forgoing a benefit (federal funds) or accepting that benefit on unconstitutional terms; and there is a credible threat of enforcement in the form of a recoupment action. (Doc. 71 at 14–20.) This Court refrained from deciding whether the Plaintiff States were likely to succeed on the merits of their constitutional claims, instead concluding that preliminary injunctive relief was not warranted because the Plaintiff States could not establish that a preliminary injunction would remedy the irreparable injury they had already suffered or were likely to suffer. This was so for several reasons. For one, recoupment of ARPA funds is not an irreparable injury because this Court could return the funds to the Plaintiff

States if the Secretary recouped them during the pendency of this lawsuit and this Court ultimately invalidated the Tax Mandate. Additionally, preliminarily enjoining the Secretary from recouping ARPA funds while this action is pending would not have remedied the harm that the Plaintiff States claimed to suffer because they still had to take into consideration, when deciding whether to accept ARPA funds, that the funds would be subject to possible recoupment if this Court were to ultimately issue a merits decision declining to invalidate the Tax Mandate. This Court noted that the only difference in whether this Court granted or denied the motion for a preliminary injunction was that, if the Court granted the motion, the Secretary could not recoup funds from that point until the point that this Court decided the ultimate issues in this case, and there was virtually no likelihood that the Secretary would recoup ARPA funds from the Plaintiff States during that short—likely only months-long—time frame.

Immediately after the Court denied the motion for a preliminary injunction, the parties filed, and the Court granted, a joint motion for an expedited briefing schedule relating to motions for final resolution of this case, acknowledging that this dispute presents purely legal issues. On July 29, 2021, the Plaintiff States moved for a final judgment, permanent injunction, and declaratory judgment. (Doc. 75.) In support of their motion, the Plaintiff States provided a list of some of the revenue-

related laws that each of the thirteen Plaintiff States has passed since the enactment of the ARPA in March 2021. (Doc. 75-1.) The Plaintiff States also provided the declaration of an Alabama State Senator, Greg Albritton. (Doc. 75-2.) The Defendants responded in opposition to the Plaintiff States' motion for a permanent injunction and moved to dismiss the Plaintiff States' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. (Doc. 76.)

According to a joint stipulation of facts submitted by the parties, as of July 23, 2021, the following Plaintiff States have submitted to the Secretary signed certifications under 42 U.S.C. § 802(d), agreeing to abide by the Tax Mandate, and have received funds under the ARPA: Alabama, Arkansas, Alaska, Florida, Iowa, Kansas, Montana, New Hampshire, Utah, and West Virginia. (Doc. 74.) Wisconsin has done so as well, according to the Treasury in its response in opposition to the Wisconsin Legislature's motion to intervene. (Doc. 67 at 14.) As of August 12, 2021, those ten Plaintiff States had received over $10.6 billion in federal funds through the ARPA. The remaining Plaintiff States—Oklahoma, South Carolina, and South Dakota—had not yet provided certifications to the Secretary as of August 2021.

With these factual developments in mind, the Court turns to the matters before the Court.

III. Discussion

A. Jurisdiction

Although the Court ruled that it has jurisdiction over this action in its earlier opinion considering the Plaintiff States' request for a preliminary injunction, *see* doc. 71 at 18–20, because the Defendants have moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction based upon the doctrines of standing, ripeness, and mootness, this Court will once again consider its power to hear this case. *See also RES-GA Cobblestone, LLC v. Blake Const. & Dev., LLC*, 718 F.3d 1308, 1313 (11th Cir. 2013) ("Federal courts operate under a continuing obligation to inquire into the existence of subject matter jurisdiction whenever it may be lacking.").

Article III of the U.S. Constitution restricts federal courts to the resolution of "Cases" and "Controversies." U.S. Const. art. III, § 2. "Standing is a doctrine that 'stems directly from Article III's "case or controversy" requirement,' and thus it 'implicates [this Court's] subject matter jurisdiction.'" *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (quoting *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003)). Plaintiffs are required to "'alleg[e] such a personal stake in the outcome of the controversy' as to . . . justify [the] exercise of the court's remedial powers on [their] behalf." *Simon v. E. Ky. Welfare*

Rights Org., 426 U.S. 26, 38 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)). Further, "'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Standing is assessed under the facts as they existed when the complaint was filed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 606 n.4 (1992).

To show standing, a plaintiff must generally demonstrate that he suffered or shall immediately suffer an injury in fact, that the injury was caused by the defendant's conduct, and that the injury is redressable by a favorable court decision. *See Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008). An injury sufficient to satisfy Article III must be "concrete and particularized" and "actual and imminent, not 'conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

The dispute between the parties as to standing centers on the question of injury in fact. The Defendants assert that the Plaintiff States have not proved that there is an imminent threat of enforcement of the Tax Mandate or that they have suffered any other cognizable injury.[2] In contrast, the Plaintiff States contend that

[2] Relatedly, the Defendants assert that the Plaintiff States' claims are not ripe. The ripeness inquiry requires a two-part determination of "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 148–49

they have suffered harm to their sovereign power to set tax policy since the date on which the Tax Mandate became effective, whether or not they certify compliance with the ARPA's conditions or the Secretary ever initiates recoupment proceedings, because the Tax Mandate does not define how States might use ARPA funds to indirectly offset any net tax revenue reductions caused by a change in state law.

