IN THE SUPREME COURT OF THE UNITED STATES

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No. 23A_____

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

v.

KENTUCKY, ET AL.

____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH 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 Janet Yellen, Secretary of the Treasury; Richard K. Delmar, Acting Inspector General of the Treasury; and the Department of the Treasury, respectfully requests a 30-day extension of time, to and including August 31, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The court of appeals entered its judgment on November 18, 2022, and denied a timely filed petition for rehearing en banc on May 3, 2023. Therefore, unless extended, the time within which to file a petition for a writ of certiorari will expire on August 1, 2023. 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 54 F.4th 325, is attached. App., infra, 1a-51a.

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 ensure 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). 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. The States of Kentucky and Tennessee have accepted their allotments of fiscal recovery funds and received approximately $2.1 billion and $3.7 billion respectively. D. Ct. Doc. 23, at 11 (June 21, 2021). They also filed this suit, asserting that the

offset provision is an unlawful condition on the grant of funds they accepted. Id. at 19-25.

The U.S. District Court for the Eastern District of Kentucky granted summary judgment to the States and permanently enjoined enforcement of the offset provision against them. App., infra, 71a-87a. The court held that both States had Article III standing, id. at 73a-75a, and that the offset provision was unduly coercive and thus exceeded Congress's power under the Spending Clause due primarily to "the sheer size of the federal government's offering" of funds, id. at 79a; see id. at 75a-82a.

3. The court of appeals affirmed in part and reversed in part. App., infra, 1a-51a. As an initial matter, the court held that Kentucky's claim was nonjusticiable and vacated the district court's injunction barring enforcement of the offset provision against Kentucky. Id. at 20a.

The court of appeals determined, however, that Tennessee's claim was justiciable. App., infra, 20a-26a. According to the court, Tennessee had a cognizable claim because it had showed that the Treasury Department's regulations (and the offset provision itself) "burden the State with compliance costs," including "additional labor and other expenses that Tennessee must incur to ensure that its recent and proposed tax cuts do not violate the Offset Provision." Id. at 4a.

On the merits, the court of appeals held that "the Offset Provision is impermissibly vague under the Spending Clause." App.,

infra, 4a. "As a matter of statutory interpretation," the court reasoned, the offset provision "does not clearly explain (1) how to calculate a 'reduction' in net tax revenue, (2) how to determine whether such a reduction resulted from a tax cut, or (3) how to tell what particular conduct constitutes an 'indirect' offset." Id. at 28a. And the court stated that "Treasury's attempted liquidation of the Offset Provision via the Rule in no way followed clearly from the Offset Provision's text." Ibid. Thus, the court concluded, "Tennessee may legitimately discontinue the compliance procedures entailed by the Rule," and the Treasury Department is permanently enjoined from enforcing the offset provision against Tennessee. Ibid.

4. The court of appeals denied the government's petition for rehearing en banc. App., infra, 53a. Judge Griffin dissented from the denial of en banc review, joined by Judges Clay, Gibbons, and Stranch. Ibid.; see id. at 61a-70a. The dissent observed that "[n]o prior Spending Clause case has ever prospectively enjoined enforcement of an entire provision based on purported vagueness in the statute, meaning the panel's analysis lacks a cognizable legal foundation." Id. at 65a. And the dissent emphasized that "[t]he terms of Congress's offer were certain enough to create a contract, permitting Tennessee to make its choice knowingly and voluntarily." Id. at 70a.

5. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The addi-

tional time sought in this application is needed for further consultation with the Treasury Department regarding the potential legal and practical ramifications of the court of appeals' decision. Additional 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

JULY 2023

APPENDIX

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0245p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY; STATE OF TENNESSEE,
Plaintiffs-Appellees,

v.

JANET YELLEN, in her official capacity as Secretary of the U.S. Department of the Treasury; RICHARD K. DELMAR, in his official capacity as Acting Inspector General of the U.S. Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellants.

No. 21-6108

Appeal from the United States District Court for the Eastern District of Kentucky at Frankfort.
No. 3:21-cv-00017—Gregory F. Van Tatenhove, District Judge.

Argued: July 21, 2022

Decided and Filed: November 18, 2022

Before: DONALD, BUSH, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Daniel Winik, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Brett R. Nolan, OFFICE OF THE ATTORNEY GENERAL OF KENTUCKY, Frankfort, Kentucky, for Appellees. **ON BRIEF:** Daniel Winik, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Brett R. Nolan, Barry L. Dunn, Matthew F. Kuhn, OFFICE OF THE ATTORNEY GENERAL OF KENTUCKY, Frankfort, Kentucky, Andrée S. Blumstein, Brandon J. Smith, OFFICE OF THE ATTORNEY GENERAL AND REPORTER OF TENNESSEE, Nashville, Tennessee, for Appellees. Paul D. Clement, KIRKLAND & ELLIS LLP, Washington, D.C., Joseph D. Henchman, NATIONAL TAXPAYERS UNION FOUNDATION, Washington, D.C., Sheng Li, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., Drew C. Ensign, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona, for Amici Curiae.

BUSH, J., delivered the opinion of the court in which DONALD, J., joined in full, and NALBANDIAN, J., joined in part. NALBANDIAN, J. (pp. 43–51), delivered a separate opinion concurring in part and dissenting in part.

OPINION

JOHN K. BUSH, Circuit Judge. In response to the grave economic challenges posed by COVID-19, Congress enacted the American Rescue Plan Act of 2021 ("ARPA" or "the Act"). Pursuant to Congress's spending power, ARPA set aside $195.3 billion in stimulus funds, to be distributed by the Treasury Department to states and the District of Columbia. This appeal concerns a challenge brought by Kentucky and Tennessee ("the States") to what they allege is an ambiguous, coercive, and commandeering condition attached to those funds. Specifically, to get the money, the States had to certify that they would comply with the Act's "Offset Provision." Its terms bar the States from enacting tax cuts and then using ARPA funds to "directly or indirectly offset a reduction in [their] net tax revenue" resulting from such tax cuts. 42 U.S.C. § 802(c)(2)(A). And a related portion of the Act explains that should a State violate the Offset Provision, Treasury may initiate a recoupment action to recover the misused funds. 42 U.S.C. § 802(e)(1)–(2).

What the Offset Provision actually means, however, is the subject of grave dispute. Because money is fungible, enacting *any* tax cut and then spending ARPA funds could be construed, the States say, as having impermissibly used those funds to "indirectly offset" a revenue reduction from the tax cut. Appellees' Br. at 12–13. As a result, should the States wish to expend their ARPA funds, they are effectively barred from enacting *any* tax cuts[1]—despite their desire to do so—for fear that Treasury could construe the cuts as implicating an "indirect offset" and correspondingly pursue recoupment. *Id.* at 22–23; 38. Compounding the Act's indeterminacy, the Offset Provision itself never explains which fiscal year ("FY") serves as the baseline for calculating a "reduction" in net tax revenue. *Id.* at 13, 40. That omission allegedly

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[1]This alleged restriction applies at least during ARPA's "covered period," 42 U.S.C. § 802(g)(1), which extends until "the last day of the fiscal year of such State . . . in which all funds received by the State . . . have been expended or returned to, or recovered by, the Secretary," § 802(g)(1)(B).

leaves the States in the dark about when Treasury may deem them to have violated the Act. *Id.* And even though a Treasury regulation has since offered a narrowing construction of the Offset Provision, the States assert that this construction in no way follows *clearly* from the text of the Offset Provision itself. *Id.* at 41. Thus, the States object that the Offset Provision failed to provide them with clear notice of whatever conditions it entails. And because of those indeterminacies, they contend that the Offset Provision is unenforceable under the clear-statement rule the Supreme Court has long instructed governs spending legislation.

Worse yet, the States argue, they were coerced into relinquishing this control over their sovereign taxing authority. Amended Complaint ¶74, R. 23. By offering such a massive aid package—promising to confer on the States a sum equal to one-fifth of their annual budgets—in a time of fiscal crisis no less, the federal government made the States an offer they couldn't refuse. Appellees' Br. at 4, 12. Given these alleged intrusions upon their sovereignty, the States filed suit against the Treasury Department. They sought an injunction of the Offset Provision's enforcement and a declaratory judgment that the provision is unenforceable.

Relying on the coercion rationale alone, the district court granted the States a permanent injunction in September 2021. Treasury's appeal of that order is now before us. It asserts that the States' challenges are nonjusticiable and that, in any event, their objections to the Offset Provision fail on the merits.

We agree that Kentucky's challenge is nonjusticiable. At the outset of their suit, both Kentucky and Tennessee had standing to bring their pre-enforcement challenges, since the Offset Provision itself at least arguably proscribed the post-acceptance enactment of *any* revenue-reducing tax cut. Thus, the Offset Provision at least arguably threatened a significant intrusion upon state taxing authority—an intrusion that arguably offended the Spending Clause because it was not clearly authorized by the Offset Provision itself. But Treasury later promulgated an implementing regulation ("the Rule") that disavowed this interpretation of the Offset Provision and established certain safe harbors permitting the States to cut taxes. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (proposed May 17, 2021) (interim final rule); *see also* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 4,338 (Jan. 27, 2022) (final rule); 31 C.F.R. § 35 *et seq.* In response, Kentucky and Tennessee offered no additional

evidence of a concrete plan to violate *the Rule*, so they failed to establish that Treasury will imminently seek recoupment because of any demonstrated policy they wish to pursue. And because Kentucky offered no evidence for any other theory of injury, the Rule mooted its challenge to the Offset Provision. We thus reverse the district court's conclusion that Kentucky's claim is justiciable and vacate the injunction to the extent that it bars enforcement of the Offset Provision against Kentucky.

Tennessee, by contrast, *did* adduce additional evidence of a distinct theory of injury: that Treasury's Rule (and the underlying Offset Provision it implements) burden the State with compliance costs. *See* Eley Dec., R. 25-3. These costs represent additional labor and other expenses that Tennessee must incur to ensure that its recent and proposed tax cuts do not violate the Offset Provision; expenses that it would not incur were enforcement of the Offset Provision enjoined. Far from mooting the compliance-costs theory of injury, the Rule in fact exacerbated the harm with its more detailed explanation of the measures required to comply with the Offset Provision. Thus, we hold that Tennessee's challenge is justiciable.

On the merits of Tennessee's claim, we affirm the district court's injunction on the basis that the Offset Provision is impermissibly vague under the Spending Clause. Because the Offset Provision is subject to a range of plausible meanings, Tennessee was deprived of the requisite "clear notice" of ARPA's conditions when it accepted the funds. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1574 (2022) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). As a result, Treasury cannot use its Rule to impose compliance requirements upon Tennessee that are not clearly authorized by the Offset Provision itself. And because this defect suffices to affirm, we need not consider Tennessee's additional objections to the Offset Provision.

I.

Congress enacted ARPA in March 2021 to make available almost $2 trillion in COVID-related relief funding. Approximately $195.3 billion of that sum was set aside for distribution to the states and the District of Columbia. "Kentucky's allotment under the Act is about $2.1 billion," while Tennessee's is about $3.7 billion. Amended Complaint ¶¶26–27, R. 23. These

sums amount to nearly one-fifth of the States' respective annual general revenues. *Id.* In the States' view, "[t]he financial aid the Act offer[ed] . . . is simply unparalleled in size." *Id.* ¶28.

That offer also came with several conditions. For instance, the States may spend their ARPA funds in only four particular areas that Congress deemed relevant to economic recovery from the pandemic. Those four areas are as follows:

> (A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
>
> (B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;
>
> (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

42 U.S.C. § 802(c)(1)(A)–(D).

Conversely, the States are specifically forbidden from using ARPA funds for two particular applications. First, "[n]o State or territory may use funds made available under this section for deposit into any pension fund." § 802(c)(2)(B). And second—the crux of this lawsuit—the States may not use ARPA funds:

> 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.

§ 802(c)(2)(A). This is the so-called "Offset Provision"—the States have dubbed it the "Tax Mandate"—that has provoked legal challenges across the country. *See, e.g.*, *Missouri v. Yellen*, 39 F.4th 1063 (8th Cir. 2022); *Arizona v. Yellen*, 34 F.4th 841 (9th Cir. 2022); *West Virginia v.*

U.S. Dep't of Treas., No. 7:21-cv-00465-LSC, 2021 WL 2952863, *1 (N.D. Ala. July 14, 2021); *Texas v. Yellen*, No. 2:21-CV-079-Z, 2022 WL 1063066, *1 (N.D. Tex. Apr. 8, 2022).

Accompanying the Offset Provision are a couple of related enforcement mechanisms. First is the statute's reporting requirement, which instructs the states:

> To provide to the Secretary periodic reports providing a detailed accounting of—
>
> (A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and
>
> (B) such other information as the Secretary may require for the administration of this section.

§ 802(d)(2)(A)–(B). And second is the statute's recoupment procedure. Should a state violate the Act's requirements, Treasury may initiate a recoupment action to seek reimbursement from a state "equal to the amount of funds used in [the] violation." § 802(e).

Kentucky and Tennessee were not alone, it turns out, in their apprehensions about this statutory scheme. Several of their sister-states were similarly puzzled by the Offset Provision's requirements. So they wrote jointly to Secretary Yellen to seek clarification about the precise obligations it imposed. Secretary Yellen—who elsewhere had acknowledged that the "fungibility of money" presented "thorny questions" about the meaning of the Offset Provision—wrote back to explain that the States could expect "further guidance" from Treasury in the near future. Treasury Secretary & Federal Reserve Chair Testimony on COVID-19 Economic Recovery, C-SPAN (Mar. 24, 2021), at 58:00–59:11, *available at* https://www.c-span.org/video/?510059-1/treasury-secretary-federalreserve-chair-testimony-covid-19-economic-recovery; *see* Yellen Letter, R. 1-2.[2] But she also explained that Treasury *did* intend to enforce whatever prohibitions the Offset Provision was revealed to entail. *See id.* Perhaps

[2]In particular, Senator Mike Crapo asked Secretary Yellen, "How do you intend to approach the question of what is 'directly or indirectly offsetting' a tax cut?" The Secretary responded, "Well, when I said that we have 'thorny questions' to work through, you've just indicated why we do. *We will have to define what it means* to use money from this Act as an 'offset' for tax cuts. And, given the fungibility of money, it's a hard question to answer." Treasury Secretary & Federal Reserve Chair Testimony on COVID-19 Economic Recovery at 58:30–59:05 (emphasis added), *available at* https://www.c-span.org/video/?510059-1/treasury-secretary-federalreserve-chair-testimony-covid-19-economic-recovery.

unsurprisingly, given these lingering uncertainties, several states filed suit to restrain the Offset Provision's enforcement.

Kentucky and Tennessee brought their own challenge in April 2021. They each alleged that because of the funds' irresistible nature in the midst of an economic crisis, they intended to accept their respective funding allotments.[3] But they also alleged that the Offset Provision tied to those funds injured the States with a coercive and ambiguous restriction that "unconstitutionally intrud[es] on the [States'] sovereign authority, by interfering with their ordinary management of their fiscal affairs, and by requiring them to forgo their constitutional taxing powers or face an action to return much-needed federal funds after they have already been spent." Complaint ¶12, R. 1.

In response to this and other suits, Treasury attempted to clarify the Offset Provision by promulgating an Interim Final Rule in May 2021. *See* 86 Fed. Reg. at 26,786. In relevant part, the Interim Final Rule explained that Treasury did not read the Offset Provision to proscribe *all* tax cuts during ARPA's "covered period." *Id.* at 26,807. Rather, it views the Provision as proscribing only a tax cut that (1) results in a revenue reduction as compared to revenues for the "fiscal year ending in 2019," and (2) for which a state fails to identify a permissible, non-ARPA source of additional funds to offset the revenue reduction. *Id.*; *see also id.* at 26,810. In particular, Treasury said, it would not initiate a recoupment action even after a state enacted a revenue-reducing tax cut and expended ARPA funds so long as the state could show that the revenue reduction was offset with (1) a state tax increase on some other activity, (2) additional inlays from macroeconomic growth, or (3) a state spending cut in an area the state is not expending ARPA funds. *Id.*; *see also* Appellants' Br. at 5; 31 C.F.R. §§ 35.1–35.12 (codifying the Rule).

The States reacted with an amended complaint in June 2021. The Interim Final Rule notwithstanding, the States reprised their contention that the Offset Provision functionally

[3]Kentucky ultimately accepted the funds after the complaint was filed and certified that it would comply with the Offset Provision, while Tennessee accepted the funds only after the district court entered its permanent injunction. *See* Recording of Oral Arg. at 27:38–27:55. Additionally, Tennessee accepted the funds with a reservation that it considered the Offset Provision invalid. *Id.*

proscribes all future tax cuts to the extent a state wishes to expend its ARPA funds. Amended Complaint ¶32, R. 23 (alleging that Congress, as a condition of ARPA, required the States to "promise that [they] will not lower taxes on their residents for four years"). But they augmented their complaint with an allegation about compliance costs. *See id.* ¶12. In addition to their "imminent recoupment" and "sovereign authority" theories of injury, the States complained that "the Tax Mandate w[ould] impose administrative burdens on [them] by obligating them to spend resources on calculation and reporting requirements." *Id.* And the States alleged that all of those injuries "are traceable to the Tax Mandate and Defendants' efforts to enforce it." *Id.* Thus, they continued to seek a declaratory judgment that the Offset Provision is unconstitutional and an injunction to restrain Treasury from initiating an enforcement action.

Two days later, the States submitted their corresponding motion for summary judgment and a permanent injunction. They reiterated their view that they have standing to challenge the Offset Provision for the three aforementioned reasons: that it intrudes on state taxing authority, could result in a recoupment action if the States were to pursue their desired tax cuts, and imposes administrative burdens and compliance costs. As to the merits, they argued that the Offset Provision is impermissibly ambiguous under the Spending Clause, not reasonably related to ARPA's nominal goal of fiscal recovery, and unconstitutionally coercive and commandeering.