As this Court noted at the preliminary injunction stage, the Supreme Court has likened Congress's conditioning of federal money to 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). Just as a contract requires a knowing acceptance of the offer's terms, conditioned federal money must "enable the States to exercise their choice knowingly, cognizant of the consequences of" their acceptance. *Id.* The Court in *Pennhurst* continued, "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. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (internal citations and footnote omitted). Taking note of this Spending Clause jurisprudence,

(1967)). "Courts must resolve 'whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court.'" *Id.* (quoting *Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995)). For the same reasons that the Plaintiff States have standing, as discussed below, their claims are ripe.

this Court concluded that, because Congress is required to clearly state the terms upon which it extends an offer of conditional funding to the States, the Plaintiff States had established that they were entitled to clarity regarding the strings attached when presented with an offer of conditional funding. This Court ruled that such clarity is critical to a State's ability to exercise its sovereign prerogative of deciding whether to accept that offer. Thus, the Court found that the Plaintiff States had shown that they suffered an injury in fact when they were presented with an unconstitutionally ambiguous spending condition. Further, because there is no question that the alleged injury in fact is fairly traceable to the Tax Mandate and can be redressed by a court order invalidating the mandate, *see Browning*, 522 F.3d at 1159, the Court found that the Plaintiff States possessed standing.

The Defendants present various arguments seeking a different result now, but none has merit. First, they contend that the original harm that the Plaintiff States claimed in filing suit—the difficulty that the Tax Mandate's ambiguity created for them in deciding whether to accept ARPA funding—ended for ten of the thirteen Plaintiff States when they made the decision to certify compliance with the ARPA, binding them to its terms. According to the Defendants, accepting the deal moots the injury as to those ten States.

As an initial matter, standing is measured at the time the lawsuit is filed based on the facts as they existed at that time. *Lujan*, 504 U.S. at 569 n.4. Thus, the Plaintiff States do not relinquish their standing to sue due to subsequent events. However, if events that occur subsequent to the filing of a lawsuit deprive the court of the ability to give a plaintiff meaningful relief, then the case is moot and must be dismissed. *See, e.g., Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). Granted, for ten of the Plaintiff States, one type of harm that they incurred in contemplating whether to accept an ambiguous deal has now been extinguished in that they have made that decision. However, these ten States continue to suffer the closely related harm to their sovereign authority to set their own tax policies. Indeed, the Supreme Court has long recognized the States' sovereign authority to tax as "indispensable" to the States' very "existence." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824); *see also McCulloch v. Maryland*, 17 U.S. 316, 428 (1819) ("[T]he power of taxing the people and their property[] is essential to the very existence of government."). The Plaintiff States have sufficiently demonstrated that their legislatures do not have sufficient information in considering tax changes to determine the impact such changes will have on their ability to retain the federal grant money. As stated by Alabama State Senator Albritton in his declaration submitted by the Plaintiff States, it is crucial that State legislatures understand the financial effects of revenue laws that they pass to

effectively craft state budgets, and the uncertainty surrounding the Tax Mandate has caused at least one bill in the Alabama legislature to fail despite widespread approval by legislators and constituents, due to fear that the Secretary could interpret the reduction as triggering a right to recoupment. (Doc. 75-2.) Thus, the Plaintiff States have shown that they are subject to continuous and ongoing harm even if no recoupment action ever happens because of the harm that the Tax Mandate inflicts on the legislative process. And they are experiencing these injuries now, making them "actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 560. Accordingly, the fact that ten Plaintiff States have now accepted the deal certainly does not moot this Court's ability to give them meaningful relief by way of invalidating the Tax Mandate.

The second challenge that the Defendants present to the Plaintiff States' standing is to stress that the evidentiary showing required to establish standing is greater at this stage of the litigation, where final relief is sought, than it was at the preliminary injunction stage. The burden of proof in establishing standing does increase "with the manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561. The Defendants argue that at final judgment, that means that the Plaintiff States must provide evidence to prevail. While that may be correct, it does not impact the Court's earlier legal conclusion that the Plaintiff

States have already suffered and continue to suffer an injury in fact due to being presented with an ambiguous deal. Moreover, the Plaintiff States have bolstered their allegations with a list of revenue-related laws passed by the thirteen States since the ARPA's passing as well as a declaration by a State senator. (*See* docs. 75-1, 75-2.) It is unclear, and the Defendants have not suggested, what additional evidence the Plaintiff States could or would be able to present on this front.

Finally, the Defendants resist the conclusion that the Plaintiff States have met the injury in fact element of the standing inquiry by emphasizing their arguments about the substantive validity of the Tax Mandate. They argue that the plain text of the Tax Mandate does not actually prohibit States from reducing their own taxes and that the Tax Mandate is sufficiently clear under the Supreme Court's Spending Clause jurisprudence because all that is required is that a recipient of federal funds know that a condition *exists*, not what it *means*. However, while standing "often turns on the nature and source of the claim asserted," it "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500. Thus, whether the Plaintiff States have standing to bring this lawsuit is not dependent on whether their constitutional claims ultimately succeed.[3]

[3] The Court pauses to note that the Supreme Court has articulated an alternative method for a plaintiff to establish the injury in fact element of the standing inquiry when that plaintiff challenges the constitutionality of a statute that has yet to be enforced against him or her. When a plaintiff seeks to enjoin the future enforcement of a statute, "the injury-in-fact requirement"

In sum, the Defendants have not shown that the Court's earlier conclusion that the Plaintiff States have suffered an injury in fact for standing purposes was erroneous, and they have similarly not demonstrated that the matters at hand are moot. The Court once again concludes that it has jurisdiction over this action.

B. The Wisconsin Legislature's Motion to Intervene

The Wisconsin Legislature—not the State of Wisconsin—seeks to intervene as a Plaintiff in this action by right, pursuant to Federal Rule of Civil Procedure 24(a), or, if this Court does not grant intervention by right, it requests permissive intervention under Rule 24(b)(1)(B). Each request will be addressed in turn.

1. Intervention as of Right and Standing

Under Rule 24(a)(2), a party may intervene as a matter of right if: (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair

demands that the plaintiff "allege[] '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 [enforcement] thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). The Court found at the preliminary injunction stage of this litigation that the Plaintiff States had also established an injury in fact under this alternative method. However, the Court now believes that this method of establishing an injury in fact is not well suited to the facts of this case. The Plaintiff States need not prove pre-enforcement standing because, as previously discussed, the Plaintiff States' injury has already occurred. In other words, whether they are injured is not dependent on whether the Secretary enforces the Tax Mandate against them in the future.

his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit. *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007). Importantly, "[a]ny party, whether original or intervening, that seeks relief from a federal court must have standing to pursue its claims." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007). "[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) ("An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction."). This requirement stems from the rule that "at least one plaintiff must have standing to seek each form of relief requested in the complaint." *Laroe Ests.*, 137 S. Ct. at 1651.