Given Treasury's strenuous objections to justiciability, the corresponding evidence the States submitted in support of their motion for summary judgment deserves particular scrutiny. Kentucky offered merely a confirmation email indicating its acceptance of the ARPA funds. *See* Submission Confirmation, R. 25-1. By contrast, Tennessee submitted declarations from two state officials. First was a declaration from N. Antonio Niknejad, Policy Director to Governor Bill Lee. *See* Niknejad Dec., R. 25-2. Niknejad explained that Tennessee has "a long history of cutting taxes and spending in order to spur economic growth," that Tennessee had recently enacted several tax cuts on gym memberships, professional licensing, agricultural products, and broadband fiber optic cables, and that Tennessee is contemplating several future tax cuts. *Id.* ¶¶6, 8, 9–11. Yet he explained that uncertainty about how the Offset Provision could be construed has caused policymakers in Tennessee to "defer, slow, or reconsider some of [their] taxing decisions." *Id.* ¶14.

The second was a declaration from Commissioner Howard H. Eley of Tennessee's Department of Finance and Administration. *See* Eley Dec., R. 25-3. Unlike Niknejad, who focused on anticipated tax cuts, Eley described the administrative burdens and compliance costs the Offset Provision (and Rule) would inflict on Tennessee. We quote three particularly relevant paragraphs from his declaration below:

> 8. Tennessee is required by its state constitution to enact a balanced budget. General fund expenditures, which include certain reductions in tax revenue due to a statutory or regulatory change, are described by category, agency, program, and the recurring or non-recurring nature of the expenditure. State revenues, which include federal funds and reimbursements, are described by source. The enacted budget appropriates a specific amount from the general fund and other funds to fund the State's programs and operations. But in determining whether the budget is balanced, the Department of Finance and Administration generally compares total expenditures to total revenues and does not typically connect expenditures to specific revenue sources or "indirect" causes for those revenues. If the State receives federal funds to offset certain state expenditures, the state funds that would have been used to pay for those expenditures are not used and can be returned to the general fund for future appropriation. *To comply with the Tax Mandate, the Department will be required to create new accounting processes that specifically track whether federal funds received under the Rescue Plan are being used to "directly or indirectly offset" any state expenditures resulting from a reduction in tax revenue that otherwise would have been funded from state appropriated tax revenues.* That will include tracking whether any cost savings resulting from the receipt of federal funds to offset certain state expenditures are ultimately and indirectly used to offset a tax reduction. Establishing these additional processes and preparing the required reports *will require at least one budget analyst and one revenue analyst to divert at least some of their work to that task and other state employees to support and review that work.*
>
> 9. To comply with the Secretary's Regulations attempting to implement and enforce the Tax Mandate, the State of Tennessee will be forced *to expend additional resources adjusting Tennessee's "baseline" level of tax revenue* for inflation each year during the covered period "using the Bureau of Economic Analysis's Implicit Price Deflator for the gross domestic product of the United States" and then using that adjusted figure to determine whether the State's tax policies may violate the Secretary's interpretation of the Tax Mandate. 31 C.F.R. §§ 35.3, 35.8(b).
>
> 10. The State of Tennessee *would not incur these additional costs to determine whether any revenue reductions could be said to have been "directly or indirectly offset" by funds received under the Rescue Plan or to report its revenue modifications to the Secretary but for the Tax Mandate.*

Eley Dec. ¶¶8–10, R. 25-3 (emphases added). Given both these compliance costs and the asserted threat of a recoupment action should the States pursue their desired tax cuts, the States asked the district court to grant them summary judgment and permanently enjoin the Offset Provision's enforcement.

Treasury cross-moved for summary judgment, or, alternatively, to dismiss the complaint. It introduced no evidence of its own, and thus it did not attempt to controvert Niknejad or Eley's declarations. Rather, it argued that even taking the declarations as true, the States lacked standing and that their merits challenges failed as a matter of law. *See* Mot. to Dismiss & Mot. for Summ. J. at 8, 17, R. 32. Concerning a recoupment action, Treasury argued that none was imminent. *Id.* at 10. For even if the States had established that they wish to cut taxes, they failed to show that not only would such cuts result in revenue reductions, but also that they intended to use ARPA funds to offset those reductions. *Id.* at 11. As to compliance costs, it argued that (1) any administrative burdens were traceable solely to the reporting requirement, not the Offset Provision, and (2) no injury occurs because the States are permitted to use ARPA funds "to cover administrative costs." *Id.* at 14–15. As to the merits, Treasury conceded that its Rule cannot cure potential ambiguities in the Offset Provision for purposes of the Spending Clause. *Id.* at 30. But it claimed that the text of the Offset Provision *itself* is unambiguous. *Id.* It likewise argued that no precedents support the States' view that the Offset Provision is unduly coercive or commandeers state taxing authority. *Id.* at 18–26.

The district court rendered its opinion on these motions in September 2021. As to justiciability, it concluded that both Kentucky and Tennessee had satisfied the pre-enforcement-challenge standing test described in *Susan B. Anthony List*. *See id.* at 3–5 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014)). First, both the States intended to accept ARPA funds and yet asserted that doing so entailed compliance with the arguably unconstitutional "Tax Mandate." Op. & Order at 4–5. Second, the "Tax Mandate" at least arguably proscribed the States' desired efforts to cut taxes. *Id.* at 5. And third, Secretary Yellen had expressed intent to enforce the Offset Provision in her earlier letter to the States, demonstrating a credible threat of enforcement. *Id.* The district court thus held that both Kentucky and Tennessee had standing to challenge the Offset Provision. *Id.*

As for the merits, the district court concluded that ARPA violated the Spending Clause because it had coerced the States into relinquishing control over their taxing authority to the federal government. *Id.* at 11. In essence, it said, the economic crisis made the federal government's aid offer irresistible, and so it represented an "undue influence" on the States' authority to tax. *Id.* at 6 (quoting *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.)); *see also id.* at 11. The district court thus granted summary judgment to the States and imposed a permanent injunction[4] restraining enforcement of the Offset Provision. *Id.* at 16–17.

II.

The district court's order granting the States summary judgment and imposing a permanent injunction was a final decision. *See, e.g.*, *Reform Am. v. City of Detroit*, 37 F.4th 1138, 1147 (6th Cir. 2022) (citation omitted). Thus, 28 U.S.C. § 1291 gives us statutory jurisdiction to handle Treasury's appeal. We examine Article III jurisdiction over the States' respective claims below.

As for our standards of review, we consider summary-judgment orders *de novo*. *See Jordan v. Howard*, 987 F.3d 537, 542 (6th Cir. 2021) (citation omitted). Thus, drawing all reasonable inferences in favor of the non-movant, we ask whether the party seeking summary judgment demonstrated "that there is no genuine dispute as to any material fact" and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On cross-motions for summary judgment, we apply these same standards to each of the individual motions. *See Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (citation omitted); *accord Reform Am.*, 37 F.4th at 1147; *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001).

Concerning the district court's decision to grant a permanent injunction, several standards of review are relevant. "[F]actual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed *de novo*, and the scope of injunctive relief is reviewed for an abuse of discretion." *Sec'y of Lab. v. 3Re.com, Inc.*, 317 F.3d 534, 537 (6th Cir. 2003) (quoting

[4]By contrast, the district court denied the States' requested declaratory judgment, reasoning that such relief was subsumed into its order awarding a permanent injunction. Op. & Order at 14, R. 42.

S. Cent. Power Co. v. Int'l Brotherhood. of Elec. Workers, Loc. Union 2359, 186 F.3d 733, 737 (6th Cir. 1999)).

III.

As is our obligation, we consider first whether Kentucky and Tennessee established that their respective challenges to the Offset Provision are justiciable. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). We hold that Tennessee alone satisfied that showing. We then explain our view that the text of the Offset Provision is insufficiently clear under the relevant Spending Clause jurisprudence for Treasury, through promulgation of its Rule, to impose the specific obligations that Tennessee complains have inflicted compliance costs upon it.

A. Justiciability

1. Kentucky and Tennessee's Initial Standing to Sue

From the States' original complaint onward, their central theory of standing has been as follows. First, they said, they both intended to accept ARPA funds. Complaint ¶¶26–27, R. 1. But second, the Offset Provision at least arguably proscribes enacting *any* post-acceptance tax cut should the States wish to expend their funds. *Id.* ¶32. Indeed, because money is fungible, spending ARPA funds and then cutting taxes (or vice versa) could arguably be construed as having used those funds to "indirectly offset" a resultant revenue reduction. *Id.* ¶35. And second, the States alleged, both Kentucky and Tennessee desire to enact (or have enacted) tax cuts. Kentucky, for instance, recently enacted a tax-deferral bill to revitalize an area of Louisville. *Id.* ¶41. Likewise, Tennessee is considering eliminating its professional-privilege tax, and it has recently enacted cuts to several other taxes. *Id.* ¶42. But the States complained that such tax cuts "could be construed to come within the Tax Mandate if they result in a revenue decrease." *Id.* They thus contended that the Offset Provision constrained their sovereign authority to tax and exposed them to an imminent recoupment action should they wish to pursue their preferred policies.

These original theories sufficed for standing. Whether a party has standing to redress an injury is measured as of the time the injury is first asserted; here, in the original complaint. *See*

Lynch v. Leis, 382 F.3d 642, 647 (6th Cir. 2004). As of that moment, therefore, we apply two relevant frameworks to assess whether these "imminent-recoupment" and "sovereign-authority" theories sufficed for standing. The first framework derives from the Supreme Court's decision in *Lujan*, which explained that plaintiffs must establish an injury that is (1) actual or imminent and concrete and particularized, (2) traceable to the defendant, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Here at least, elements (2) and (3) are not subject to serious dispute. A recoupment action initiated by Treasury is no doubt traceable to Treasury, and an injunction restraining such a proceeding would provide the States corresponding relief. But what about an injury in fact? No recoupment action is now pending. So the question is whether a future such proceeding is sufficiently imminent to say the States have suffered a de facto injury for purposes of Article III.

That brings us to the second, more specialized framework, which instructs us how to determine whether an enforcement action is sufficiently imminent to support Article III jurisdiction over a pre-enforcement challenge. *See Susan B. Anthony List*, 573 U.S. at 158–59. Under that test, we ask whether the States, when they first asserted these injuries, had established (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) that this course of conduct was arguably proscribed by the Offset Provision, and (3) that if the States should pursue such a course of conduct, there was a credible threat that Treasury would pursue a recoupment action. *See id.* at 161–64. Before the eventual advent of the Rule, we believe, the States had satisfied this tripartite showing.

First, Kentucky and Tennessee alleged that despite their intention to accept and expend ARPA funds, they had either enacted or planned to enact tax cuts that could potentially result in revenue reductions. Complaint ¶¶41–42, R. 1. And their decision to do so was at least arguably affected with a constitutional interest, given that states have a powerful sovereign prerogative under federalism principles to control their own internal taxation policies. *See id.* ¶40; *see also Lane County v. Oregon*, 74 U.S. 71, 76 (1868) (describing states' control over "the power of taxation" as "indispensable" and "an essential function of government"); *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) ("Subsection (b)(4), like the whole of

§ 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty.”).

Second, this course of conduct was at least arguably proscribed by the Offset Provision. As we noted before, “money is fungible.” Complaint ¶35, R. 1; *see also United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (“Unlike real or personal property, money is fungible.”); *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 79 (2011) (same); *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 904 (E.D. Ky. 2016) (“Because money is fungible, such benefits will to some extent have the incidental effect of allowing the institution’s other funds to be used to advance their [other] purposes if they wish. Indeed any reimbursement, aid, or tax exemption necessarily frees up other funds for other purposes.”). As a result, merely enacting a revenue-reducing tax cut and expending ARPA funds could at least arguably be construed as having used the funds to “indirectly offset” the revenue reduction, given that the ARPA funds could support continued state spending rendered otherwise impossible by the tax cuts.[5]

Indeed, Treasury acknowledged in the commentary to its own Final Rule that this is at least a *plausible* interpretation of the statute. For instance, it explained, “*because money is fungible*, even if [ARPA] funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds 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.” 87 Fed. Reg. at 4,424 (emphasis added). For that matter, the plausibility of the States’ money-is-fungible interpretation is the very reason Treasury had to promulgate its Rule—to disavow that interpretation and attempt to clarify the Offset Provision. *See, e.g.*, *id.* at 4,423–24. Thus, the States’ desire to cut taxes while spending ARPA funds was at least *arguably* proscribed by the Offset Provision.

Last, the States had illustrated a credible threat of enforcement. For instance, the States produced Secretary Yellen’s letter indicating that Treasury intended to enforce the Offset

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[5]The question may arise why a revenue reduction would necessarily make additional spending impossible, since it would seem the States could continue to spend at the same levels by taking on debt. The answer is that this sort of debt-financed spending is restricted under Kentucky and Tennessee’s respective constitutions, which have balanced-budget amendments. *See* Ky. Const. §§ 49–50, 171; Tenn. Const. Art. II, § 24.

Provision. *See* Yellen Letter, R. 1-2. The letter reiterated that "[ARPA] funding may not be used to offset a reduction in net tax revenue resulting from certain changes in state law." *Id.* at 1. It also explained that Treasury would later promulgate "further guidance" about what sort of changes in state law could provoke a recoupment action.[6] *Id.* at 1–2. Thus, the letter itself acknowledged that (1) the Offset Provision *would* be enforced, but (2) it was not yet clear, based on the statute alone, how the States could comply with the Provision (and stave off recoupment). So as of the original complaint, the States had satisfied the Supreme Court's pre-enforcement-challenge test. In addition to traceability and redressability, in other words, they had also established a sufficiently imminent injury for jurisdiction.

2. *The Interim Final Rule Complicates the Initial Imminent-Recoupment and Sovereign-Authority Theories of Injury*

A little over a month after the States had filed their original complaint, Treasury promulgated its Interim Final Rule ("IFR") offering its construction of the Offset Provision. Several features of that Rule are relevant to this dispute. First, the IFR supplied the missing baseline for calculating whether a tax cut results in a revenue reduction. It clarified that the revenue baseline would be the state's "fiscal year 2019 tax revenue adjusted for inflation." 86 Fed. Reg. at 26,808.[7] Second, the IFR attempted to provide guidance about when a state would be understood to have "directly or indirectly offset a reduction in . . . net tax revenue." 42 U.S.C. § 802(c)(2)(A). Treasury's commentary explained as follows:

> A recipient government would only be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery

[6]Technically, even this letter explained Secretary Yellen's position that the Offset Provision does not render tax cuts impermissible *per se*. *See* Yellen Letter at 1, R. 1-2. But the letter also acknowledged that the Offset Provision created significant uncertainty about when tax cuts were permissible versus when they were not, which was why Treasury intended to promulgate "further guidance" about when it would pursue recoupment actions. *Id.* at 2. Thus, in the absence of those clarifying regulations, it was at least arguable that the tax cuts Kentucky and Tennessee had enacted or planned to enact could provoke a recoupment action. Indeed, as this Circuit's precedent recognizes, a threatened enforcement action should only be understood as too remote to support jurisdiction when the defendants have provided "clear assurances" they will not undertake the enforcement action. *See, e.g.*, *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1035 (6th Cir. 2022).

[7]The Final Rule likewise confirms that the fiscal year ending in 2019 is the relevant baseline. *See* 31 C.F.R. § 35.3; 87 Fed. Reg. at 4,423.

> Funds to offset the reduction in net tax revenue. If sufficient funds from other sources cannot be identified to cover the full cost of the reduction in net tax revenue resulting from changes in law, regulation, or interpretation, the remaining amount not covered by these sources will be considered to have been offset by Fiscal Recovery Funds, in contravention of the offset provision. The interim final rule recognizes three sources of funds that may offset a reduction in net tax revenue other than Fiscal Recovery Funds—organic growth, increases in revenue (*e.g.*, an increase in a tax rate), and certain cuts in spending.

86 Fed. Reg. at 26,807. The IFR thus provided the "further guidance" Secretary Yellen had promised in her initial letter to the States. As we explained before, Treasury construed the Offset Provision not to bar a revenue-reducing tax cut so long as a state identifies replacement funds from (1) macroeconomic growth, (2) increased state taxation on some other activity, or (3) state spending cuts in an area where the state is not expending ARPA funds. *Id.*; *see also* Appellants' Br. at 5.

Yet this narrowing construction created apparent justiciability issues for the States' challenge to the Offset Provision. In their initial complaint, the States had alleged only that they have enacted or plan to enact tax cuts that may result in reduced state revenues. Complaint ¶¶41–42, R. 1. They never additionally alleged that they would then fail to identify a permissible source of revenue—such as from macroeconomic growth or a reduction in certain state spending—to offset the resultant reductions in inlays. And only if *that* contingency were to occur, according to Treasury's new Rule, would Treasury pursue a recoupment action against the States. *See* 86 Fed. Reg. at 26,807; *see also* Appellants' Br. at 5. The IFR thus rendered it unclear why there was a reasonable prospect of a recoupment action.

And the States' sovereign-authority theory now suffered from a similar issue. The States' apparent view was that they had either been injured (1) *in the past* from the receipt of an ambiguous or coercive offer, or (2) are being continuously injured because the Offset Provision "prohibit[s] . . . tax relief." Appellees' Br. at 46. But an injunction cannot be used to redress a purely past injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Rather, the States had to show why they were likely to suffer some present or future harm. *Id.* So that leaves the

claim that the Offset Provision "prohibits . . . tax relief." Appellees' Br. at 46.[8] But the IFR subsequently disavowed the States' interpretation of the Offset Provision, clarifying that they remain free to expend ARPA funds and enact tax cuts resulting in revenue reductions so long as they identify a permissible source of offsetting funds. *See, e.g.*, 86 Fed. Reg. at 26,807. And the Final Rule crystallized precisely the same understanding. *See, e.g.*, 87 Fed. Reg. at 4,426.[9] Yet the States never established that they would fail to meet *that* obligation. Thus, we do not see how the sovereign-authority theory could support injunctive relief when the States identified no specific course of conduct they wish to pursue but against which Treasury will initiate an enforcement proceeding. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)).

3. The States File Their Amended Complaint and Motion for Summary Judgment But Provide No Evidence that They Intend to Violate the Rule

About a month after the IFR's promulgation, the States filed their amended complaint and corresponding motion for summary judgment and a permanent injunction. Despite the advent of the IFR, the States made no allegations and adduced no specific evidence about how

[8]In response to our request for supplemental briefing on mootness, the States emphasized their contention that their "sovereign authority" theory remains live even despite the Rule because the Offset Provision still "limits the range of policy options available to the[m]." Appellees' Supp. Br. at 4 (quoting Appellees' Br. at 20–21). Of course, *any* law could be said to "limit the range," in an abstract sense, of a plaintiff's legitimate behavior. But merely because enjoining the law's enforcement could be said to expand the range of potential behaviors a plaintiff might permissibly engage in does not alone establish the plaintiff's standing to seek an injunction. Rather, the plaintiff must show that he is "able and ready" to violate the law and that an enforcement action would realistically and likely ensue in response to the violation. *Carney v. Adams*, 141 S. Ct. 493, 501–02 (2020); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). Thus, as concerns the "sovereign authority" theory, the States still had the burden to establish, with evidence, why they plan to imminently pursue some policy objective outside the range of conduct permitted by the Rule and against which Treasury would correspondingly take action. *Lujan*, 504 U.S. at 561; *cf. Whole Woman's Health v. Jackson*, 141 S. Ct 2104, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021))).

[9]We do not hold today that the interim final rule *itself* necessarily mooted the imminent-recoupment and sovereign-authority theories. Interim final rules are subject to revision after the notice-and-comment process, so a rule's content could still change from its interim form to its final form in some way relevant to justiciability. But that concern is absent from *this* particular case, given that the final rule varied from the interim final rule in no way material to this dispute. Both disavow enforcement in exactly the same way and present exactly the same safe harbors for states and enforcement constraints on the Treasury Department.

they have pursued or intend to pursue a course of conduct that would arguably violate *the Rule*. In other words, they provided no declarations or other evidence about how they intend to enact tax cuts that (1) would result in net revenue reductions compared to 2019 inlays, and (2) would then fail to identify a permissible funding source (such as from growth or spending cuts) to offset the revenue reduction. Indeed, the *only* evidence Kentucky adduced in the States' motion for summary judgment was its notification that it intended to accept the ARPA funds. *See* Submission Confirmation, R. 25-1.

Those omissions are problematic for justiciability, since the States produced no evidence about why there is a realistic risk of an enforcement proceeding. And justiciability must be established with the degree of evidence required at each respective stage of the suit. *See Lujan*, 504 U.S. at 561. So the States were obliged to submit evidence—such as a sworn declaration—detailing how they are "able and ready" to pursue a course of action that would run afoul of the Rule. *Carney v. Adams*, 141 S. Ct. 493, 501–02 (2020). For only *then* would there be a demonstrated risk of a recoupment action, which a federal court could redress by enjoining such action. *See Jackson*, 141 S. Ct. at 2495 (citing *California*, 141 S. Ct. at 2115–16). In the absence of that evidence, we conclude that Treasury's disavowal of the money-is-fungible interpretation dispelled the States' claim that they run the risk of an imminent enforcement action—as when, for instance, a prosecutor credibly disavows that he will enforce a challenged statute. *See, e.g.*, *Mink v. Suthers*, 482 F.3d 1244, 1256–57 (10th Cir. 2007); *cf. Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) (explaining that courts will find a credible threat of enforcement when "the Government fails to indicate affirmatively that it will not enforce the statute" (emphasis omitted)).

The only remaining question is what *kind* of justiciability defect Treasury's disavowal created. The parties initially framed the issue as one of the States' "standing." But we disagree with that characterization. Whether an "intervening circumstance" arising *after* a suit has been filed causes a plaintiff's asserted injury to dissipate is really a question of mootness. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). And whether the Rule mooted the imminent-recoupment and sovereign-authority theories comes down to whether we should credit Treasury's voluntary disavowal of a broad view of the Offset Provision; in essence, whether

Treasury established[10] that there is no "reasonable possibility" it will act as if the Offset Provision forbids tax cuts *per se*. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 529 (6th Cir. 2022) (en banc).

We hold that Treasury satisfied this showing. Its Final Rule resulted from the notice-and-comment process, and thus it may be rescinded only pursuant to that process as well. *See* 5 U.S.C. § 551(5); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). And we have no evidence that Treasury plans to pursue such rescission. Indeed, and more importantly, Treasury has repeatedly taken the position in this litigation that its Rule necessarily follows from the plain text of the Offset Provision *itself*. *See, e.g.*, Reply Br. at 1; Appellants' Supp. Br. at 2 n.2. So even *without* the Rule, according to Treasury, it would pursue recoupment against Kentucky and Tennessee—even if they were to enact a revenue-reducing tax cut and expend ARPA funds—*only* if the States additionally failed to identify one of the permissible sources of offsetting funds, such as a tax increase or macroeconomic growth.[11] *Id.* On those bases, then, we conclude that Treasury has affirmatively and credibly disavowed the money-is-fungible interpretation of the Offset Provision. Thus, because the States failed to provide evidence that they intend to

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[10]Aside from how standing and mootness concern the parties' interests at different stages of a lawsuit, they can also present different burdens of proof. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). The burden to establish jurisdiction rests on the party invoking jurisdiction—here, the States—while the burden to defeat jurisdiction with a mootness objection rests on the party asserting mootness—here, Treasury. *Id.* Because of this burden-shifting issue, we ordered supplemental briefing to solicit Treasury's affirmative case as to why the States' challenge is moot. *See* Order, ECF No. 45. After agreeing that mootness (rather than standing) is the appropriate framework to assess the impact of the Rule's advent, Treasury's supplemental brief once again disavowed the money-is-fungible interpretation of the Offset Provision and disclaimed that Treasury has any intent to pursue recoupment in response to tax cuts *per se*. *See* Appellants' Supp. Br. at 1. We thus understand Treasury, through its supplemental briefing, to have discharged its duty to make an affirmative showing about why at least the imminent-recoupment and sovereign-authority theories are moot.

[11]In their supplemental briefing, the States contended that the Rule did not moot the imminent-recoupment and sovereign-authority theories because it contains a reservation of authority. *See* Appellees' Supp. Br. at 5 (citing 31 C.F.R. § 35.4(a)). And, true, the Rule provides that "[n]othing in this part shall limit the authority of the Secretary to take action to enforce conditions or violations of law, including actions necessary to prevent evasions of this subpart." 31 C.F.R. § 35.4(a). But we have no evidence (or even argument) about how the States plan to engage in conduct that Treasury would construe as an "evasion," much less why Treasury would construe behavior clearly permitted by other parts of the Rule to constitute such an "evasion." Moreover, Treasury insists that the Rule's narrowing construction "flows naturally from the text of the Offset Provision itself." Appellants' Supp. Br. at 2 n.2. So even if the *Rule* arguably did not bar Treasury from pursuing recoupment under, for instance, the money-is-fungible interpretation, Treasury has solemnly represented before us that the Offset Provision *itself* would preclude such an enforcement action. Again, Treasury's position is that the Offset Provision *itself* unambiguously dispels that interpretation of the statute. Reply Br. at 1; Appellants' Supp. Br. at 2.

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.

Moreover, that holding ends the case for Kentucky. Kentucky submitted nothing other than an email indicating its intent to accept the ARPA funds. Submission Confirmation, R. 25-1. It furnished no proof about how it intends to violate the Rule, or about why it suffers a continuing sovereign injury when it identified no desired tax cut that, if enacted, would likely provoke recoupment. It also offered no additional theory of injury, such as compliance costs, that might sustain its challenge even in the absence of an imminent recoupment action. *See* Recording of Oral Arg. at 30:38–30:45 (conceding that there is no evidence in the record about Kentucky's budgeting processes). Thus, the district court should have dismissed its challenge to the Offset Provision as moot.[12]

4. Tennessee's Challenge Remains Justiciable, However, Under a Compliance-Costs Theory of Injury

The same cannot be said for Tennessee. Recall how, in their amended complaint, the States made allegations about an additional injury the Offset Provision would inflict upon them:

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[12]Kentucky insists that its challenge to the Offset Provision is justiciable if we determine that *Tennessee's* challenge to the Offset Provision is justiciable. *See, e.g.*, Recording of Oral Arg. at 30:15–30:20; Appellees' Br. at 16 n.4. We disagree. "Standing is not dispensed in gross." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Rather, to win summary judgment and obtain injunctive relief, Kentucky and Tennessee each had to demonstrate, with evidence, why it was suffering *particularized* continuing or imminent injuries in fact, and why that remained the case even after promulgation of the Rule. *Lujan*, 504 U.S. at 561; *see also id.* at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); *Trump v. New York*, 141 S. Ct. 530, 534 (2020) ("A foundational principle of Article III is that an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." (cleaned up)). Thus, the district court had no authority to issue an injunction protecting a party that failed to demonstrate that its challenge was even justiciable. Instead, a "remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimerChrysler Corp.*, 547 U.S. at 353. The case that Kentucky cites to the contrary—*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*—is inapposite. *See* Appellees' Br. at 16 n.4 (citing 547 U.S. 47, 52 n.2 (2006)). There, determining the standing of each individual plaintiff (and thus the legitimate scope of injunctive relief) was irrelevant; since plaintiffs had all advanced the same non-meritorious claim, the Court needed to find standing only as to a single plaintiff to deem their shared legal theory erroneous. *Id.* at 70. But while such cases "give courts license to *avoid* complex questions of standing in cases where the standing of others makes a case justiciable, it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case." *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). The proper course is, instead, to limit relief only to those parties who established the district court's jurisdiction to award it. *DaimlerChrysler Corp.*, 547 U.S. at 353.

compliance costs. Amended Complaint ¶12, R. 23. Unlike Kentucky, Tennessee then submitted uncontroverted evidence of those costs. Eley Dec. ¶¶8–10, R. 25-3. As Eley's declaration explains, the Offset Provision requires Tennessee to expend time and money that it would not expend but for the Offset Provision to ensure that none of the tax cuts it has enacted or will enact could be construed as having been "indirectly offset" by ARPA spending. *Id.* ¶8. Likewise, it must also expend resources it would not otherwise have to expend "adjusting [its] 'baseline' level of tax revenue for inflation each year during the covered period" to determine whether its tax policies may provoke a recoupment action. *Id.* ¶9. *These* injuries were not mooted by the advent of the Rule, since Tennessee must still expend resources to maintain compliance with the Offset Provision (and, for that matter, the Rule as well). *See id.*

And, unlike with the imminent-recoupment and sovereign-authority theories, we have no similar imminence concern about the compliance-costs argument.[13] Tennessee already accepted the funds, so it must undertake compliance efforts at present. Given those facts, we conclude that Tennessee satisfied its obligation to show an actual injury traceable to the defendants and likely redressable by a favorable decision. Indeed, compliance costs are a recognized harm for purposes of Article III. *See, e.g.*, *Federal Election Comm'n v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1646 (2022); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *see also State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (Kavanaugh, J.) ("The Rule also offers a safe harbor, but banks such as State National Bank must incur costs to ensure that they are properly complying with the terms of that safe harbor. . . . Under *Lujan*, the Bank therefore has standing to challenge the constitutionality of the Bureau."); *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021) (collecting cases). Tennessee's expenditure of those resources, as we explain below, is traceable to the Offset Provision. Its proscriptions are why Tennessee must incur such costs—to maintain compliance with the Offset Provision and stave off a recoupment action.[14] And permanently enjoining the Offset Provision's enforcement

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[13]We thus assess Tennessee's standing argument under the ordinary *Lujan* framework. *See supra* at 12–13.

[14]Supreme Court doctrine, we note, provides that a federal court has jurisdiction over a regulated entity's pre-enforcement challenge even when no enforcement action is imminent if the enforcement action's remoteness stems from the regulated entity's own involuntary efforts to comply with the contested proscription. *MedImmune,*

would redress that injury. For if enforcement of the Offset Provision were enjoined, Tennessee would have no reason to continue expending resources to maintain compliance with an unenforceable provision.

Still, however, Treasury disputes several aspects of this analysis. Its objections focus on whether these compliance costs are a legitimate injury in fact, and, even assuming they are, whether such an injury is truly traceable to the Offset Provision. After more fully describing those objections below, we explain why none persuades us that we lack jurisdiction.

a. Treasury's Objection that Tennessee's Compliance Costs are not an Injury in Fact

Treasury at points seems to dispute that the compliance costs the Offset Provision (and Rule) inflict on Tennessee even constitute an injury in fact. *See, e.g.*, Reply Br. at 4 n.1. Its argument rests on a portion of the Final Rule—which, we note, acknowledges that ARPA imposes an "administrative burden" on the States—but that permits states to use ARPA funds to defray the costs of complying with ARPA's reporting requirement. *Id.*; 87 Fed. Reg. at 4,444. The theory seems to be that Tennessee cannot be injured by ARPA-related compliance costs when ARPA funds may themselves be used to offset administrative expenses.

We perceive two central problems with this argument. The first is that even if the Rule permits states to use ARPA funds to defray the costs of complying with the *reporting requirement*, 87 Fed. Reg. at 4,444, that is simply beside the point as concerns Tennessee's compliance-costs argument. Tennessee complained of compliance costs distinct from those imposed by the reporting requirement. *See* Eley Dec. ¶¶8–9, R. 25-3. Indeed, Eley's declaration draws an explicit distinction between the costs of *reporting* Tennessee's uses of ARPA funds, on the one hand, and the costs of tracking whether any such use could be construed as an "indirect offset," on the other. *Id.* ¶10. And that distinction makes perfect sense based on the statute's text. The reporting requirement explains that states must provide a "detailed accounting

Inc. v. Genentech, Inc., 549 U.S. 118, 128–30 (2007). *MedImmune* concerned a declaratory judgment, of course, but the Declaratory Judgment Act did not expand federal courts' jurisdiction beyond that which they already could have exercised to award traditional remedies like money damages or an injunction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950). So since the court in *MedImmune* had jurisdiction to adjudicate a declaratory-judgment action concerning alleviation of a prospective harm, it necessarily would have had jurisdiction to entertain an injunctive suit (such as the one at issue here) as well.

of . . . the uses of [ARPA] funds" and "all modifications to the State's . . . revenue sources during the covered period," along with "other information as the Secretary may require[.]" 42 U.S.C. § 802(d)(2)(A)–(B). The Offset Provision, by contrast, presents a different obligation: that such "uses" may not be for "indirect" offsets of revenue-reducing tax cuts. § 802(c)(2)(A). So a state could violate the Offset Provision—indirectly offsetting tax cuts with ARPA funds—while complying with the reporting requirement—by simply telling Treasury that it was using the funds in an impermissible manner. Thus, even if we assumed that the States were not injured by the reporting requirement, given that they may defray associated administrative expenses with ARPA funds, that would in no way dispel Tennessee's distinct injury from additional costs incurred to comply with the Offset Provision.

Second, and more fundamentally, even if we assumed that the Rule permitted Tennessee to use ARPA funds to defray its *Offset Provision*-related compliance costs, that would still represent an injury in fact. Tennessee has an independent interest in expending its ARPA funds on other legitimate uses; for instance, spending in one of the four areas that Congress deemed necessary to recovery from the pandemic. 42 U.S.C. § 802(c)(1)(A)–(D). ARPA funds expended on compliance with an invalid Offset Provision are necessarily ARPA funds *not* productively expended on economic recovery. So a "diversion of resources" from useful areas to compliance with an invalid condition would nonetheless constitute an injury in fact. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). Put simply, Tennessee has a live interest in not wasting its ARPA funds on compliance with an invalid condition.

b. Additional Concerns about Traceability

Next, Treasury reframes the same argument as an objection to traceability—that all of Tennessee's compliance costs are traceable solely to the unchallenged reporting requirement, rather than to the Offset Provision. Reply Br. at 4. But we reject this argument for the same reason we rejected it above; again, that it is undercut by both law and fact. The reporting requirement contains no prohibition on *how* funds may be used. It establishes only an obligation that states inform Treasury of *which* uses a state pursues. The Offset Provision, by contrast, contains a substantive prohibition on use—that the funds cannot be used to "indirectly offset" revenue reductions resulting from tax cuts. 42 U.S.C. § 802(c)(2)(A). And Eley's

uncontroverted declaration establishes that these distinct obligations incur distinct sets of compliance costs upon Tennessee.

That discussion appears to exhaust Treasury's arguments about why the compliance-costs injury is nonjusticiable. But given our independent obligation to ensure that we have jurisdiction, we find a few additional comments about traceability in order. *See, e.g.*, *Arbaugh*, 546 U.S. at 514. One important issue, we note, is whether Tennessee's compliance costs are truly traceable to the Offset Provision *itself*, or whether they are traceable merely to the *Rule*. In our view, Tennessee's costs are most proximately traceable to the Rule, rather than to the Offset Provision's text. If the Rule had never existed, after all, the statute alone arguably might have entailed obligations wholly distinct from those described by the Rule, and thus a distinct set of compliance costs as well. Absent the Rule's safe harbors about growth, tax increases, and spending cuts, for instance, the Offset Provision itself, under the money-is-fungible interpretation, arguably proscribed *all* revenue-reducing tax cuts during ARPA's "covered period." So compliance costs under that regime would have been much simpler: just don't cut taxes if you want to expend ARPA funds. But the Rule clarified that Tennessee *may* cut taxes insofar as it establishes a new tracking procedure to ensure that funds offsetting a tax cut stem from a permissible replacement revenue source (e.g., growth) rather than from ARPA funds. Eley Dec. ¶8, R. 25-3. Likewise, Eley's declaration explained that Tennessee must expend additional resources to inflation-adjust its revenues for each year of the "covered period" and then compare them with a 2019 baseline to determine whether any year during the "covered period" witnessed a "reduction" in net tax revenue. *That* specific requirement only became clear from the Rule. *Id.* ¶9 (citing 31 C.F.R. § 35.3, 35.8(b)).