Because the Wisconsin Legislature seeks relief not specifically sought by the Plaintiff States—a Court order invalidating the Tax Mandate that applies to the State of Wisconsin—the Wisconsin Legislature must establish its own standing aside from the standing of the Plaintiff States. The Court will thus first address whether the Wisconsin Legislature has standing to challenge the Tax Mandate before moving to the elements of intervention as of right. *See Steel Co. v. Citizens for a Better Env't*, 523

U.S. 83, 94 (1998) (when a court lacks jurisdiction, it "cannot proceed at all in any cause").

The Wisconsin Legislature asserts that it seeks "to protect the interests of the State of Wisconsin and its Legislature." (Doc. 58 at 5.) It contends that a Wisconsin statute authorizes it to represent the interests of the State of Wisconsin, which it alleges is being harmed by the Tax Mandate for the same reasons that the Plaintiff States have alleged. However, the Wisconsin Legislature cannot represent the interests of the State of Wisconsin in this context. "[I]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The exception to this rule is that a party who lacks standing in their own right may represent the State only if State law authorizes that party "to speak for the State in federal court." *Id.* at 710; *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019). Wisconsin law provides:

> The [Wisconsin] department of justice shall . . . appear for and represent the state . . . and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal in which the state or the people of this state may be interested. The joint committee on legislative organization may intervene as permitted under § 803.09(2m) at any time.

Wis. Stat. § 165.25(1m). Thus, the proper entity to represent the interests of the State of Wisconsin is the Wisconsin department of justice in all cases unless the exception under § 803.09(2m) applies. That section states:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene . . .

Id. § 803.09(2m). Under § 803.09(2m), the Wisconsin Legislature may intervene to represent the State's interests in court only to defend the validity of a Wisconsin law. As the Wisconsin Supreme Court recently stated, "the statutory text [of § 803.09(2m)] unmistakably grants the Legislature an interest *in defending the validity of state law* when challenged in court." *Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 426 (Wis. 2020) (emphasis added). *See also Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 795 (7th Cir. 2019) ("The State of Wisconsin has chosen to have an attorney general as its representative, but it also has recently provided a mechanism by which its legislature . . . can intervene to defend the State's interest *in the constitutionality of its statutes*.") (emphasis added); *id.* at 806 ("section 803.09(2m) reflects a sovereign policy judgment that the Attorney General is not the State's exclusive representative in court *when state laws are challenged*") (Sykes, J., concurring) (emphasis added).

That is not the case here. Here, the Wisconsin Legislature seeks to bring an affirmative challenge to a federal statute. There is no question about the validity of any Wisconsin statute at issue in this case. Thus, the default rule under § 165.25(1m) applies, and the Wisconsin department of justice retains exclusive authority to represent the State of Wisconsin.

The Wisconsin Legislature's argument to the contrary is unavailing. It argues that the Legislature can challenge the Tax Mandate because "a Spending Clause penalty that is so coercive as to make the State's passage of a contrary law prohibitive is indistinguishable from a direct violation of state law . . . ." (Doc. 69 at 4.) Thus, according to the Wisconsin Legislature, it *is* representing the State of Wisconsin's "interest in the validity of state laws" by challenging the Tax Mandate. *See Democratic Nat'l Comm.*, 949 N.W.2d at 424. The Court declines to interpret § 803.09(2m) in such a broad manner.

Because the Wisconsin Legislature cannot represent the interests of the State of Wisconsin, it must show that it has or will suffer an injury in fact to itself as an institution. *Cf. Bethune-Hill*, 139 S. Ct. at 1953 (requiring the Virginia House of Representatives to establishing standing in its own right once it was determined that it could not proceed as the State's agent). The Court finds that the Legislature has not established an injury in fact for several reasons. The Legislature asserts that the

Tax Mandate "harms the sovereign dignity of the State of Wisconsin *and its Legislature*" by being unconstitutionally vague and coercive. (Doc. 58 at 11–12 (emphasis added).) But the sovereign is the State, not its legislature. And the ARPA's funds are offered to the States, not to State legislatures. See 42 U.S.C. § 802(b)(3)(A) ("The Secretary shall reserve $195,300,000,000 of the amount appropriated under subsection (a)(1) to make payments to each of the 50 States and the District of Columbia."). States decide whether to accept the money with strings attached, not their legislatures, and if they accept, States must agree to refrain from using the money in contravention of the Tax Mandate, not their legislatures. *See id.* § 802(c)(1) (". . . a State . . . shall only use the funds provided . . .") & (2) ("A State . . . shall not use the funds provided under this section . . .").

The distinction between the State and its legislature may seem minor considering that, in practice, the legislatures certainly play a major role in setting state fiscal policy. But, given the type of constitutional rights asserted in this case, the difference between the two cannot be overstated. *See Warth*, 422 U.S. at 500 (standing turns on the "nature and source of the claim asserted"). As further explained in the merits section of this opinion, the limits placed on Congress's Spending Clause power rest on concerns of federalism and the protection of our nation's dual system of governing. *See Nat'l Fed'n of Indep. Bus.* ("*NFIB*") *v.*

Sebelius, 567 U.S. 519, 577 (2012) ("Respecting th[e] limitation [on Congress's ability to secure States' compliance with federal objectives by requiring States' knowing and voluntary acceptance of the terms of a spending condition] is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."). It is the States' unique sovereignty that enables them to have certain rights as "offerees" of the "contracts" Congress is authorized to extend to them pursuant to the Spending Clause. *See, e.g.*, *Pennhurst*, 451 U.S. at 17. Thus, while a State, as the offeree of a Spending Clause contract that is impermissibly ambiguous or coercive, can certainly claim an injury to its sovereign interest in setting its own tax policies, it does not make sense to say that a State legislature, which is not the offeree, can do the same. Given the requirement that a plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way," *see Lujan*, 560–61 n.1, it thus seems a stretch to say that a legislature can claim the same type of harm—to its right to be offered an unambiguous condition of federal money—that a State can.