Yet while these refined obligations' origin in the Rule may highlight the indeterminacies of the underlying Offset Provision, they do not establish that Tennessee's injuries cannot be traced to the Offset Provision itself. The Supreme Court recently confronted an analogous issue in *Federal Election Commission v. Ted Cruz for Senate*. 142 S. Ct. at 1638. There, the Cruz campaign challenged a campaign-finance restriction found in an agency regulation implementing a statute but absent from the underlying statute's text. *Id.* at 1648. Thus, the government argued, "[a] challenge to the regulation . . . is separate from a challenge to the statute that authorized it."

Id. But the Court declined to endorse this distinction. To the contrary, it held that an injury from a regulation implementing a statute was still traceable to the statute itself. *Id.* at 1649. "An agency, after all, 'literally has no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." *Id.* (citations omitted). And "[a]n agency's regulation cannot 'operate independently of' the statute that authorized it." *Id.* (citation omitted). So even if Tennessee's injuries are *most* proximately traceable to the Rule, we nonetheless conclude that these injuries also suffice for standing to challenge the Offset Provision itself. For if enforcement of the Offset Provision itself were enjoined, it would necessarily preclude enforcement of the Rule, at least to the extent it implements the Offset Provision.

Last, we address the notion that Tennessee's compliance costs are a "self-inflicted injury" and are thus traceable solely to its own conduct in accepting the ARPA funds, rather than to some wrongful conduct of the federal government.[15] It is in some sense true that Tennessee exposed itself to the risk of compliance costs when it accepted the ARPA funds. Of course, Tennessee did so with a reservation about the Offset Provision, and it also insists that it took the funds under duress. *See* Recording of Oral Arg. at 27:38–27:55; Appellees' Br. at 29. But even if we assumed that Tennessee took the money purely of its own volition, that would not make its compliance costs "self-inflicted" in a way that would defeat jurisdiction. The Supreme Court recently rejected a similar argument in, incidentally, *Ted Cruz for Senate*. 142 S. Ct. at 1647–48. There, the Cruz campaign stipulated that its "sole and exclusive motivation" for violating the campaign-finance restriction was to create a factual basis for challenging the restriction. *Id.* at 1647. The government accordingly argued that any resultant injury was traceable not to the restriction, but to the Cruz campaign's willful violation of it. *Id.* Again, however, the Court unequivocally rejected this theory. As it explained, "[w]e have never recognized a rule of this kind under Article III. To the contrary, we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Id.*; *see*

[15]The district court raised this concern at the permanent-injunction hearing, apparently *sua sponte*. *See* 9/8/2021 Tr. of Hearing at 4:15-23, R. 41. As the States point out, Treasury has declined to press it either below or before us. *See* Appellees' Br. at 18 n.5. We nonetheless address it because, again, we have independent obligation to assure ourselves of jurisdiction. *See, e.g.*, *Arbaugh*, 546 U.S. at 514.

also id. at 1648 ("That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply."). So even if Tennessee had voluntarily chosen to subject itself to the Offset Provision, it would not defeat (and, indeed, would establish) Tennessee's standing to challenge it.

Moreover, Tennessee points out, such a jurisdictional bar would be irreconcilable with the Supreme Court's broader Spending Clause jurisprudence. *See* Appellees' Br. at 18 n.5. In *any* Spending Clause challenge, it could be argued, states that accepted federal funds assumed the risk that an ambiguous condition could be construed against their interests. *Id.* For instance, states might have recognized that the term "costs" in the Individuals with Disabilities Education Act ("IDEA") *could* be construed to include expert-witness fees. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 293–94. That it did was, in fact, the position of three dissenting Justices. *See id.* at 308 (Breyer, J., dissenting, joined by Stevens, J., and Souter, J.). Or, states might have recognized, the term "appropriate relief" *could* be construed to include money damages—a position that two dissenting Justices called "self-evident." *Sossamon v. Texas*, 563 U.S. 277, 293 (2011) (Sotomayor, J., dissenting, joined by Breyer, J.). But in neither of those cases were the states held subject to such obligations, since the question is not whether states could have *conceived of* those liabilities when accepting the funds; it is instead whether they assumed an obligation about which the relevant statute conferred notice *clearly* and *unambiguously*. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 298; *Sossamon*, 563 U.S. at 289–91. Conversely, therefore, jurisdiction is not defeated by (and the merits of the challenge are *established* by) a spending law's omission of clear warnings about the obligations it entails.

B. The Merits

Having concluded that Tennessee's challenge is justiciable, we now explain why we agree with Tennessee that the Offset Provision did not establish, with the requisite clarity, the putative obligations it was revealed to entail by the Rule.

1. Under the Relevant Spending Clause Jurisprudence, the Offset Provision Fails to Provide States Clear Notice of the Conditions It Entails

At the outset, we note that the States have labeled their challenge as against an "unconstitutionally ambiguous" piece of spending legislation. *See, e.g.*, Amended Complaint ¶57, R. 23. Neither of those terms is entirely accurate. First, as a technical matter, the Offset Provision is more than merely "ambiguous." Ambiguity refers to situations in which language has at least two definite meanings and a court must select between or among them. *See* Caleb Nelson, *Statutory Interpretation* 77–80 (2011). (For instance, the word "bank" without further context might refer to either a riverside or a financial institution.) Vagueness, by contrast, arises when a term is open-ended and lacks inherent or definite content. *Id.* The Offset Provision is better described as suffering from the latter defect. The States could not have known from the statute itself the reticulated way that Treasury's Rule would construe the Offset Provision, since that construction was hardly obvious *ex ante*. Nor could they have reliably predicted which of the several potential baselines Treasury would select to measure a "reduction," nor when Treasury might deem such a reduction to have "resulted" from a tax cut. To the contrary, the statute's open-endedness gave Treasury expansive discretion to construe its terms in the particular way Treasury saw fit.

And second, the Offset Provision is not "unconstitutional" under the Spending Clause, strictly speaking, just because of those indeterminacies. Rather, the Supreme Court has explained that because Congress can cajole the states to enact policies indirectly (through a spending inducement) that it could never *directly* order them to perform with its other enumerated powers, we must employ a federalism-based clear-statement rule when construing spending legislation as a matter of *statutory* interpretation. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Cummings*, 142 S. Ct. at 1570, 1574; *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 283–84 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (describing the clear-statement rule as a "statutory limitation on Congress's spending power"); *see also Haight v. Thompson*, 763 F.3d 554, 568 (6th Cir. 2014) ("One of the distinguishing features of the spending power is that it allows Congress to exceed its otherwise limited and enumerated powers by regulating in areas that the vertical structural protections of

the Constitution would not otherwise permit."). In other words, Congress does not necessarily lack the constitutional *power* to enact vague spending laws in the same way that, for instance, it lacks the power to enact a law "respecting an establishment of religion." U.S. Const. amend. I. But those laws may be unenforceable in certain circumstances when they fail to provide states with clear notice of a purported funding condition.

So, as we explain below, we do not hold the Offset Provision "unconstitutional" under the Spending Clause. Rather, our holding is this. As a matter of statutory interpretation, we conclude that the Offset Provision does not clearly explain (1) how to calculate a "reduction" in net tax revenue, (2) how to determine whether such a reduction resulted from a tax cut, or (3) how to tell what particular conduct constitutes an "indirect" offset. And Treasury's attempted liquidation of the Offset Provision via the Rule in no way followed *clearly* from the Offset Provision's text. Thus, Tennessee may legitimately discontinue the compliance procedures entailed by the Rule, and if, as a result, it should engage in conduct Treasury deems a violation of the Offset Provision, Treasury may not initiate enforcement proceedings in response.

2. Applying the Spending Clause Clear-Statement Rule

It is undisputed that ARPA was enacted pursuant to the Spending Clause. Unlike ordinary coercive legislation, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress'[s] power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). And "[s]tates cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17)). As a result, Congress must provide "clear notice" of the obligations a spending law entails. *Pennhurst*, 451 U.S. at 25. "After all, when considering whether to accept federal funds, a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table." *Cummings*, 142 S. Ct. at 1570. And this clear-statement rule applies with particular force where "a State's potential obligations under the Act are largely indeterminate." *Pennhurst*, 451 U.S. at 24. "Accordingly, if Congress intends to

impose a condition on the grant of federal moneys, it must do so unambiguously" and with a "clear voice." *Id.* at 17. Applying these principles reveals that neither the "indirectly offset" language nor the "reduction in the net tax revenue . . . resulting from" language provided the states the requisite "clear notice" of whatever obligations such language entails. *Id.* To the contrary, these are "largely indeterminate" provisions susceptible to a range of plausible meanings. *Id.* at 24; *cf. Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1498 (2022) ("Where multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear." (citation omitted)).

a. "Indirectly Offset"

In assessing justiciability, we spoke at length about the Offset Provision's indeterminacies; particularly, the prohibition on "indirect" offsets. So we briefly reiterate those points here. The first core issue with the Offset Provision, again, is that its text does not clearly explain what it means to "indirectly offset" revenue-reducing tax cuts with ARPA funds. "Indirectly" means "not directly; obliquely; not straightforwardly, or the like; in an indirect, roundabout, or subtle manner." *Indirectly*, Webster's New International Dictionary 1267 (2d ed. 1960); *see also Indirectly*, New Practical Standard Dictionary 677 (1956) ("Not in direct relation; not tending to a result by the shortest or plainest course; inferential."); *Indirectly*, Compact Edition of the Oxford English Dictionary 1418 (1971) ("By indirect action, means, connexion, agency, or instrumentality; through some intervening person or thing; mediately."). And "offset," in the relevant sense, simply means "to counterbalance" or "compensate" for something. *Offset*, Webster's New International Dictionary at 1691; *see also Offset*, New Standard Practical Dictionary at 917 ("Anything regarded or advanced as a counterbalance or equivalent; set-off."); *Offset*, Compact Edition of the Oxford English Dictionary at 1981 ("To set off as an equivalent against something else."). So, as Treasury contends, this statutory language apparently stands for the general proposition that states may not circumvent the use restriction "with formalities." Appellants' Supp. Br. at 3. Beyond that general notion, however, what this language actually obliges the States to do is difficult to say.

For instance, the States contend that an "indirect offset" could plausibly occur whenever a state enacts a revenue-reducing tax cut and expends ARPA funds—no matter whether the state

pours the ARPA funds into the precise area it cut taxes. *See* Appellees' Br. at 38–39. This is the money-is-fungible interpretation of the Offset Provision that we described above. *See id.*; *see also* Amended Complaint ¶35, R. 23. Nothing about ARPA's text or context suggests that this interpretation is particularly far-fetched. The macroeconomic assumption underlying the Act seems to be that recovery from a recession is best achieved by high levels of spending, rather than static levels of spending accompanied by cuts in taxation. *See, e.g.*, 86 Fed. Reg. at 26,786–87 (explaining that the "demand for government services is high," but that "State, local, and Tribal government austerity measures can hamper overall economic growth, as occurred in the recovery from the Great Recession."). So, chilling tax cuts to facilitate high levels of spending would seem consistent with ARPA's purpose. *Id.* And even Treasury's own Rule acknowledges that the money-is-fungible interpretation is at least a *plausible* concern with the Offset Provision.[16] Once again, it explained, "*because money is fungible*, even if [ARPA] funds are not explicitly or directly used to cover the cost of changes that reduce net tax revenue, those funds 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." 87 Fed. Reg. at 4,424 (emphasis added).[17] The plausibility of this interpretation was the very reason that Treasury had to shed so much ink attempting to disavow it with the Rule.

[16]In its reply brief, Treasury invoked the canon of constitutional avoidance to suggest that the money-is-fungible interpretation of the Offset Provision is implausible (though, we note, it raised this point in its objections to justiciability rather than the merits). *See* Reply Br. at 3 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)). We find this canon of minimal importance to either justiciability or the merits for two key reasons. First, "[f]or standing purposes, we accept as valid the merits of appellees' legal claims." *Ted Cruz for Senate*, 142 S. Ct. at 1647; *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."). So it would be inappropriate for us, at the justiciability stage, to render a merits interpretation of the Offset Provision and to then declare based on that merits interpretation that the controversy is not even justiciable. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). After all, if the laws of the United States when "given one construction" would establish jurisdiction and would defeat it when "given another," then the plaintiff has established jurisdiction. *Bell v. Hood*, 327 U.S. 678, 685 (1946). Second, concerning the merits, the constitutional-avoidance canon would at most dispel the States' money-is-fungible interpretation of the Offset Provision. But establishing whatever obligations the Offset Provision does *not* impose cannot suffice to defeat a Spending Clause challenge, for the critical question would still remain about whatever obligations the Offset Provision *does* impose—such as those it is claimed to impose in the Rule—and whether it does so clearly and unambiguously.

[17]Or, once again, consider Secretary Yellen's acknowledgement that "[w]e will have to define what it means to use money from this Act as an 'offset' for tax cuts. And, given the fungibility of money, it's a hard question to answer." Treasury Secretary & Federal Reserve Chair Testimony on COVID-19 Economic Recovery at 58:30–59:05, available at https://www.c-span.org/video/?510059-1/treasury-secretary-federalreserve-chair-testimony-covid-19-economic-recovery.

See, e.g., Yellen Letter, R. 1-1 (explaining that Treasury would promulgate "further guidance" so that states could understand their obligations under the Offset Provision).

True, the Rule—as distinct from the Offset Provision itself—went on to clarify that such an "indirect offset" would not be deemed to have occurred in three particular situations: where the spending cut is offset with macroeconomic growth, another state tax increase, or a state spending reduction. 87 Fed. Reg. at 4,423; *see also* Appellants' Br. at 5. But why is the presence of *any* safe harbor dictated by the underlying statute, much less *clearly* so? And why do those *particular* safe harbors reside in the statutory text, much less *clearly* so? In reality, the statute is silent on those questions. Precisely because the Offset Provision is so indeterminate about what behavior might constitute an "indirect offset," Treasury was necessarily left with a huge range of discretion about which state behavior it would deem permissible versus impermissible. As a result, the statute itself failed to provide "clear notice" to Tennessee about whichever particular conduct Treasury would permit or proscribe. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296. And no doubt because of the Offset Provision's lack of inherent content, Treasury found it necessary to promulgate a Final Rule with a hundred pages of commentary in its attempt to establish some concrete "guidance." *See* Yellen Letter, R. 1-2.

b. "A Reduction in the Net Tax Revenue . . . Resulting From" a Tax Cut

The Offset Provision's language concerning "a reduction in the net tax revenue . . . resulting from" a tax cut is similarly indeterminate. 42 U.S.C. § 802(c)(2)(A). Several major issues prevent it from having provided the States "clear notice" of their "obligations" under the statute. *Cummings*, 142 S. Ct. at 1574.

The first, as we mentioned before, is that this portion of the statute never actually specifies which fiscal year's revenue inlays serve as the baseline against which to determine whether a state experienced a "reduction" in its revenues. *See* Appellees' Br. at 40. And even Treasury's own Rule acknowledges how critical this omission was: "Measuring a 'reduction' in net tax revenue requires identification of a baseline. In other words, a 'reduction' can be assessed only by comparing two amounts." 87 Fed. Reg. at 4,426. In response to that omission, the Rule happened to set the baseline for the Offset Provision as "the fiscal year ending in 2019."

31 C.F.R. § 35.3; 87 Fed. Reg. at 4,423. Yet nothing in the Offset Provision's *text* clearly dictates why a 2019 baseline applies. For instance, Treasury might have selected a cascading baseline, in which the Offset Provision was construed to "prohibit[ ] the States from cutting taxes in any given year relative to the year prior." Appellees' Br. at 40. Or it might have set the baseline as the fiscal year of ARPA's enactment. And that might have been an especially obvious baseline, given that we typically assess statutory meaning as of "the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

The point is that the statute itself is "indeterminate" with respect to whatever baseline the offer entailed. *Pennhurst*, 451 U.S. at 24. And that wasn't because there was some inherent obstacle to Congress's specification of a baseline. For instance, compare the Offset Provision with the provision just above it—§ 802(c)(1)(C)—which establishes one of the permissible uses of ARPA funds. Congress there explained that states may spend the funds "for the provision of government services to the extent of the reduction in revenue of such State . . . relative to revenues collected *in the most recent full fiscal year of the State . . . prior to the emergency*." 42 U.S.C. § 802(c)(1)(C) (emphasis added). So Congress specified a baseline *there*. Why not specify a baseline for the Offset Provision itself?[18]

Second, setting aside the baseline issue, the Offset Provision contains further indeterminacies about how states must assess whether a reduction in tax revenue "*result*[*ed*] from a change" in state tax policy. § 802(c)(2)(A) (emphasis added). Put simply, the actual effect of a tax cut may be hard to predict *ex ante*. *See* 87 Fed. Reg. at 4,406, 4,423, 4,426; *see*

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[18]The simultaneous enumeration of a baseline in § 802(c)(1)(C) and the omission of one in § 802(c)(2)(A)—the Offset Provision—creates further clear-notice issues. Treasury interprets the "most recent full fiscal year . . . prior to the emergency" in § 802(c)(1)(C) as imposing a baseline consistent with revenues collected in the fiscal year ending in 2019. 87 Fed. Reg. at 4,426. It also interprets the Offset Provision to impose the *same* baseline, despite the Offset Provision having omitted the relevant language from § 802(c)(1)(C). Perhaps states were supposed to extrapolate that the § 802(c)(1)(C) baseline also applied to the Offset Provision. *See, e.g.*, 31 C.F.R. § 35.4. But the typical presumption is 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. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). So the differing text in §§ 802(c)(2)(A) and 802(c)(1)(C) would complicate the notion that states had clear notice that differently worded provisions imposed the same baseline.