The Supreme Court cases addressing the standing of legislative bodies, while not directly on point, further support this Court's conclusion that the Wisconsin Legislature, as an institution, has not suffered an injury in fact by virtue of the Tax

Mandate's enactment. The Supreme Court addressed the standing of a state legislature in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). Arizona voters adopted Proposition 106, which amended the Arizona Constitution by removing the Arizona Legislature's redistricting authority and vesting it in an independent commission. *Id.* at 791. The Arizona Legislature sued, alleging that Proposition 106 and the commission's redistricting activities deprived the Legislature of its constitutional authority over redistricting, in violation of the Elections Clause of the U.S. Constitution. *Id.* at 792 (citing U.S. Const. art. I § 4, cl.1). The Supreme Court considered whether the Arizona Legislature had alleged an injury that was sufficiently concrete to meet Article III's standing requirements. *Id.* at 799–800. The Court compared the Legislature's claims with the claims made in two earlier legislative standing cases, *Raines v. Byrd*, 521 U.S. 811 (1997), and *Coleman v. Miller*, 307 U.S. 433 (1939). *Id.* at 801–04.

In *Raines*, the Supreme Court considered whether six members of Congress had standing to challenge the constitutionality of the Line Item Veto Act after they were outnumbered in their votes against it as a bill. 521 U.S. at 814. The Act gave the President authority to cancel certain spending and tax benefit measures after signing them into law. *Id.* The Court observed that the members of Congress did not assert

a personal injury but instead claimed merely "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id.* at 821. The nature of that injury did not permit the members to claim a "personal stake" in the suit and the alleged injury was not "sufficiently concrete" to establish Article III standing. *Id.* at 830.

On the other hand, in *Coleman*, the Supreme Court recognized the standing of twenty Kansas state legislators who voted against a resolution that ultimately passed only because the Lieutenant Governor cast a tie-breaking vote—a procedure that the legislators argued was impermissible under Article V of the U.S. Constitution. 307 U.S. at 436. The Supreme Court stated in *Raines* that *Coleman* stands "at most . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823.

The Supreme Court in *Arizona State Legislature* concluded that its facts were more like those in *Coleman* than in *Raines*. 576 U.S. at 803. Proposition 106 "would 'completely nullif[y]' any vote by the Arizona Legislature now or 'in the future,' purporting to adopt a redistricting plan." *Id.* (quoting *Raines*, 521 U.S. at 823–24). Accordingly, the Court concluded, there was a sufficiently concrete injury to the

Arizona Legislature's interest in redistricting that the Legislature had Article III standing. *Id*.

From *Arizona State Legislature*, this Court derives the principle that a legislative body may have standing as an institution so long as its claimed harm serves to "completely nullify" its interest in taking some action that it is legally authorized to take, "now or in the future." *See id.* It is not enough that the legislature's power is diluted; it must be completely lost. *Id*. at 802–04. Here, the application of the Tax Mandate does not nullify any actions that the Wisconsin Legislature would like to take. It may affect them, but it does not render them meaningless. Thus, the Wisconsin Legislature has at most alleged an "abstract dilution of institutional legislative power," rather than a cognizable institutional injury. *See Raines*, 521 U.S. at 826. It therefore lacks standing.

If this Court were to hold differently, it would not find, in any event, that the Wisconsin Legislature may intervene as a matter of right under Rule 24(a)(2). Although the motion to intervene was timely,[4] the Wisconsin Legislature does not

[4] To decide if a motion to intervene is timely the Court considers four factors: (1) the period of time during which the intervenor knew of its interest in the suit before petitioning for intervention; (2) any prejudice the resulting delay might cause the existing parties; (3) any prejudice denial of intervention would cause the intervenor to suffer; and (4) "the existence of unusual circumstances weighing for or against a determination of timeliness." *Comm'r, Ala. Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019). The Wisconsin Legislature moved to intervene approximately six weeks after the Plaintiff States filed their Complaint and roughly one month after they filed their motion for a preliminary injunction. At the

have a "direct, substantial, and legally protectable" interest in the subject matter of this litigation. *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002) ("Under Rule 24(a)(2), a party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable."). The Eleventh Circuit has held that a legally protectable interest "is something more than an economic interest." *United States v. South Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991) (quotation marks and citation omitted). "What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant." *Id.* (quotation marks and citation omitted). Thus, a legally protectable interest is an interest that derives from a legal right. The Wisconsin Legislature has no legally protectable interest in invalidating the Tax Mandate on constitutional grounds because it, unlike the States, has no sovereign right to set its own tax policy.

Nor can the Wisconsin Legislature establish that its interests, if any, would be impaired by the disposition of this action. The Wisconsin Legislature may separately litigate, should it be able to establish its standing using some other theory of harm,

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time of the Legislature's filing, this Court had "yet to take significant action." *Georgia*, 302 F.3d at 1259–60. Furthermore, the fact that the Legislature intended to raise the same claims as the Plaintiff States, even joining in their existing briefing, indicates that intervention would not "delay the proceedings." *Id.* Additionally, because only seven months have passed since the Wisconsin Legislature sought to intervene, the denial of intervention will not seriously prejudice the Wisconsin Legislature's ability to separately litigate.

and the Eleventh Circuit has noted that the ability to separately litigate defeats the impairment element. *See Worlds v. Dep't of Health & Rehab. Servs., State of Fla.,* 929 F.2d 591, 594 (11th Cir. 1991). Finally, this Court may "presume that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993). Accordingly, assuming it had standing, this Court would not have allowed the Wisconsin Legislature to intervene as of right pursuant to Rule 24(a)(2).

2. Permissive Intervention

Although the absence of standing dooms the Wisconsin Legislature's request to intervene as of right, that does not necessarily command the same result for its request to intervene permissibly under Rule 24(b). It appears to be an open question among the federal courts whether a permissive intervenor is required to possess standing. The Supreme Court's holding in *Laroe Estates* is inapposite because it considered only Rule 24(a) intervenors as of right. *See* 137 S. Ct. at 1651.[5] Long before *Laroe Estates*, the Eleventh Circuit held in *Chiles v. Thornburgh* that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the

[5] The Court does note, however, that extending the holding in *Laroe Estates* to Rule 24(b) permissive intervention would make sense because, without standing, proposed intervenors could bootstrap their way into ongoing federal litigation.

requirements of Rule 24 as long as there exists a justiciable case or controversy between the parties already in the lawsuit." 865 F.2d 1197, 1213 (11th Cir. 1989).

This Court need not, however, take a position on the standing requirements for permissive intervention because the Court exercises its broad discretion to deny the Wisconsin Legislature's request. Rule 24(b) provides for permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b); *Georgia*, 302 F.3d at 1249–50. However, even if a proposed intervenor satisfies the timeliness and common interest requirements, the court may still deny permissive intervention. *Chiles*, 865 F.2d at 1213 (citation omitted). Ultimately, the decision whether a party should be allowed to permissively intervene is left to the district court's "full discretionary powers." *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 712 (11th Cir. 1991).

Here, several factors counsel against permissive intervention. The Wisconsin Legislature lacks Article III standing in its own right. It also seeks relief different from the Plaintiff States in the form of an injunction of the Tax Mandate that applies to the State of Wisconsin, of which the Legislature is not a legal representative in this

action. Accordingly, in the exercise of its discretion, the Court declines to permit the Wisconsin Legislature to permissively intervene under Rule 24(b).

C. Merits

Having concluded that it has jurisdiction and determined the proper parties to this case, the Court turns to the merits of the Plaintiff States' constitutional challenge. The Plaintiff States claim both that Congress exceeded its authority under the Spending Clause as well as violated the Tenth Amendment's grant of power to the States and the anti-commandeering doctrine when it enacted the Tax Mandate. Because the Court concludes that the Plaintiff States are correct on the first front, it need not address the second. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

The U.S. Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Put simply, Congress may tax and spend." *NFIB*, 567 U.S. at 537. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of

federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

However, Congress's spending power is not unlimited. *Dole*, 483 U.S. at 207. Although Congress can condition a State's receipt of federal money, any such condition must comply with several requirements. *See id.* at 207–08. First, the condition must "be in pursuit of 'the general welfare.'" *Id.* at 207 (quoting *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937)). Second, Congress must condition the States' receipt of federal funds "unambiguously . . ., enabl[ing] the States to exercise their choice [whether to accept federal funds] knowingly, cognizant of the consequences of their participation." *Id.* (quoting *Pennhurst*, 451 U.S. at 17). Third, the condition must be reasonably related to a "federal interest in particular national projects or programs." *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). Fourth, no condition attached to receipt of federal funds may violate another provision of the U.S. Constitution. *Id.* at 208. Finally, the Supreme Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). If a federal condition induces a State to act "not of her unfettered will, but

under the strain of a persuasion equivalent to undue influence," then the condition exceeds Congress's Spending Clause authority. *Steward Mach.*, 301 U.S. at 590.

Federalism is the root of these limitations that are placed on Congress's ability to "pay for" States' compliance with federal policies or directives. *See NFIB*, 567 U.S. at 577. As the Supreme Court has recognized in its Spending Clause jurisprudence, the Federal Government possesses only enumerated powers, while the States and the people retain the remainder. *Id.* at 533. *See also* U.S. Const., Amdt. 10. Thus, while the Federal Government "must show that a constitutional grant of power authorizes each of its actions . . . [t]he same does not apply to the States, because the Constitution is not the source of their power." *NFIB*, 567 U.S. at 535. "The States thus can and do perform many of the vital functions of modern government" through their police power, "even though the Constitution's text does not authorize any government to do so." *Id.* at 536–37. State sovereignty both ensures that "powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' [are] held by governments more local and more accountable than a distant federal bureaucracy," *id.* (quoting The Federalist No. 45, at 293 (J. Madison)), and "serves as a check on the power of the Federal Government [and] protects the liberty of the individual from arbitrary power." *Id.* (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).

The Plaintiff States claim that the Tax Mandate is inconsistent with nearly every Spending Clause restriction espoused in *Dole*, *supra*. First, they contend that the mandate is unconstitutionally coercive because the amount of ARPA funding offered to the States is so large a percentage of their annual budgets that they have no real choice but to accept the mandate's restriction on their sovereign taxing powers. Second, they claim that the mandate is unconstitutionally ambiguous because it contains no explanation as to how the Treasury will determine whether a State has—either directly or indirectly—offset its tax cuts with ARPA funds. Thus, the Plaintiff States state that they are unable make an informed choice of whether to accept or decline ARPA funds, and if they accept ARPA funds, whether to cut taxes without putting those ARPA funds at risk of being recouped by the Treasury. Third, they contend that the mandate is not reasonably related to the purpose that the ARPA serves—to assist in the rebound from the COVID-19 pandemic's economic devastation—because prohibiting state tax reductions does not advance the goal of providing economic relief to individuals and entities affected by the pandemic. Finally, they claim that the mandate violates an independent constitutional provision—the Tenth Amendment, which reserves power to the States. Because the Court concludes that the Tax Mandate is an unconstitutionally ambiguous condition on the States' receipt of federal funds, *see Dole*, 483 U.S. at 207; *Pennhurst*, 451 U.S.

at 17, it need not address the Plaintiff States' other concerns. *See Ashwander*, 297 U.S. at 347.