Appellees' Br. at 41–44. So states considering tax cuts must necessarily generate and rely upon estimates of the real-world effects a tax cut will produce when assessing the cut's potential impact on their budgets. For instance, a state in one fiscal year might collect $10 million per annum from a particular tax. But the state's budget analysts might forecast that the state could collect the same *amount* of tax—$10 million per annum—even if the state reduced the relevant tax *rate*, as doing so might stimulate the occurrence of additional transactions subject to the tax. So imagine that the state, acting upon that assumption, enacted a tax cut in the relevant area. But during the next fiscal year, that same tax generated only $9 million in inlays. Did that fall in inlays *result* from the tax cut?

The Offset Provision itself does not supply an answer, because it never specifies whether it prohibits a reduction in *expected* tax revenues, which a state would be able to control *ex ante*, or whether it prohibits a reduction in *actual* tax revenues, which a state could potentially determine only *ex post*. Yet the difference matters. In the above hypothetical, for instance, the state's tax cut did not reduce its *expected* tax revenues, since the best information then available to it suggested that the effect of the tax cut would be revenue-neutral. But the tax cut arguably reduced its *actual* tax revenues, assuming that the only variable that changed from one year to the next was the tax cut.[19]

Recognizing that the Offset Provision itself is silent on this issue, the Rule, perhaps surprisingly, suggests that whether a revenue reduction "resulted" from a tax cut hinges on whichever accounting method a state uses to determine the effect of the tax cut. 87 Fed. Reg. at 4,406–07. As it explains, "[i]n assessing whether a tax change has had the effect of reducing tax revenue, recipients may *either* calculate the actual effect on revenue *or* rely on estimates prepared at the time the tax change was adopted," so long as those estimates were "based on

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[19]In real-world applications, of course, determining causation can be much more complicated. For instance, as Treasury acknowledges, many variables "exogenous" to a tax cut itself affect whether the tax cut, even if preceding a reduction in actual revenues, *caused* the reduction in actual revenues. 87 Fed. Reg. at 4,406. So isolating whether a tax cut ultimately caused a reduction in actual revenues can be extremely difficult. *Id.* Treasury attempted to resolve this problem by establishing a causation presumption that, whether sound policy or not, has little apparent relationship to ARPA's plain text: the IFR "included a presumption that all revenue loss is due to the pandemic," rather than to a tax cut. *Id.* The Final Rule then explained that this presumption applied to revenue reductions experienced *before* January 6, 2022, but did not apply to revenue reductions experienced *after* January 6, 2022. *Id.*

reasonable assumptions." *Id.* (emphases added). So assuming that a state uses an "actual effect" accounting method in the above example, the revenue reduction arguably resulted from the tax cut. But if a state uses a "reasonable expectations" accounting method, the revenue reduction seemingly did *not* result from the tax cut, as the state did not reasonably expect an actual revenue reduction *ex ante*. Yet how were the States supposed to know about these critical points based on the Offset Provision alone?

Or consider this issue: the Offset Provision itself never specifies the timespan during which we assess whether a revenue reduction occurred. For instance, imagine a state recorded $100 million in tax revenues in FY 2019, enacted a tax cut in FY 2020 that stimulated the economy and produced $120 million in tax revenues, but then experienced a downturn in FY 2021 resulting in tax revenues of only $95 million (which arguably might have been higher absent the FY 2020 tax cut). Does that scenario count as a "reduction . . . in net tax revenue" resulting from the FY 2020 tax cut, given that the tax cut arguably resulted in reduced inlays in FY 2021? Or did the state actually experience an *increase* in net tax revenues, since, combining the inlays from FY 2020 and 2021, the state recorded a net gain of $15 million in inlays versus FY 2019? Whatever the answer, it is at least unclear from the Offset Provision itself whether such a "net reduction" is measured across the entire "covered period" or on a year-to-year basis within the "covered period." 42 U.S.C. § 802(c)(2)(A).

For those reasons, therefore, neither operative portion of the Offset Provision—"indirectly offset" and "reduction in . . . net tax revenue . . . resulting from" a tax cut—provided Tennessee "clear notice" about the measures required to maintain compliance. *Cummings*, 142 S. Ct. at 1570.[20] Nor—as we explain below—can Treasury's subsequent promulgation of its Rule cure this vagueness defect.

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[20]Treasury emphasized in its reply brief that no court decision has ever "declared any . . . funding condition to be 'unconstitutionally ambiguous' in the abstract, as a facial matter. Rather, the Supreme Court and other courts, including this one, have relied on the clear-statement principle as a tool of statutory interpretation, to be used when adjudicating concrete disputes over the application of particular funding conditions." Reply Br. at 5. With today's opinion, the trend continues. Nowhere have we deemed the Offset Provision "unconstitutional" under the Spending Clause because of its indeterminacies. We instead have conducted our analysis as a matter of statutory interpretation. Likewise, that analysis has not unfolded "in the abstract," but has focused on two concrete obligations imposed by Treasury's rule: (1) that Tennessee, should it wish to enact revenue-reducing tax cuts, must trace any dollars arguably used to offset those reductions to three particular, *ad hoc* safe harbors, and (2) that in

c. Why Treasury's Rule Cannot Cure Spending-Law Vagueness

The question whether agency regulations construing spending legislation are entitled to deference has generated some occasional academic interest. *See, e.g.*, Peter J. Smith, Pennhurst*,* Chevron*, and the Spending Power*, 110 Yale L.J. 1187, 1189–90 (2001). But we note at the outset that this issue is not in the present case: Treasury categorically waived reliance on the Rule to cure a vagueness defect under the Spending Clause. As it told the district court, "agency regulations should have *no bearing* on the Spending Clause analysis." Defs.' Mot. to Dismiss & Mot. for Summ. J. at 30, R. 32 (emphasis added). It argued instead that the Offset Provision *itself* satisfied the Spending Clause, since at the very least it put the States on notice that the offer came with "*a* condition"—no matter whether the contours of that condition presented significant indeterminacies as a matter of the statutory text. *Id.* at 39.

Treasury has reprised these arguments before us. It does not argue that the Rule—even though it was promulgated before the States accepted the ARPA funds—can provide clear notice to the States of their obligations. Rather, it argues that it was the Offset Provision's text alone that "clearly place[d] States 'on notice' that their acceptance of Fiscal Recovery Funds 'is conditioned upon compliance with' the requirement not to use those funds to pay for tax cuts." Reply Br. at 7; *see also* Appellants' Supp. Br. at 2 n.2. So again, Treasury acknowledges that whether Tennessee's Spending Clause challenge succeeds hinges on whether the Offset Provision *itself* is impermissibly vague about whichever obligations it imposes on the states.

But we note that even if we were bound to independently assess whether Treasury's Rule could provide clear notice of conditions left otherwise indeterminate by the statute, we still would hold that it could not do so in these particular circumstances.[21] Our primary concern here

assessing whether such a revenue reduction occurred, Tennessee must establish and use an accounting procedure to compare its current inlays to its inflation-adjusted revenue in "its fiscal year ending in 2019." 31 C.F.R. § 35.3. Those are the relevant obligations, we conclude, of which Tennessee did not have clear notice from the Offset Provision itself.

[21]We confront the Rule's effect even despite Treasury's waiver because we recognize that there are serious and unresolved disputes about, for instance, whether the government may validly waive *Chevron* deference. *Compare Guedes v. BATFE*, 920 F.3d 1, 23 (D.C. Cir. 2019) (concluding that *Chevron* deference cannot be waived if the "underlying agency action" would otherwise merit *Chevron* deference), *with Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in denial of certiorari) (arguing that the D.C. Circuit's conclusion was

is the legitimate domain of *Chevron* deference—whether we (or a state) must accept as binding an agency regulation establishing an otherwise-uncertain spending-law condition. For instance, Treasury suggested before us that deference might be appropriate at least if we understood the relevant content of the Rule—the meaning of an "indirect" offset, the baseline for a revenue reduction, and how to tell whether such a reduction "resulted from" a tax cut—to constitute mere "implementation details." Reply Br. at 7–8. And, to that end, it invoked a couple of circuit decisions where we indeed deferred to agencies' reasonable views about marginal ambiguities in spending laws: one concerning whether the term "medical devices" includes "incontinence products" and the other concerning whether "records maintained by a law enforcement unit of [an] education agency or institution that were created by that law enforcement unit for the purpose of law enforcement" includes student disciplinary records involving "serious criminal conduct." *See id.* (citing *Harris v. Olszewski*, 442 F.3d 456, 467–68 (6th Cir. 2006), and then citing *United States v. Miami Univ.*, 294 F.3d 797, 814–15 (6th Cir. 2002)).

Yet we find that whether deference was warranted on such arcane topics as those has little relevance to the Offset Provision. It is difficult to see how the Rule represents mere "implementation details" when it supplied content without which the Offset Provision literally could not function. And, in any event, Treasury is wrong to suggest that we should act "as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc).[22] Unlike the distribution of incontinence products or the release of disciplinary records, control over taxation is a core aspect of state sovereignty. *See Dep't of Revenue of Or.*, 510 U.S. at 345; *Lane County*, 74 U.S. at 76. For Congress to impose conditions in *that* area, it must do so in clear and unmistakable terms. *See, e.g.*, *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (explaining that the Court "would not extend *Chevron* deference" to an agency interpretation involving "federal encroachment upon a traditional state power."); *see also Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

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erroneous because the "[Supreme] Court has often declined to apply *Chevron* deference when the government fails to invoke it").

[22]We quote from Judge Luttig's dissenting panel opinion, the relevant portion of which a majority of the full Fourth Circuit adopted upon *en banc* rehearing. *See Va. Dep't of Educ.*, 106 F.3d at 561.

When such a clear-statement rule is in play, it is insufficient merely that an agency reasonably liquidated ambiguities in the relevant statute. *Id.*; *see also Va. Dep't of Educ.*, 106 F.3d at 567 (declining to apply *Chevron* deference to an ambiguous spending statute because "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views."). Rather, in such circumstances, Congress *itself* must have spoken with a "clear voice." *Pennhurst*, 451 U.S. at 17.[23]

3. Treasury's Counterarguments

Before we close, we address a couple of Treasury's counterarguments to our conclusions above. We first discuss the import of our decision in *Cutter v. Wilkinson*, which affirmed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") against a Spending Clause challenge. 423 F.3d 579, 585–86 (6th Cir. 2005). We then address Treasury's claim that Tennessee should have enjoyed clear notice of the Offset Provision's meaning because the phrase "directly or indirectly" "appears more than a thousand times in the U.S. Code." Appellants' Supp. Br. at 3.

a. Cutter v. Wilkinson *and the RLUIPA Comparison*

Resisting our merits analysis, Treasury asserts that our decision today conflicts with circuit precedent sustaining RLUIPA against a Spending Clause challenge. *Cutter*, 423 F.3d at 585–86. We agree that RLUIPA is a helpful comparison—just not in the way Treasury thinks.

We begin with some background about RLUIPA itself. From 1963 to 1990, the Supreme Court interpreted the Free Exercise Clause to require state officials to justify even incidental

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[23]Conversely, though, we note that this analysis has no effect on our earlier mootness determination concerning Kentucky. Even if the Rule cannot fill in missing Spending Clause conditions, it can at least still bind *Treasury* in how it will administer the statute. And neither Tennessee nor Kentucky sought vacatur of the Rule under 5 U.S.C. § 706. Vacatur at least possibly could have revived the specter of Treasury enforcing the Offset Provision consistent with the money-is-fungible interpretation. But even after vacatur, that possibility would still seem rather remote, given Treasury's insistence that the text of the Offset Provision *alone* precludes the money-is-fungible reading. *See, e.g.*, Appellants' Supp. Br. at 2 n.2.

burdens on religious free exercise under strict scrutiny. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). A plaintiff could make out a prima facie case of a constitutional violation if she could establish that she had a sincere religious belief upon which the government had imposed a substantial burden, even if the burden were merely incidental. *Id.* And if that showing were made, the state then had to prove that its interest in imposing the burden was "compelling," *id.*, and that it had employed the means least restrictive on religious exercise in achieving its compelling interest. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). During the quarter-century in which this framework prevailed, the Supreme Court produced a sizeable corpus of decisions describing its particular contours. *See, e.g.*, *Sherbert*, 374 U.S. at 398; *Gillette v. United States*, 401 U.S. 437 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas*, 450 U.S. at 707; *United States v. Lee*, 455 U.S. 252 (1982); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989). And the lower courts applied it to hundreds of concrete disputes. *See generally* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407 (1992) (cataloging lower-court applications).

In 1990, however, the Supreme Court functionally overruled this body of precedent, holding that incidental burdens on religious practice merited only rational-basis review. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990). But Congress, incensed by the *Smith* decision, twice attempted to overrule it. *See* 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act); 42 U.S.C. § 2000cc *et seq.* (RLUIPA). Its second attempt, RLUIPA, restored strict-scrutiny analysis in the land-use and prison-administration contexts. § 42 U.S.C. §§ 2000cc, 2000cc–1. Congress partially rooted its power to enact such a statute in the Spending Clause, 42 U.S.C. § 2000cc-1(b)(1)–(2), and so it conditioned the receipt of certain federal funds on compliance with the old strict-scrutiny framework. *See, e.g.*, § 2000cc-1(a)(1)–(2). Ohio (and various other states) argued that strict scrutiny was too indeterminate to form an enforceable Spending Clause condition. *See Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 841, 844 (S.D. Ohio 2002). But the district court rejected the argument, holding that strict scrutiny was such a well-established framework before RLUIPA that even if it might present *marginal* indeterminacies in

certain applications, the states could easily discern what core obligations the statute entailed in the mine-run of cases. *See, e.g.*, *id.* at 844 ("Courts have been enforcing that exact standard against state action for years.").

Whether we ever actually adjudicated the correctness of that holding, we note, is uncertain. It appears that Ohio's officials pressed a different ambiguity argument on appeal to this circuit: that RLUIPA did not clearly specify that it applied to *existing* federally funded programs, rather than merely to programs established after its enactment. *See Cutter*, 423 F.3d at 585–86; *see also Gerhardt*, 221 F. Supp. 2d at 841 (distinguishing between the retroactivity argument and the strict-scrutiny-is-too-indeterminate argument). But we held that RLUIPA imposed *that* obligation clearly, since its text "explains that the Act applies to 'any program or activity that receives Federal financial assistance." *Cutter*, 423 F.3d at 586 (citing 42 U.S.C. § 2000cc-1(b)(1)). And, given that statutory language, it is difficult to see how a different result could have ensued.

Before us, however, Treasury appears to have erroneously exaggerated *Cutter*'s precedential effect by claiming that our circuit *also* rejected the strict-scrutiny-is-too-indeterminate argument. In particular, its reply brief claims that Ohio argued "RLUIPA's 'least restrictive means standard' constituted an ambiguous condition' that was impermissible under *Pennhurst*. *Cutter*, 423 F.3d at 586 (quotation marks omitted). But this Court disagreed, explaining that 'Congress need not 'delineate every instance in which a State may or may not comply with the least restrictive means test.'" Reply Br. at 6–7.[24] In reality, the portions of *Cutter* that Treasury quotes were describing a *Seventh Circuit* decision that had rejected "a similar *Pennhurst*-based challenge to RLUIPA"—the strict-scrutiny-is-too-indeterminate argument, not the anti-retroactivity argument before the panel in *Cutter*. *Cutter*, 423 F.3d at 586 (citing *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003)).

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[24]Treasury doubled down on this representation at oral argument, stating, "[o]n the question of how much has to be spelled out in the statute itself, *Cutter* involved a challenge to RLUIPA. RLUIPA said if you restrict the religious exercise of people in covered institutions, you have to satisfy strict scrutiny. It's of course *highly* unclear how strict scrutiny is going to apply to a particular kind of policy. But the court said, and every other court to consider the issue said, you don't have to have spelled that out in the statute." Recording of Oral Arg. at 16:46–17:09.

Set aside Treasury's misreading of *Cutter*, however, and pretend that *Cutter* had actually adjudicated the strict-scrutiny-is-too-indeterminate argument, so that we were bound today by a holding that RLUIPA's least-restrictive-means test satisfied the Spending Clause. What is that supposed to tell us about *the Offset Provision*? There is no comparable quarter-century of history in which the Supreme Court decided dozens of cases, and the lower courts decided *hundreds* of cases, construing what it means to "directly or indirectly offset a reduction in the net tax revenue . . . resulting from" a tax cut. 42 U.S.C. § 802(c)(2)(A). Indeed, Treasury conceded at oral argument that it is aware of *no* example in which the phrase "directly or indirectly offset" has ever even been used in a Spending Clause statute, much less been given an authoritative construction by the Supreme Court in the context of tax cuts. Recording of Oral Arg. at 43:00–43:50. So Treasury's invocation of RLUIPA, it turns out, underscores a reason the Offset Provision is impermissibly vague: given its terms' apparent novelty, there is, unlike in the context of religious free exercise, no expansive and authoritative corpus of federal-court precedents which the states might have consulted in attempting to discern the nature of their obligations.

b. "Directly or Indirectly" in the U.S. Code

Perhaps implicitly recognizing the dearth of relevant caselaw, Treasury last suggests that Tennessee should have been able to ascertain its obligations under the Offset Provision because various other federal *statutes* employ the phrase "directly or indirectly." Appellants' Supp. Br. at 3. It "is commonly used simply to underscore that a restriction cannot be circumvented through formalities," Treasury says, and "appears more than a thousand times in the U.S. Code." *Id.* That is perhaps true, but this factoid seems of no consequence to us for at least three reasons.

First, as we noted above, Treasury conceded that it has no example of such a phrase in a Spending Clause statute, much less one in the particular context of taxation, and, less still, one that survived ambiguity challenges in federal court. Recording of Oral Arg. at 43:00–43:50.