Congress must "speak with a clear voice" "[i]f [it] intends to impose a condition on the grant of federal moneys"—that is, "it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. But how much clarity is required? On the one hand, the Supreme Court has held that the State recipient must be able to "voluntarily and knowingly accept[] the [condition's] terms." *Id.* And 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.* Put another way, the State recipient must be able to "clearly understand . . . the obligations[.]"). *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The Eleventh Circuit has similarly stated that Congress must "define [the] conditions clearly enough for the states to make an informed choice." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (citing *Pennhurst*, 451 U.S. at 25).

On the other hand, the Supreme Court has warned that Congress need not "prospectively resolve every possible ambiguity concerning particular applications of a [federal grant] program's requirements." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 666–69 (1985). According to the Eleventh Circuit, "once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need

not specifically identify and proscribe in advance every conceivable state action that would be improper." *Benning*, 391 F.3d at 1306 (quoting *Sandoval v. Hagan*, 197 F.3d 484, 495 (11th Cir. 1999), overruled on other grounds, *Alexander v. Sandoval*, 532 U.S. 275 (2001)). Congress must only "make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." *Id.* at 1307 (quotation omitted).

The Plaintiff States argue that the language of the Tax Mandate makes it impossible for States to "make an informed choice," *see id.* at 1306, about the costs of receiving ARPA funds because it is impossible to know how to exercise taxing authority without putting ARPA funds at risk. The Court agrees. The Tax Mandate does not define what it means to "directly or indirectly" offset tax cuts with ARPA funds. *See* 42 U.S.C. § 802(e). Yet Congress gave the Secretary authority to recoup ARPA funds that the Treasury deems were used by a State as a "direct or indirect" offset. *See id.* Money is fungible, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010), meaning "of such a nature that one part or quantity may be replaced by another equal part or quantity in paying a debt or settling an account" or "capable of mutual substitution: interchangeable," http://www.mirram-webster.com/dictionary/fungible. Thus, any ARPA funds the Plaintiff States receive could be viewed as indirectly offsetting any reduction in net tax revenue from a

change in state law or policy. After all, a decrease in one part of a State's revenue is necessarily offset somehow to achieve a balanced budget. Thus, there is no way for the Plaintiff States to "clearly understand the[ir] obligations" if they accept ARPA funds. *See Arlington Central*, 548 U.S. at 296.

The Defendants disagree, arguing that once Congress has made explicitly clear that a condition exists, nothing else is required of it. According to the Defendants, Congress need not explain *how* States might tailor their compliance with a condition because imposing such a burden on Congress would be too onerous. Further, the Defendants contend that the major Supreme Court and Eleventh Circuit Spending Clause cases support their position. Although the cases may appear to do so at first glance, a careful reading reveals the opposite to be true.

Pennhurst, the origin of the Supreme Court's Spending Clause unambiguity requirement, concerned the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq*., a federal statute that established a grant program where the federal government provided money to participating States to aid them in creating programs to care for and treat the developmentally disabled. 451 U.S. at 11. The States were given the choice of complying with a variety of conditions set forth in the Act or foregoing the benefits of federal funding. *Id.* The Act also included a "bill of rights" provision specifying that mentally disabled citizens "have a right to

appropriate treatment, services, and habilitation for such disabilities" to be provided "in the setting that is least restrictive of the person's personal liberty." *Id*. at 13 (quoting 42 U.S.C. § 6010). A mentally disabled resident of a Pennsylvania mental health treatment hospital brought suit on behalf of himself and other hospital residents against the hospital, alleging that dangerous conditions denied residents various constitutional and statutory rights, including those enumerated in the bill of rights provision of the Act. *Id.* at 6–7.

The Supreme Court had to decide whether the bill of rights provision imposed on participating States an obligation to provide certain kinds of treatment at their own expense by virtue of receiving the federal funds. *Id*. at 10. The Supreme Court held that it did not, stating that the bill of rights provision "represent[s] general statements of federal policy, not newly created legal duties" and "in no way suggests that the grant of federal funds is 'conditioned' on a State's funding the rights described therein." *Id*. at 23. Several factors led the Court to so conclude, including that the bill of rights provision lacked "conditional" language and that under the Act and the implementing regulations, funds were incapable of being withheld from States on the basis of failure to meet the standards in the bill of rights provision. *Id.* The Court also noted that the amount of money Congress granted to Pennsylvania was "woefully inadequate" to meet the "enormous financial burden of providing

'appropriate' treatment in the 'least restrictive' setting" as stated in the bill of rights provision. *Id.* at 24 (quoting 42 U.S.C. § 1610).

The *Pennhurst* Court further discussed Congress's failure to clearly express its intent to impose a condition in the bill of rights provision:

> Our conclusion is also buttressed by the rule of statutory construction established above, that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds. That canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. It is difficult to know what is meant by providing "appropriate treatment" in the "least restrictive" setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment. The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.

Id. at 24–25.

The Defendants contend that *Pennhurst* is distinguishable from this case because, in *Pennhurst*, the Supreme Court had to decide whether a condition existed in the first place, but here, there is no question that the Tax Mandate exists as a condition to States accepting ARPA funds. Indeed, in *Pennhurst*, the requirement that Congress express unambiguously "its intent to impose conditions on the grant of federal funds" was to keep Congress from "surprising participating States with

post-acceptance or retroactive conditions." *NFIB*, 567 U.S. at 584 (quoting *Pennhurst*, 451 U.S. at 25). Yet merely because *Pennhurst* stands for the proposition that Congress must clearly state its intent to impose a condition does not mean that Congress need not also *define* the condition sufficiently so that States can know how to comply with it. To the contrary, *Pennhurst* requires Congress to speak "so clearly that . . . the State[s can] make an informed choice." 451 U.S. at 25. *Pennhurst* does not undermine the Plaintiff States' position that the Tax Mandate does not meet that standard.