Second, most of these other uses appear to have no conceivable relevance to the Offset Provision. And, for that matter, they may make the vagueness issues even worse. For instance, consider 22 U.S.C. § 9214(a)(3), which provides that Treasury may freeze the assets of anyone

who "knowingly, directly or indirectly, imports, exports, or reexports luxury goods into North Korea." The phrase in that context seemingly bars the use of third-party intermediaries to circumvent a trade restriction. So Company A, wishing to execute proscribed shipments to North Korea, still violates the statute by shipping the goods to Company B in Shanghai for reexport into Pyongyang. Or take 29 U.S.C. § 432(a)(2), which requires officers of labor organizations to report on stock they hold "directly or indirectly" in the business they seek to unionize. Once again, the statute seems to bar circumvention through the use of a third-party intermediary, such as holding the stock indirectly in an index fund. Or last, consider 15 U.S.C. § 7410(b), which prohibits the award of a "grant or fellowship . . . directly or indirectly, to any alien from a country that is a state sponsor of international terrorism." Again, and for the third time, the phrase seems to bar the use of a third-party intermediary to circumvent the restriction: the grant cannot be distributed to an "institution of higher education" for redistribution to the alien. § 7410(c). So at best, these other uses have nothing to do with the Offset Provision, and, at worst, might have misleadingly suggested that it imposed some particularized bar on the use of third-party intermediaries to launder ARPA funds.

Last, as the above examples suggest, the relevant phrase is not just "directly or indirectly," but "directly or indirectly *offset*." 42 U.S.C. § 802(c)(2)(A). The issue here is not establishing that the Offset Provision bars "circumvent[ion] through formalities" in some broad, general sense, but in determining whatever conduct the Offset Provision might treat as having "directly or indirectly offset" a tax cut. For only then could the states have "ascertain[ed]" their obligations under the Act. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296 (quoting *Pennhurst*, 451 U.S. at 17)). But *that* phrase, as far as we can tell from our research, occurs exactly *once* in the entire U.S. Code—in the Offset Provision.

IV.

In closing, we reiterate the central conclusions we have reached today. Treasury's credible disavowal of the money-is-fungible interpretation mooted Kentucky's challenge to the Offset Provision, and so the district court erred when it enjoined Treasury from enforcing the Offset Provision against Kentucky. We thus **REVERSE** the district court's justiciability holding as to Kentucky and **VACATE** the permanent injunction to the extent it bars enforcement of the

Offset Provision against Kentucky. By contrast, we **AFFIRM** the district court's injunction as to Tennessee. We do so because "[c]larity is demanded *whenever* Congress legislates through the spending power[.]" *Haight*, 763 F.3d at 568. Yet clarity is just what the Offset Provision lacks.

CONCURRING IN PART AND DISSENTING IN PART

NALBANDIAN, Circuit Judge, concurring in part and dissenting in part. I concur with nearly all of the majority's well-reasoned opinion. Importantly, I agree with the majority that the vagueness of the American Rescue Plan Act of 2021 ("ARPA") violates the Spending Clause. And I agree that Tennessee has standing for the reasons that the majority gives. My only disagreement is about whether Kentucky can press its claim. In short, I believe that both Tennessee and Kentucky ("States") have standing for reasons related to the federal government's intrusion on their sovereign-taxing authority. And I don't believe that the Department of Treasury's ("Treasury") Rules on ARPA's enforcement ("Rules") affect justiciability.[1] So I concur with respect to Tennessee's participation in the case, but respectfully dissent over Kentucky's.

I.

Standing arises here in three possible ways: through what the majority calls the "imminent-recoupment," "compliance-cost," and "sovereign-authority" theories. My concern is

[1]My analysis assumes that the majority is correct that the one-party rule doesn't apply. (*See* Majority Opinion, at 20 n.12.) But I'm not sure that's the case. The rule allows courts to review claims so long as one plaintiff has standing. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007). And courts have applied the rule to other Article III requirements like mootness. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 278 n.4 (6th Cir. 1997); *see Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013). But this doesn't mean that a party can obtain relief to which it is not entitled. So we can eventually address standing when a plaintiff would obtain "attorney's fees" or other "relief different from that sought by plaintiffs whose standing has not been questioned." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982); *see* 13B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 3531.15, at *4 (3d ed. 2022).

But a different situation arises when each plaintiff would obtain the same relief regardless. For cases involving injunctive or declaratory remedies, the practical effects of granting relief may apply to each plaintiff even if we dismiss one for lack of standing. For example, in *Bowsher v. Synar*, the Supreme Court applied the one-party rule to avoid analyzing other plaintiffs' standing. 478 U.S. 714, 721 (1986). Without returning to the standing questions, the Court affirmed relief that declared a statute unconstitutional. *See id.* at 736. Because the standing determinations wouldn't affect how the Court distributed relief, the Court didn't need to revisit its use of the rule. *See id.*; *accord McCraw*, 719 F.3d at 344 n.3 (recognizing that courts "do not need to verify the independent standing of the other co-plaintiffs" when one party with standing "rais[es] the same claims and issues" (quotation omitted)). Here, Tennessee meets Article III's requirements, and the relief granted to Tennessee applies to Kentucky regardless: Treasury cannot enforce ARPA's unconstitutional conditions. So we did not need to resolve Kentucky's mootness. That aside, I analyze why both States meet Article III's requirements.

with the last theory, under which I believe both States have standing. To establish standing under any theory, of course, the States must assert an injury that is (1) actual or imminent and concrete and particularized, (2) traceable to Treasury, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Looking at the sovereign-authority theory, I believe that the only question here is whether the States assert an imminent injury under the first inquiry. And I find that both Kentucky and Tennessee meet this requirement.

With respect to "injury," courts have recognized for over a century that states "are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). This regard stems from each state's "well-founded desire to preserve its sovereign territory." *Id.* at 519. For that reason, we don't treat states as "mere provinces or political corporations." *Alden v. Maine,* 527 U.S. 706, 715 (1999). Instead, we recognize their "residuary and inviolable sovereignty." The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). And we give "special" recognition to a case when a state sues the federal government. *Saginaw County v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 957 (6th Cir. 2020).

Although states hold a unique status in federal court, they cannot avoid "the constitutional baseline" of Article III. *Id.* States must still prove a cognizable case or controversy. *Arizona v. Biden*, 40 F.4th 375, 385 (6th Cir. 2022) ("Article III's foundational standing requirements remain for private and public litigants alike.").

Still, states have "special solicitude" when they incur "quasi-sovereign" injuries. *Id.* They cannot "bypass proof of injury in particular or Article III in general," but they may incur injuries that private parties cannot. *Id.* at 385–86. Among other things, states can allege sovereign-related injuries like federal regulation over local-lawmaking authorities, threatened intrusions on state territory, or public nuisances, in which a state seeks "to safeguard its domain and its health, comfort and welfare." *Id* at 386. (quoting *Kentucky v. Biden*, 23 F.4th 585, 596 (6th Cir. 2022)); *see Massachusetts*, 549 U.S. at 517, 521–23 (recognizing the sovereign and quasi-sovereign interests in protecting coastal lands from rising sea levels).

And the list doesn't end there. This Court has acknowledged other ways that sovereign or quasi-sovereign interests can support state standing. States can "plausibly allege[] that the federal government has intruded upon an area traditionally left to the states." *Kentucky*, 23 F.4th at 599. They can allege that federal enforcement threatens current or future state policies. *See id.* And they can allege federal threats to their economies. *See id.* at 599–601 ("[States] . . . have a quasi-sovereign interest in defending their economies from the alleged negative ramifications of [federal law]."). Indeed, as federal regulation has increased over the states, the list of sovereign injuries has grown.

Finally, a quick note about the "imminence" part of the injury-in-fact inquiry. The majority analyzes imminence using the "pre-enforcement" test from *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).[2] And that is the way that we typically assess imminence when a case concerns a pre-enforcement challenge. But because the States here allege sovereign and quasi-sovereign injuries, we can assess imminence under a slightly different analysis.

A state can establish an imminent injury by showing a "risk of harm" to their sovereign or quasi-sovereign interests. *Massachusetts*, 549 U.S. at 521 (quoting *Lujan*, 504 U.S. at 560). In *Massachusetts v. EPA*, EPA's refusal to regulate greenhouse gas emissions presented an imminent injury to state interests related to climate change. *Id.* The "risk of harm" of sea levels rising and damaging state-coastal property created the imminent injury. *Id.* at 521–23; *see Saginaw County*, 946 F.3d at 957 (recognizing that the imminence in *Massachusetts* came from this "risk"). And the Supreme Court reasoned that a state that has a procedural right to protect its sovereign interests can satisfy Article III's requirements "without meeting all the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517–18.

We have analyzed imminent harms to sovereign interests in pre-enforcement challenges too. In our recent decision in *Kentucky v. Biden*, which concerned a pre-enforcement challenge to COVID-19 mandates, we found standing under the sovereign-authority theory. *See* 23 F.4th

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[2]Under the *Susan B. Anthony* test, the States needed to show (1) injuries in the original complaint that establish an intention to engage in conduct arguably affected with a constitutional interest, (2) that ARPA arguably proscribes this conduct, and (3) that if the States should pursue such conduct, a credible threat of recoupment action exists. *See* 573 U.S. at 161–64.

at 598–601. We held that the sovereign injuries alleged met Article III's imminence requirements because the states there "show[ed the] negative effects" of federal policy on their sovereign interests. *Id.* at 602. And sister circuits applying the sovereign-authority theory have also analyzed imminence similarly.[3] Here, the States allege the same risk of harm to their sovereign interests.

II.

Applying the sovereign-authority framework, the States have standing in this case. *See Massachusetts*, 549 U.S. at 520. They allege that ARPA "unconstitutionally intrud[es] on their sovereign authority, by interfering with the orderly management of their fiscal affairs, and by requiring them to forgo their constitutional taxing powers or face an action to return much-needed federal funds after they have already been spent." (R. 1, Original Complaint, PageID 5 ¶ 12.) Each threat poses an imminent "risk of harm to" their sovereign interests. *Massachusetts*, 549 U.S. at 521. As described below, they have alleged with particularity ARPA's "negative effects" on their taxing powers, citizens, and economy. *Kentucky*, 23 F.4th at 602.

This Court's growing list of sovereign and quasi-sovereign injuries reinforces the States' standing in three ways. First, they have "plausibly alleged that the federal government has intruded upon an area traditionally left to the states"—state taxes on state citizens. *Kentucky*, 23 F.4th at 599; *see* (R. 1, Original Complaint, PageID 2–3, 5–6 ¶¶ 1–3, 12 (discussing the federalism implications of ARPA); R. 1, Original Complaint, PageID 15–16 ¶ 40 ("[T]he power to tax and spend is a sovereign function that lies at the core of State power.")); *see generally Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) (describing the tax power as "central to state sovereignty").

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[3] *See, e.g.*, *Texas v. Biden*, 20 F.4th 928, 970 (5th Cir. 2021) (reasoning that a state's "special solicitude in the standing inquiry . . . means imminence and redressability are easier to establish [] than usual"), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022); *Texas v. United States*, 809 F.3d 134, 154–55 (5th Cir. 2015) (concluding that states had sovereign-authority standing in a pre-enforcement challenge to federal immigration law without using the pre-enforcement framework); *Sturgeon v. Masica*, 768 F.3d 1066, 1073–74 (9th Cir. 2014) (reasoning that a state failed to prove an "actual or imminent" injury by not identifying "any actual conflict" between federal and state law that showed how a federal requirement would "interfere[] with the state's control over and management of" state affairs), *vacated and remanded sub nom. on other grounds*, *Sturgeon v. Frost*, 577 U.S. 424 (2016); *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1322–23 (D.C. Cir. 2008) (concluding that states had an injury-in-fact because they "credibly claim[ed] to fear" that proposed changes to water-storage uses would result in diminished water flows).

Second, after discussing their past tax cuts, they allege that ARPA's vague restrictions "chill[] legislative action" to enact similar policies. (R. 1, Original Complaint, PageID 17 ¶ 43; *see id.* at PageID 16–17 ¶¶ 41–42.) Financial hardship in part led the States to cut taxes for homeowners and businesses alike. (*Id.*) Kentucky, for example, enacted a bill intended to "invest in and revitalize a predominantly minority community in Kentucky's largest city." (*Id.* at PageID 16 ¶ 41 (citing 2021 Ky. H.B. No. 321 (NS)).) The tax cuts there fall within a "core part of its sovereign duty" and will lead to a "decrease in net revenue." (*Id.*) Likewise, Tennessee seeks to cut its "professional privilege tax" to "attract new businesses and residents, continuing Tennessee's proven record in promoting economic growth that benefits the entire [s]tate." (*Id.* at PageID 16 ¶ 42 (citing H.B. 0987, S.B. 0184, 112th General Assembly (2021)).) Tennessee also expects the bill to reduce state revenue. (*Id.*)

All this to say, ARPA's vague conditions chill the States from enacting similar tax cuts. The States allege they cannot confidently enact tax policy because they fear imminent recoupment action for exercising their sovereign-taxing authority. (*See id.* at PageID 17 ¶¶ 43–44.) And because of the "fungible" quality of money, the States construe ARPA to "potentially affect[] all State legislative and executive actions that reduce net tax revenues," even if they have nothing to do with ARPA's COVID-19 relief. (*Id.* at PageID 16, 17 ¶¶ 41, 44 (quotation omitted).) ARPA then "likely implicates" the powers to "make and enforce policies and regulations" and the "traditional prerogative to superintend" local taxes on state citizens. *Kentucky*, 23 F.4th at 599.

To top it all off, the States have standing because ARPA's chilling effect "threatens to damage each of the [S]tates' economies." *Id.* at 599. The chilling effect to enact tax policies that "invest in and revitalize" communities, (R. 1, Original Complaint, PageID 16 ¶ 41), or "attract new businesses and residents" to promote "economic growth," (*id.* at PageID 16 ¶ 42), stagnates the States' fiscal health and interest in helping their citizens. Kentucky and Tennessee plausibly allege that resistance to ARPA will result in fewer tax cuts for homeowners and businesses, "all to the detriment of their state economies." *Kentucky*, 23 F.4th at 601. Because the States have sovereign and quasi-sovereign interests in "defending their economies from the alleged negative ramifications" of ARPA, they also "have standing to contest it." *Id.*

The States' "sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered" Treasury to enforce the Offset Provision and initiate recoupment actions to recover any misused funds. *Massachusetts*, 549 U.S. at 519; *see* 42 U.S.C. § 802(e). That the States face threats from exercising their traditional-taxing authority only reinforces that they have a sufficient stake in the case so as "to warrant the exercise of federal judicial power." *Massachusetts*, 549 U.S. at 519. So along with giving this case "special" recognition because the States are suing the federal government, *Saginaw County*, 946 F.3d at 957, we should afford the States "special solicitude in our standing analysis." *Massachusetts*, 549 U.S. at 520.

Thus, I agree with the majority that the States allege imminent injuries that grant them standing.[4] Recognizing that the States suffer from sovereign injuries raises this question: Did Treasury's Rules moot the States' legal interests in obtaining relief?

III.

This is where I part ways with the majority; I believe the answer is no. Treasury's Rules do not moot Kentucky or Tennessee's controversy over their sovereign interests. Even with the guidance, the States still suffer from the same harm explained above. And both meet Article III's requirements as a result.

A case only becomes moot "when the issues presented are no longer live or parties lack a legally cognizable interest in the outcome." *Thomas v. City of Memphis*, 996 F.3d 318, 323 (6th Cir. 2021). Said differently, parties do not have a mootness problem if "the relief sought would, if granted, make a difference to the legal interests of the parties." *Ford v. Wilder*, 469 F.3d 500, 504 (6th Cir. 2006) (internal quotation omitted). Even with the Rules, the States still need injunctive and declaratory relief to avoid Treasury's enforcement of ARPA's unconstitutionally vague conditions.

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[4]One oddity about this case, it's not crystal clear to me what the States' cause of action is here—ARPA, for example, doesn't appear to recognize their right to sue the federal government. And this Court has held that a cause of action must exist apart from standing, even in a sovereign-authority case. *Kentucky*, 23 F.4th at 602. It appears to me, however, that the Supreme Court has recognized an action in cases that allege Spending Clause violations under the Constitution itself. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540, 575 (2012); *New York v. United States*, 505 U.S. 144, 154, 172 (1992); *South Dakota v. Dole*, 483 U.S. 203, 205, 210–12 (1987). And, tellingly, the government here does not contest the States' ability to sue apart from their justiciability arguments.

The States' claims withstand mootness because their issues are still "live." *Thomas*, 996 F.3d at 323. As they originally alleged, ARPA still fails to provide clear notice of a funding condition. (R. 1, Original Complaint, PageID 17–19 ¶¶ 46–54.) And even later, the States alleged that Treasury "cannot cure the inherent ambiguity in [ARPA] because *Congress* must provide the recipients of federal funds with clear notice of any conditions on the use of the funds."[5] (R. 23, Amended Complaint, PageID 148 ¶ 51.) (emphasis in original). With that in mind, they allege the Rules "cannot save" ARPA from its unconstitutional conditions. (*Id.* at PageID 150 ¶ 61.) This all rings true.

Although the Rules tried to fill in the blanks of ARPA, Treasury cannot resolve ARPA's open-endedness. The Rules tried to construct ARPA's guidelines by providing what ARPA didn't: a revenue baseline and guidance on when Treasury would enforce the Offset Provision. *See* 31 C.F.R. §§ 35.3; 35.8(b); *see also* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338, 4423, 4428 (Jan. 27, 2022) (to be codified at 31 C.F.R. § 35). But Treasury couldn't provide the clear notice of the conditions ARPA entailed; Congress, through ARPA alone, had that responsibility. And nothing in ARPA alludes to the Rules' selected baseline or construction of the Offset Provision. ARPA's text does not clearly determine why a 2019 baseline applies or why another baseline (like a different year) does not. Nor does ARPA address whether it prohibits a reduction in *expected* tax revenues or whether it prohibits a reduction in *actual* tax revenues. Only the Rules purport to provide the answer (that states can choose either), but that answer does not stem from ARPA's text.