The Defendants further contend that the Eleventh Circuit's decision in *Benning v. Georgia* forecloses the Plaintiff States' claim that the Tax Mandate is ambiguous. *Benning* concerned whether Congress violated the Spending Clause in enacting section 3 of the Religious Land Use and Institutionalized Person's Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, which requires state prisons that receive federal funds to refrain from burdening the religious exercise of prisoners. 391 F.3d 1299, 1303 (11th Cir. 2004). A Georgia prison system inmate and self-proclaimed "Torah observant Jew" sued Georgia and the Georgia Department of Corrections alleging that they violated the RLUIPA by denying his requests for a kosher diet and for permission to wear a yarmulke. *Id.* Georgia moved to dismiss the suit, arguing among other things that section 3 of RLUIPA was an unconstitutional violation of

Congress's Spending Clause power. *Id.* Section 3 provides that government actions that substantially burden the religious exercise of institutionalized persons must satisfy the "strict scrutiny" standard: the action must be in "furtherance of a compelling government interest" and must be "the least restrictive means of furthering that compelling governmental interest." *Id*. at 1304 (quoting 42 U.S.C. § 2000cc-1). Georgia argued that section 3 is ambiguous, contrary to *Pennhurst*, in four ways, one of which was that Georgia could not know in any particular case whether its actions satisfied the requirements of the strict scrutiny standard. *Id*. at 1305.

The Eleventh Circuit rejected Georgia's argument, pointing out that the strict scrutiny standard, which has "long applied to the states in disputes regarding the free exercise of religion," was "not new to Georgia or any state." *Id.* at 1306 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236–37 (11th Cir. 2004)). The court found that RLUIPA's flexibility in giving States "wide latitude in applying its provisions" does not make the statute "opaque." *Id.* It stated, "once Congress clearly signals its intent to attach federal conditions to Spending Clause legislation, it need not specifically identify and proscribe in advance every conceivable state action that would be improper." *Id.* (quoting *Sandoval*, 197 F.3d at 495).

Although Georgia relied upon *Pennhurst* in supporting its argument that section 3 of the RLUIPA is ambiguous, the Eleventh Circuit distinguished *Pennhurst*,

stating, "The federal law in *Pennhurst* was unclear as to whether the states incurred any obligations at all by accepting federal funds, but RLUIPA is clear that states incur an obligation when they accept federal funds, even if the method for compliance is left to the states. *Pennhurst* does not require more." *Id.* at 1307. Recognizing that the Ninth and Seventh Circuits had reached the same conclusion in similar cases, the Eleventh Circuit continued:

> In *Mayweathers* [*v. Newland*, 314 F.3d 1062 (9th Cir. 2002)], the Ninth Circuit stated, "Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and, perhaps, impossible. Congress must, however, make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious." 314 F.3d at 1067. The Seventh Circuit explained, "Congress permissibly conditioned the receipt of federal money in such a way that each State is made aware of the condition and is simultaneously given the freedom to tailor compliance according to its particular penological interests and circumstances." *Charles* [*v. Verhagen*], 348 F.3d [601,] 608 [(7th Cir. 2003)]. No federal appellate court has held otherwise, and we decline to be the first.

Id.

There are several reasons why *Benning* does not foreclose the Plaintiff States' ambiguity argument. For one thing, the ARPA's Tax Mandate is nothing like a Congressional spending condition that prohibits States from discriminating based on an individual's religion, as was the case in *Benning*. Although the strict scrutiny standard may result in different applications among the courts, there is no question

that the RLUIPA expressly conditions the receipt of federal money upon States' refraining from creating substantial burdens on prisoners' religious rights that are not justified by a compelling governmental interest and are not furthered by the least restrictive means possible. *See* 42 U.S.C. § 2000cc-1(a). As the Plaintiff States say, every lawyer is familiar with that standard. In contrast, the Tax Mandate that Congress crafted provides *no guidance* on critical interpretive questions. It does not tell States how they can avoid being found to have indirectly offset a net tax revenue reduction with ARPA funds. There is thus no way for States to comply with the ARPA by looking to the text of the provision itself. In other words, the condition is not "define[d] . . . clearly enough," which dooms it under *Benning*. 391 F.3d at 1306.

Additionally, the Court is cautious not to read *Benning* as applying too far outside the scope of spending conditions that prohibit unlawful discrimination. *See Benning*, 391 F.3d at 1306 ("The Supreme Court has explained that so long as a spending condition has a *clear and actionable prohibition of discrimination*, it does not matter that the manner of that discrimination can vary widely.") (emphasis added). Indeed, all of the cases that *Benning* relies upon in support of the conclusion that Congress need not identify in advance very State action that may be improper address spending clause legislation related to federal nondiscrimination statutes. *See Benning*, 391 F.3d at 1306–07 (citing *Sandoval*, 197 F.3d at 495 (spending condition

prohibited discrimination on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964); *Davis v. Monroe County Bd. of Edu.*, 526 U.S. 629, 651 (1999) (spending condition prohibited student-on-student sexual harassment in violation of Title IX of the Education Amendments of 1972); *Mayweathers*, 314 F.3d at 1067 (the same RUILPA spending condition prohibiting religious discrimination that was the subject of *Benning*); *Charles*, 348 F.3d at 607–08 (same)). The common denominator in these cases is that they addressed statutes, like the RLUIPA, that "follow[] in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and [are] 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles*, 348 F.3d at 607 (quoting *Mayweathers*, 314 F.3d at 1067)). The Eleventh Circuit in *Benning* recognized the importance of Congress's ability to place conditions on its offers of federal funds to States in this area:

> [T]he United States has a substantial interest in ensuring that state prisons that receive federal funds protect the federal civil rights of prisoners. . . .
>
>> Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion. The federal government also has a strong interest in monitoring the treatment of federal inmates housed in state prisons and in contributing to their rehabilitation. Congress may allocate federal funds freely, then, to

> protect the free exercise of religion and to promote rehabilitation. . . .