And, perhaps most importantly, the regulation does not fix the Offset Provision in three other ways: Vagueness still exists from ARPA's lack of explanation on how to (1) calculate a "reduction" in net tax revenue, (2) determine whether such a reduction resulted from a tax cut, and (3) tell what particular conduct constitutes an "indirect" offset.

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[5]Indeed, one scholar contends that only federal statutes—not federal agency conditions—can "defeat state law." Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 130 (2021). As traditionally recognized, statutes "enjoy the obligation of law" because "a legislative body representative of the people" adopts them. *Id.* Hamburger notes that this logic does not legitimize a federal agency's elaboration of a statute. *Id.* at 131. Agencies, of course, do not represent the people in the same way Congress does, so their rules may not render state law void. *Id.*

Indeed, Kentucky and Tennessee allege that the Rules made their concerns over their tax authorities even worse. (*See* R. 23, Amended Complaint, at PageID 147 ¶ 50.) If ARPA is impermissibly vague, as the States allege and the majority concludes, then Kentucky and Tennessee still face "an unlawfully-imposed quandary in determining how to exercise its sovereign taxing power." *Ohio v. Yellen*, 547 F. Supp. 3d 713, 725 (S.D. Ohio 2021). The States' legislators considering tax changes may delay, second guess, or abandon parts of tax policies because ARPA does not explain the impact that such changes will have on their ability to retain ARPA funds. *See id.*

And even if the Rules could clarify ARPA's open-endedness, the States still face a live threat to their sovereign authority. The Rules seek to allow states to enact tax cuts resulting in revenue reductions so long as they identify permissible sources of offsetting funds. *See, e.g.*, 87 Fed. Reg. at 4428. Although allowing for some tax cuts, the Rules still narrow the range of permissible tax policies the States may enact, which in turn takes a toll on the States' citizens and economies.

What's more, the Rules do not ease the States' concern regarding Treasury's enforcement against them. Secretary Yellen's threat to enforce the Offset Provision in her earlier letter to the States still stands. (*See* R. 1-2, Yellen Letter, PageID 33–34.) Indeed, the Rules make matters worse. They expressly reserve the Secretary's broad authority to enforce ARPA's requirements and provide that "[n]othing" in the Rules "shall limit the authority of the Secretary to take action to enforce conditions or violations of law . . . ." 31 C.F.R. § 35.4(a) (2022). So the Rules do not limit ARPA's enforcement; they instead provide the Secretary broad enforcement discretion. If a state accepts the funds and the Secretary believes that the state violates ARPA, that state must "repay to the Secretary an amount equal to the amount of funds used in violation [thereof]." 42 U.S.C. § 802(e). All this considered, a credible threat of enforcement still stands.

Next, while facing "live" issues, the States continue to have "a legally cognizable interest in the outcome" of this case. *Thomas*, 996 F.3d at 323. The Rules do not "mak[e] it 'impossible for the [C]ourt to grant any effectual relief[.]'" *Id.* at 330 (quotations omitted). The Court can still grant injunctive and declaratory relief given the States' continued stake in the case without creating an "advisory opinion that Article III prohibits." *Id.* That such relief "would have [a]

practical effect" on the States reaffirms that mootness does not pose a problem here. *Id.*; *see Ford*, 469 F.3d at 504. Because ARPA's vague conditions still restrict States from enacting tax cuts in their sovereign capacities and Treasury-recoupment actions remain a credible threat, the relief sought affects the parties' current legal interests. *See Ford*, 469 F.3d at 504–05. If granted, the States' relief would help them avoid enforcement of ARPA's unconstitutionally vague conditions.

For these reasons, I do not find the claims moot like the majority. I acknowledge that the States did not allege they would fail to offset their funds with a permissible revenue source. *See* 87 Fed. Reg. at 4428. But I don't believe that moots Treasury's threat of recoupment action. Again, the Rules still limit the States from enacting tax policies if they do not offset a net reduction with permissible revenue sources. This restraint makes the States fear that they "cannot lower their citizens' tax burdens without suffering a penalty." (R. 23, Amended Complaint, PageID 131 ¶ 1.) And seeing that the Rules do not "limit the authority of the Secretary" to enforce ARPA, a credible threat of recoupment action still stands. 31 C.F.R. § 35.4(a). Or if the States wish to comply with the Rules, they must do *something*—either raise other taxes or lower expenditures elsewhere in the budget to offset a revenue reduction. That *something* creates an ongoing injury. On that note, the Rules also leave the States' claims of vagueness intact, which leads ARPA to intrude upon the States' tax powers—"an area traditionally left to the states." *Kentucky*, 23 F.4th at 599. And the chilling effects and the threats to the States' economies remain. *See id.* at 599–601. Because the States still face the effects of ARPA's vagueness, the Rules do not moot this case.

IV.

I concur with almost all of the majority opinion. But I respectfully dissent in part only to explain why I believe the Rules do not moot the States' controversy over their sovereign-tax interests. Thus, I would grant both Kentucky and Tennessee their sought-after relief.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0091p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY; STATE OF TENNESSEE,

Plaintiffs-Appellees,

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as Acting Inspector General of the Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

No. 21-6108

On Petition for Rehearing En Banc
United States District Court for the Eastern District of Kentucky at Frankfort.
No. 3:21-cv-00017—Gregory F. Van Tatenhove, District Judge.

Decided and Filed: May 3, 2023

Before: BUSH and NALBANDIAN, Circuit Judges.*

COUNSEL

ON PETITION FOR REHEARING EN BANC: Daniel Winik, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. **ON RESPONSE:** Matthew F. Kuhn, Michael R. Wajda, OFFICE OF THE ATTORNEY GENERAL OF KENTUCKY, Frankfort, Kentucky, Andrée S. Blumstein, J. Matthew Rice, OFFICE OF THE ATTORNEY GENERAL AND REPORTER OF TENNESSEE, Nashville, Tennessee, for Appellees.

*In view of the retirement of Hon. Bernice Bouie Donald, the third member of the original panel in this appeal, this order is entered by a quorum of the panel. 28 U.S.C. § 46(d).

BUSH, J. (pp. 3–9), issued a statement, in which KETHLEDGE, THAPAR, and NALBANDIAN, JJ., joined, regarding the denial of rehearing en banc. GRIFFIN, J. (pp. 10–19), delivered a separate opinion, in which CLAY, GIBBONS, and STRANCH, JJ., joined, dissenting from the denial of the petition for rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

STATEMENT

JOHN K. BUSH, Circuit Judge, issuing a statement regarding the denial of en banc.

During the debates over ratification of the Constitution, Alexander Hamilton, writing as Publius, insisted that states would retain their authority over their own taxation "in the most absolute and unqualified sense"—keeping any power to infringe that authority out of the new federal government's hands. *See* THE FEDERALIST NO. 32, at 154 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that "an attempt on the part of the national Government to abridge [the States] in the exercise of [their taxing authority] would be a violent assumption of power, unwarranted by any article or clause of its constitution"). As Hamilton explained, other than "the power of imposing taxes . . . on exports and imports," which would vest exclusively at the national level, "the power of imposing taxes" would be "manifestly a concurrent and co-equal authority in the United States and in the individual states." *Id.* at 156; *see also* THE FEDERALIST NO. 34, at 162 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]he particular states, under the proposed constitution, would have co-equal authority with the union in the article of revenue, except as to duties on imports."). Because taxing power would be held concurrently by the federal government on the one hand and the states on the other, there would be "no power on either side to annul the acts of the other." *Id.* at 163.

This appeal tested Hamilton's argument. The state of Tennessee claimed that, as part of the American Rescue Plan Act of 2021 (ARPA), Congress included a component—the "Offset Provision"—that could be read to give the federal government control over that state's taxing power.[1] Specifically, as Tennessee argued, the Offset Provision, codified at 42 U.S.C.

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[1]The states of Tennessee and Kentucky both sued to challenge the application of the Offset Provision. Although the panel majority held that Kentucky's claim was nonjusticiable because its claim had been mooted by a Department of Treasury rule that stated how Treasury would enforce the Offset Provision, Tennessee's claim remained viable based on its alleged injury from costs of compliance with the Treasury rule and the underlying Offset Provision. Our court then held the Offset Provision was unconstitutionally vague and therefore was an unenforceable spending condition under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

§ 802(c)(2)(a), could be read to bar the states from enacting *any* tax cuts—a key part of their sovereign taxing authority, *see, e.g.*, *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) (noting that "the taxation authority of state government" is "an authority we have recognized as central to state sovereignty") (citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976); *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1873)).

How did the federal government infringe on state taxing authority, according to Tennessee? ARPA offered states billions of dollars to help address the public health and economic consequences of COVID-19, to help compensate essential workers, and for investments in water and broadband infrastructure. *See* 42 U.S.C. § 802(c)(1)(A)–(D). But the Offset Provision purportedly forbids the states from using ARPA funds

> 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). This directive "does not clearly explain (1) how to calculate a 'reduction' in net tax revenue, (2) how to determine whether such a reduction resulted from a tax cut, or (3) how to tell what particular conduct constitutes an 'indirect' offset." *Kentucky v. Yellen*, 54 F.4th 325, 347 (6th Cir. 2022). As a result, Tennessee argued (and we agreed) "that an 'indirect offset' could plausibly occur whenever a state enacts a revenue-reducing tax cut and expends ARPA funds—no matter whether the state pours the ARPA funds into the precise area it cut taxes." *Id.* at 348.

Under this "money-is-fungible interpretation of the Offset Provision," *id.* at 349, executive officials could use Congress's vague statutory language to control the taxation policy of any state that accepts ARPA funds. Indeed, that's what Treasury's Rule implementing the Offset Provision seems to say: "*because money is fungible*, even if [ARPA] funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for

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Judge Nalbandian disagreed with the panel majority regarding whether Kentucky could proceed but otherwise agreed on all other aspects of the decision.

the state's or territory's funds that would otherwise have been needed to cover the costs of the reduction." 87 Fed. Reg. at 4,424 (emphasis added).

The dissental does not seem to dispute that, through use of Spending Clause legislation, Congress could control state tax policy in this way. And the ramifications of the dissental's reasoning are far-reaching. The dissental apparently would allow Congress to control large aspects of a state's sovereign power, so long as the state agreed to give up that authority by "contracting" with the federal government through acceptance of federal grant money.

Could a state, for a sum of money paid by the federal government, give up all of its powers of governance? Of course not. So what are the limits to a state's ability to sell its sovereign powers to the federal government? As even the dissental must acknowledge, there are limits: a spending condition on states is valid only "if the essence of their statehood is maintained without impairment." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 597 (1937).

For purposes of the appeal, we didn't need to decide when this impairment occurs in the context of states receiving federal grant money dispensed with conditions under the Spending Clause. Instead, the case turned on whether Congress clearly stated one such condition—the tax limitation that is embodied in the Offset Provision. For, as the Supreme Court has directed, "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citing *Emps. v. Dep't of Pub. Health & Welfare of Mo.*, 411 U.S. 279, 285 (1973)). This threshold requirement—that Congress speak clearly as to a condition it imposes—at least provides assurance that, before a state gives up some of its power in exchange for federal grant money, the state's eyes are wide open: it knows what the consequences are.

This requirement that Congress clearly state its conditions was applied in *Pennhurst* in the context of federal grant funds for services for people with mental disabilities. Attached to the grant money was a "bill of rights" that stated that (1) people with developmental disabilities "have a right to appropriate treatment" and (2) such treatment "should be provided in the setting that is least restrictive of the person's personal liberty." *Id.* at 13. The Court held that

"appropriate treatment" and "least restrictive" are indeterminate terms, so "Congress fell well short of providing clear notice to the [s]tates" of what the bill-of-rights provisions meant or that they were compulsory. *Id.* at 24–25.

A similar vagueness existed here in the Offset Provision. Indeed, Secretary Yellen acknowledged as much when she stated that "[w]e will have to define what it means to use money from this Act as an 'offset' for tax cuts. And, given the fungibility of money, it's a hard question to answer." Treasury Secretary & Federal Reserve Chair Testimony on COVID-19 Economic Recovery at 58:30-59:05, available at https://www.c-span.org/video/?510059-1/treasury-secretary-federalreserve-chair-testimony-covid-19-economic-recovery. Because it was "a hard question to answer"—that is, the meaning of the Offset Provision was vague—that condition is unenforceable under *Pennhurst.*

The dissental attempts to clarify the vagueness by asserting that the Offset Provision simply "prohibits a state from using the funding to help balance its books." Dissental at 10. That is one reading of the statute. But because of the lack of clear content, it is not obvious what the provision requires. Another possible reading—acknowledged by Treasury—is that the Offset Provision allows Congress to control *any* tax cut of a state, regardless of whether the tax cut is directly tied to the receipt of ARPA funds. The availability of other interpretations like this one, which would tie the hands of a state when it comes to cutting taxes, renders the Offset Provision unenforceable under the *Pennhurst* clear-statement rule.

The dissental contends that *Pennhurst* and its progeny apply "when the Treasury seeks to recoup funds from a state for an alleged violation of a *specific* condition attached to a grant of funds." Dissental at 13. But that was not exactly the situation in *Pennhurst* itself. In that case, the Supreme Court considered whether the "bill of rights" provision was a valid exercise of Congress's authority under the Constitution's Spending Clause—not whether a recoupment action was valid. 451 U.S. at 25.

The dissental also asserts: "No prior Spending Clause case has ever prospectively enjoined enforcement of an entire provision based on purported vagueness in the statute, meaning that the panel's analysis lacks a cognizable legal foundation." Dissental at 14. But

Pennhurst essentially did just that by nullifying the bill-of-rights provisions. Similarly, in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that Congress could not use the spending power to force states to expand Medicaid. As Chief Justice Roberts explained,

> Section 1396c gives the Secretary of Health and Human Services the authority to . . . withhold all "further [Medicaid] payments . . . to the State" if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. That fully remedies the constitutional violation we have identified.

Id. at 586 (opinion of C.J. Roberts).[2] While *NFIB v. Sebelius* was decided on coercion and not vagueness grounds, the Court in that case nevertheless invalidated, on a pre-enforcement basis, new conditions purportedly required to retain Medicaid funds.

Other Supreme Court cases have approved prospective relief based on the *Pennhurst* clear-statement rule. Consider *Sossamon v. Texas*, 563 U.S. 277 (2011), a case about the Religious Land Use and Institutionalized Persons Act of 2000, Pub L. No. 106-274, 42 U.S.C. § 2000cc et seq., which authorized "appropriate relief against a government" for burdens on prisoners' religious exercise. 563 U.S. at 282. Noting that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint," *id.* at 283, the Supreme Court held this relief provision ambiguous and forbade future damages suits against states under the statute as violative of sovereign immunity. *Id.* at 288. Similarly, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court held that "federal funding provisions provide no basis for private enforcement by [42 U.S.C.] § 1983" absent a clear statement, thus barring future § 1983 actions under the Family Educational Rights and Privacy Act of 1974. *Id.* at 279–80.

The dissental presses that "[w]hatever vagueness exists in the Act is of no moment to our prospective inquiry today; at most, it may make recoupment actions for the government more difficult tomorrow." Dissental at 19. But the purpose of the *Pennhurst* rule is to provide clarity

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[2]Although the *NFIB* opinion was fractured, a majority of the court believed the spending condition was unconstitutional. 567 U.S. at 689. Based on the narrowest possible holding under the *Marks* rule, *see Marks v. United States*, 430 U.S. 188 (1977), it is fair to say the court held that the spending condition was unenforceable against the states for the purpose of withdrawing existing Medicaid funds.

to states when Congress *passes* the law, not just when the Executive chooses to enforce it. The states are entitled to know clearly what conditions they must abide by when they take the grant money, not live with the uncertainty of how vague conditions will be enforced in the future. *See Pennhurst*, 451 U.S. at 25 ("Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with postacceptance or 'retroactive' conditions.").

The dissental further appears to question the panel's reliance on statutory interpretation, but such reasoning is not out of the ordinary in cases involving challenges based on the Spending Clause. Such cases usually follow a clear-statement rule as a matter of statutory interpretation—namely, that Congress must condition the states' receipt of federal funds "unambiguously." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17); *see, e.g.*, *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 283–84 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (describing the clear-statement rule as a "statutory limitation on Congress's spending power"). Consistent with these and other precedents, our court decided this case based on statutory interpretation rather than invalidating the condition as unconstitutional. However, had the court taken the latter approach, as did the Eleventh Circuit, that mode of reasoning would have changed little about the outcome of the case. *See West Virginia v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1146 (11th Cir. 2023). Indeed, as the dissental recognizes in a footnote, the reasoning it advocates would create a circuit split with the Eleventh Circuit. Dissental at 19 n.4.

Lastly, the dissental suggests that if the vagueness is "severe enough," the entire statute should be void under contract principles. Dissental at 17. Although Spending Clause legislation is "much in the nature of a contract," *id.* at 7 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)), that hardly means that every contract principle should be imported into the interpretation of spending legislation that infringes on state sovereign interests. This view would be difficult to square with Supreme Court precedent. Returning to *Pennhurst*, the Supreme Court did not invalidate the entire statute by treating it as a "contract" but instead deemed only the portion of the statute containing the vague conditions to be unenforceable. 451 U.S. at 23–25. Our court here followed a similar course with respect to the vague Offset Provision.

As *Pennhurst* and other precedents recognize, more is at stake when Congressional spending legislation threatens state sovereign interests than is at issue in a run-of-the-mill private contract dispute. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). And the idea that cursory statutory language could slice state taxing authority stabs at the heart of Hamilton's defense of the Constitution in The Federalist Nos. 32 and 34, where he insisted that the federal government would have no control over retained state taxing authority. These are among the reasons that, particularly in the context of taxing policy, Congress must speak with a clear voice when it imposes conditions on states for the receipt of federal funds—a principle from *Pennhurst* that our court faithfully implemented in this case.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

The American Rescue Plan Act (ARPA) appropriated nearly two trillion dollars to help mitigate the COVID-19 pandemic and its economic impact. Two hundred billion dollars went to the states if they agreed to comply with the conditions imposed by the Act. Every state did so and accepted the funding.