Mayweathers, 314 F.3d at 1067; *see also Charles*, 348 F.3d at 608–09.

Benning, 391 F.3d at 1307.[6] Simply put, the Federal Government's paramount interest in protecting individuals from discrimination that was present in *Benning* is simply not present in this case. *See Pennhurst*, 451 U.S. at 18 (reminding courts to "look to the provisions of the whole law, and to its object and policy," in determining whether Congress intended to impose a condition). To the contrary, the Federal Government has *no* interest in proscribing state tax policy. Yet the Tax Mandate dictates more than what States do with federal funds; it dictates what States do with State funds as well. The Tax Mandate's restriction on direct or indirect state tax cuts pressures States into adopting a particular—and federally preferred—tax policy. The inherent ambiguity in the text of the mandate may disincentive the Plaintiff States from considering any tax reductions for fear of forfeiting ARPA funds. This is a federal invasion of State sovereignty that was just simply not at issue in *Benning*.

Accordingly, the Court finds no precedential authority that would proscribe

[6] The *Benning* court made these statements in response to Georgia's argument that the federal grants for its prisons were unrelated to the objective of the RLUIPA in contravention of *Dole*'s requirement that any condition Congress imposes on the States' receipt of federal funds be related to a particular federal interest. *See id.*

its ruling today that Congress exceeded its Spending Clause authority in crafting an unconstitutionally ambiguous spending condition in the Tax Mandate.

Having determined that the Tax Mandate falls short of the clarity required when Congress exercises its powers under the Spending Clause, the Court must now determine what effect, if any, the Final Rule has on the Tax Mandate's failure—as enacted—to meet that requirement. Although the issuance of the Final Rule raises the question whether an administrative regulation can provide the clarity needed for a statutorily ambiguous spending condition to pass muster under the Spending Clause jurisprudence, little discussion is ultimately needed on this point. This is because the Defendants appear to concede that, assuming that the language of the Tax Mandate is itself unconstitutionally ambiguous, the Final Rule cannot cure that ambiguity. (*See* Doc. 76 at 32 ("Both sides agree that agencies cannot impose funding conditions that Congress itself has not attached. . . . Defendants are not asking the Court to defer to the [Final] Rule because Plaintiffs have not challenged it.")).

It bears noting, however, that the Final Rule still fails to define how a State "indirectly offsets" spending cuts with ARPA funds. A State, for example, can cut taxes so long as decreases in revenue are counterbalanced by "[s]pending cuts in areas not being replaced by [ARPA] Funds." 86 Fed. Reg. at 26808. But the Rule does not define "areas." And because the Final Rule "provides benefits across

several areas" due to the breadth with which ARPA funds can be used, *id*. at 26816, few "areas" of State spending will be suitable candidates for spending cuts that could offset a decrease in revenue. Further, the Treasury has multiple years during which it can assess whether "a spending cut is subsequently replaced with [ARPA] Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change." *Id*. at 26810. Thus, a spending cut in 2021 followed by a use of ARPA funds in 2023 could later be deemed "an evasion of the restrictions of the offset provision" that would entitle Treasury to recoupment. *Id.* In short, the Final Rule still leaves States guessing as to how they may exercise their sovereign power to tax.

D. Remedies

Having found that the Tax Mandate exceeds Congress's power under the Constitution, the Court now turns to the remedies sought by the Plaintiff States. The Plaintiff States request both declaratory relief and a permanent injunction enjoining the Secretary from enforcing the Tax Mandate provision of the ARPA against the thirteen Plaintiff States.

1. Permanent Injunction

A plaintiff who has demonstrated success on the merits is entitled to a permanent injunction if: (1) it "suffered an irreparable injury"; (2) the "remedies available at law, such as monetary damages, are inadequate to compensate for that

injury"; (3) the "balance of hardships between the plaintiff and the defendant" justify an equitable remedy; and (4) "the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The Plaintiff States satisfy each factor. First, the Tax Mandate has and will continue to inflict irreparable injury on the Plaintiff States, who are all either faced with or bound by an unconstitutionally ambiguous "deal" that is intruding on each State's ability to exercise its "indispensable" sovereign power to tax. *See Gibbons*, 22 U.S. at 199. Second, the States cannot sue the federal government for damages. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Thus, since their harms are not redressable through damages, "the remedies available at law" are "inadequate." *eBay*, 547 U.S. at 391. Third, the balance of hardships favors the States, which have a strong interest in not having their sovereign authority impinged by an unconstitutional law, while the Defendants have no legitimate interest in enforcing that law. Additionally, given the limited scope of the permanent injunction, the Defendants will be free to enforce every other provision of the ARPA. Fourth, an injunction will promote the public interest because "the public . . . has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010).

A permanent injunction is proper in this case, as enjoining the enforcement of the Tax Mandate against the Plaintiff States alleviates the constitutional harm.

2. Declaratory Relief

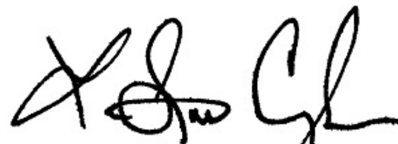
The Declaratory Judgment Act provides a federal court with jurisdiction over "a case of actual controversy" the authority to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201(a). "The Declaratory Judgment Act is 'an enabling Act, which confers a discretion on courts rather than an absolute right upon the litigant.'" *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995)). "It only gives the federal courts competence to make a declaration of rights; it does not impose a duty to do so." *Id.* (citing *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942)). Here, because a permanent injunction fully rectifies the Plaintiff States' harm, the Court need not also issue a declaratory judgment.

IV. Conclusion

For the aforementioned reasons, the Plaintiff States' motion for a final judgment and permanent injunction is due to be granted, and the Defendants'

motion to dismiss the complaint is due to be denied. A separate order consistent with this opinion will be issued.

DONE and **ORDERED** on November 15, 2021.



L. Scott Coogler
United States District Judge

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