Yet despite the largesse the Act bestowed, many states took issue with it. *See, e.g.*, *Arizona v. Yellen*, 34 F.4th 841, 847–48 (9th Cir. 2022) (collecting cases). Relevant here, Tennessee complained, not about the money, but about a particular condition attached to the receipt of those funds. Under the Act, a state must use the funds in several ways, all generally related to the COVID-19 pandemic—to respond to the "public health emergency," to assist "workers performing essential work," to bolster "government services," and to make "necessary investments" in infrastructure. 42 U.S.C. § 802(c)(1)(A)–(D).[1] The Act also explicitly prohibits a state from using the funding to help balance its books:

> A State . . . shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title *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.

Id. § 802(c)(2)(A) (emphasis added).

This "Offset Provision" drew Tennessee's ire. It sought to prospectively enjoin the Department of the Treasury from enforcing the Provision, claiming, among other things, that the

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[1] A fifth permissible use of the funds was later added, allowing the states "to provide emergency relief from natural disasters or the negative economic impacts of natural disasters." 42 U.S.C. § 802(c)(1)(E).

Provision was an unconstitutionally ambiguous condition in violation of the Spending Clause.[2] *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 207, 211 (1987). The panel held that the Provision was vague because it failed to adequately explain: "(1) how to calculate a 'reduction' in net tax revenue, (2) how to determine whether such a reduction resulted from a tax cut, or (3) how to tell what particular conduct constitutes an 'indirect' offset." *Kentucky v. Yellen*, 54 F.4th 325, 347 (6th Cir. 2022). Yet while the panel explicitly declined to hold the Provision "'unconstitutional' under the Spending Clause, strictly speaking, just because of those indeterminacies," it still provided the requested injunctive relief. *Id*. It concluded that, "[a]s a matter of statutory interpretation," the provision was statutorily unenforceable and severable by operation of the Spending Clause's clear-statement rule. *Id*. This analysis, conclusion, and remedy is extraordinary, erroneous, and in conflict with Supreme Court precedent. *See* Fed. R. App. P. 35(a)(1).

This case also involves a question of exceptional importance. *See* Fed. R. App. P. 35(a)(2). It has significant, wide-reaching implications. Every state accepted ARPA funding and agreed to its conditions, so a correct interpretation of the Offset Provision is critical not only for the states in our circuit, but also on a national level. In addition, the panel's decision will significantly impair Congress's ability to impose conditions in future legislation. *Cf. Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985) (noting that Congress need not "prospectively resolve every possible ambiguity" in Spending Clause legislation). This impacts Congress's relationship with the states and its ability to further its own policy objectives through Spending Clause legislation.

I therefore respectfully dissent from the denial of the petition for rehearing en banc.

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[2]Kentucky joined Tennessee in bringing this suit, but Kentucky's claim, as with other states' parallel suits, foundered on jurisdictional issues based on the injuries (or lack thereof) alleged in the individual complaints. *Compare Kentucky v. Yellen*, 54 F.4th 325, 341 (6th Cir. 2022), *Ohio v. Yellen*, 53 F.4th 983, 985 (6th Cir. 2022), *and Missouri v. Yellen*, 39 F.4th 1063, 1070–71 (8th Cir. 2022), *with West Virginia v. U. S. Dep't of Treasury*, 59 F.4th 1124, 1138–40 (11th Cir. 2023), *and Arizona*, 34 F.4th at 853.

I.

Incident to the Spending Clause of the U.S. Constitution, "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." *Dole*, 483 U.S. at 206 (internal quotation marks omitted); *see also* U.S. Const. art. I, § 8, cl. 1. These conditions and policy objectives may exceed the Constitution's "enumerated legislative fields" because "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Dole*, 483 U.S. at 207 (citation omitted). With this, the Supreme Court has "repeatedly characterized" Spending Clause legislation as "much in the nature of a *contract*: in return for federal funds, the [states] agree to comply with federally imposed conditions." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (citation omitted). States, as sovereigns, are therefore free to contract with Congress under the Spending Clause "if the essence of their statehood is maintained without impairment." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 597 (1937).

Yet Congress's power under the Spending Clause is not unlimited, for if Congress imposes a condition on the receipt of funds, it "must do so unambiguously," thereby enabling the states "to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The seminal case on unambiguity is *Pennhurst*. The dispute there was whether Pennsylvania was required to provide certain types of treatment to mentally disabled persons after it accepted funds under the Developmentally Disabled Assistance and Bill of Rights Act of 1975. 451 U.S. at 6–10. The plaintiffs alleged that the state violated its obligations under the so-called patient "bill of rights" provision of the act by not affording patients the right to "appropriate treatment" in the "least restrictive" setting. *Id*. But the Court held that this was not a condition on the receipt of funding and thus the state did not agree to it as a binding obligation when it accepted the funding. *Id*. at 27. In context, that provision merely "serve[d] as a nudge" in Congress's preferred direction and did "no more than express a congressional preference for certain kinds of treatment." *Id*. at 19 (citation omitted). Because the Provision "lack[ed]

conditional language," Congress intended it to be "hortatory, not mandatory," and "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 [it]." *Id*. at 24, 25.

Pennhurst thus established the contours of the clear-statement rule. This rule applies when the Treasury seeks to recoup funds from a state for an alleged violation of a *specific* condition attached to a grant of funds. When a state has allegedly violated a condition and we are called to determine whether that purported condition is, in fact, a condition on the receipt of funds, we look for a clear statement from Congress. This is a matter of "statutory construction." *Id*. at 24. We must determine whether Congress gave "clear notice" that it intended the alleged condition to be a binding obligation on the acceptance of funds. *Id*. at 25. If it did, the condition applies. But if *not*, the disputed provision is simply *not* a condition, and a state—like Pennsylvania in *Pennhurst*—need not comply with it. *See id*. at 25, 27.

Subsequent cases have not deviated from this analysis. For example, the Supreme Court in *Bennett* held that Kentucky had to comply with an "unambiguous" funding-calculation condition in Title I even if ambiguities existed in other applications of the statute—"*Pennhurst* does not suggest that . . . every improper expenditure [must be] specifically identified and proscribed in advance." 470 U.S. at 666, 673. In *Arlington Central School District Board of Education v. Murphy*, the Court concluded that compensation of expert fees was not an unambiguous condition in the Individuals with Disabilities Education Act: when viewing the Act "from the perspective of a state official" deciding whether to accept the funds, the act did not clearly express that the "liability at issue" (i.e., expert fees) was a condition on the receipt of funding. 548 U.S. 291, 296–98 (2006). And our court has followed the same framework. Though we divided as to application, the entire en banc court applied this statutory interpretation principle in *School District of City of Pontiac v. Secretary of the United States Department of Education*, 584 F.3d 253 (6th Cir. 2009) (en banc), when determining whether the "unfunded mandate" in the No Child Left Behind Act required a state to comply with the act, even if doing so increased the costs of compliance. *See id*. at 271–72 (opinion of Cole, J.); *id*. at 284–85 (Sutton, J., concurring); *id*. at 310–11 (Gibbons, J., concurring in part). *See also Cutter v. Wilkinson*, 423 F.3d 579, 585–86 (6th Cir. 2005) ("The plain language of RLUIPA provides

ample notice to potential funding recipients" that the statute applies to "any program or activity that receives Federal financial assistance." (citation omitted)). In each of these cases, the state was accused of violating a Congressional requirement attached to funding. Then, to evaluate each claim, each court was tasked with determining whether the specific "liability at issue" was clearly articulated and unambiguous such as to require the state to comply with the condition. *Cf. Arlington*, 548 U.S. at 296.

The panel's decision to use the clear-notice standard in such a novel manner conflicts with this caselaw. The Treasury has not claimed that Tennessee violated the Offset Provision; rather, Tennessee prospectively challenges the provision's ambiguity and asks us to enjoin its future enforcement. *Pennhurst*'s clear-statement rule nowhere near encompasses this situation. Thus, it is inapplicable here, for "a decision based on a certain set of facts should not control the outcome of a later case with a factual context that the court adjudicating the earlier case had no opportunity to consider." *See* Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* 82 (2016). By applying the "clear notice" language in an unprecedented manner, wholly unsupported by prior caselaw, the panel "cherry-pick[ed] a sentence" from *Pennhurst* to divine a rule that "has no precedential force" in this analysis. *Id.*; *see also In re Flint Water Cases*, 53 F.4th 176, 207 (6th Cir. 2022) (opinion of Griffin, J.) ("To derive a rule from a case that did not address the pertinent question is to build a syllogism upon a conjecture." (citation and internal quotation marks omitted)). No prior Spending Clause case has ever prospectively enjoined enforcement of an entire provision based on purported vagueness in the statute, meaning that the panel's analysis lacks a cognizable legal foundation.

The decision also creates intractable tension with other areas of law. Despite recognizing that the Offset Provision is not "unconstitutional" because of its purported vagueness, the panel still enjoined enforcement of the provision "[a]s a matter of statutory interpretation." *Kentucky*, 54 F.4th at 347. But a party is entitled to a permanent injunction like this only "if it can establish that it suffered a *constitutional* violation . . . ." *Schmitt v. LaRose*, 933 F.3d 628, 637 (6th Cir. 2019) (citation omitted; emphasis added). Statutory interpretation, by contrast, does not give a court this authority. Rather, "[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States*

v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940). Thus, Tennessee could be entitled to a facial injunction if it could demonstrate that ARPA were unconstitutional, but such a challenge would face a high bar—we presume statutes to be constitutional and require litigants to establish that no set of circumstances exist under which the statute is valid. *See United States v. Morrison*, 529 U.S. 598, 607 (2000); *United States v. Salerno*, 481 U.S. 739, 745 (1987). The panel's opinion thus recasts a constitutional analysis as a statutory one, allowing it to provide a constitutional *remedy* (injunctive relief) while avoiding the high hurdles of a constitutional *analysis*. But this it could not do, for "[e]ven though this clear-statement rule has constitutional roots, it remains a rule of *statutory* interpretation, one constrained by other canons of statutory interpretation." *City of Pontiac*, 584 F.3d at 284 (Sutton, J, concurring); *accord id*. at 271–73 (Cole, J.). No authority allows a court to enjoin enforcement of a statute under the Spending Clause simply because it is vague "as a matter of statutory interpretation."

To resolve Tennessee's ambiguity argument, we should instead apply traditional contract law principles. As noted above, the Supreme Court has "repeatedly characterized Spending Clause legislation as 'much in the nature of a *contract*'" and "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst*, 451 U.S. at 17). "Just as a valid contract requires offer and acceptance of its terms," Spending Clause legislation "rests on whether the [state] voluntarily and knowingly accepts the terms of the 'contract.'" *Id*. (citation omitted). The "crucial inquiry" is "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst*, 451 U.S. at 25. These principles apply here, as Tennessee complains of an "unconstitutionally ambiguous" condition attached to an offer of funding (with which it agreed to comply).[3]

Through this lens, ARPA is a valid exercise of Congress's Spending Clause power at this juncture. A valid contract requires "reasonably certain" terms—ones that "provide a basis for

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[3]While *Barnes* did note that not "*all* contract-law rules apply to Spending Clause legislation," that is no barrier here. 536 U.S. at 186. That was a reference to *Bennett*'s conclusion that "ambiguities in the requirements should [not] invariably be resolved against the Federal Government as the drafter of the grant agreement." 470 U.S. at 669. Therefore, this admonition from *Barnes* merely makes clear that we should not automatically hold any ambiguity here against the government.

determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33 (Am. L. Inst. 1981). And the terms of Congress's offer are indeed reasonably certain. For one, states know that the Offset Provision is one of the "[r]equirements" on the use of funds, § 802(c), so the Act does not "lack conditional language," *Pennhurst*, 451 U.S. at 25. A state also knows that it must "use" the money only in the ways enumerated by the Act: by providing (1) assistance or aid to industries affected by the pandemic; (2) pay or grants to essential workers; (3) "government services" in those areas where funding was impacted by the pandemic; (4) "necessary investments" in infrastructure, or (5) "emergency relief from natural disasters." 42 U.S.C. § 802(c)(1). Conversely, the Offset Provision itself conveys that the states *cannot* "use" the money to balance the books by offsetting a tax reduction. *Id.* § 802(c)(2)(A). Together, these conditions convey that a state must use the money in certain ways to provide direct assistance, while clarifying that offsetting tax breaks is not a permitted use of ARPA funds.

That some vagueness may exist in the Offset Provision itself does not change that a state can reasonably understand its obligations. First, § 802(g)(1) reasonably conveys the baseline year—states should know that this is 2019, the last full fiscal year before the "covered period" outlined by ARPA and before the beginning of the COVID-19 pandemic. Second, the statute provides a mechanism for determining whether a state's tax revenues are "reduce[d]"—the Secretary of the Treasury is empowered to provide "necessary or appropriate" guidance to carry out the section under § 802(f). States would reasonably know that that guidance would fill in the missing pieces, including whether the Offset Provision applies to expected or actual tax revenues. And courts have deferred to an agency's explicit authority to implement Spending Clause legislation. *See Bennett*, 470 U.S. at 668–73; *Mowbray v. Kozlowski*, 914 F.2d 593, 600–01 (4th Cir. 1990) ("[A]mbiguit[ies] in the Medicaid scheme . . . require some deference to [the Secretary of Health's] interpretation."). Third, the term "indirectly offset" is not so broad as to deprive a state of the ability to understand its obligations. The directives in § 802(c)(1) convey how a state must use ARPA money, and the Offset Provision clarifies that tax cuts are not a mode of "assistance" that states can provide. Read in context with § 802(c)(1), if Tennessee uses ARPA funds in compliance with the enumerated "use" requirements, it will comply with ARPA's conditions, even if it enacts other tax cuts. Whether § 802(c)(2)(A) conveys the precise

contours of "indirectly offset" is immaterial here, for no interpretation of the Offset Provision can override or conflict with the provisions of § 802(c)(1). *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme."(citation omitted)); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). For this reason, it is unambiguously clear that the phrase does *not* rise to the level of prohibiting *all* tax cuts, meaning that the Act does not abridge a state's "indispensable" and "essential" power of taxation. *See Lane Cnty. v. State of Oregon*, 74 U.S. 71, 76–77 (1868). So the agreement is valid because "the essence of their statehood is maintained without impairment." *Steward Mach. Co.*, 301 U.S. at 597. In sum, as long as a state complies with § 802(c)(1), it knows it is not performing an indirect offset and that the government cannot recoup the spent funds.

The panel's decision to ignore these contract-law principles is particularly problematic here. For one, in contract law, an ambiguous or vague term *never* leads to invalidation of only one part of a contract. If the vagueness is severe enough, there is no meeting of the minds and the agreement *itself* is void: "If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." Restatement (Second) of Contracts § 33, comment *a*. But if the agreement stands, a court will interpret it and provide the requisite clarity. "When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are *for* in contract cases—to resolve interpretive questions founded on ambiguity." *Colfax Envelope Corp. v. Local No. 458-3M, Chi. Graphic Commc'ns Int'l Union AFL-CIO*, 20 F.3d 750, 754 (7th Cir. 1994). In *no* instance will a court determine that a contract exists but that one provision is categorically unenforceable simply because its scope may be initially unclear. *Cf. Texas v. New Mexico*, 482 U.S. 124, 129 (1987) ("[G]ood-faith differences about the scope of contractual undertakings do not relieve either party from performance."). If the Provision's terms were indeed vague, Tennessee and the Treasury did not contract, the entire contract is void, and Tennessee must return the funding. Conspicuously (and unsurprisingly), Tennessee has never volunteered to do so.

Further, this conclusion causes particular discord in the Spending Clause context as Congress must now speak with greater clarity than courts have ever required. Congress does not need to "prospectively resolve every possible ambiguity" or identify "every improper expenditure" when offering funds to states. *Bennett*, 470 U.S. at 666, 669; *see also Pennhurst*, 451 U.S. at 24–25 (noting that a condition is valid if "Congress spoke so clearly that we can fairly say that the State could make an informed choice," even if a state's potential obligations may otherwise be "largely indeterminate"). Requiring it to do so would have a chilling effect on Congress's ability to impose discretionary conditions, even though courts have held that those pass Spending Clause muster. *See, e.g.*, *Penn., Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 153 (3rd Cir. 2012) (noting that a "discretionary" condition does not defy *Pennhurst*, which "merely requires that states have clear notice of conditions on accepting federal funds, and imposes no requirement that such conditions be unconditional"). And requiring this much specificity will likely prove to be unworkable. *See Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) ("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.").

Moreover, the panel's decision wrongly allows the states to receive ARPA funds but escape their agreement with Congress to comply with the Offset Provision—to essentially have their cake and eat it too. Every state agreed to accept ARPA funding on the condition that it would not use the money to offset tax breaks. Allowing states to renege on this agreement not only contravenes the Spending Clause and basic contract law, but it also goes against principles of equity and fairness. And allowing states to do this harms the public—rather than use ARPA funds only for the public benefits outlined in § 802(c)(1), states may keep some funding to balance their own books.

Finally, Tennessee had the option to accept or decline ARPA's conditional funding, and we should honor its decision to take the money, conditions and all. If indeed it was concerned about the Offset Provision and did not want to comply with it, Tennessee could have, and should have, said no to the federal government's offer of assistance. Turning down Congress's substantial funding offer may have been a difficult one, but doing so would have been a

legitimate way for Tennessee to defend its sovereign prerogatives. In this circumstance, Chief Justice Roberts's words are particularly poignant:

> In the typical case we look to the States to defend their prerogatives by adopting "the simple expedient of not yielding" to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.

National Federation of Independent Business v. Sebelius, 567 U.S. 519, 579 (2012) (opinion of Roberts, C.J.) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

In sum, ARPA's offer of funding passes muster at this juncture. The terms of Congress's offer were certain enough to create a contract, permitting Tennessee to make its choice knowingly and voluntarily. *Pennhurst*, 451 U.S. at 17. The panel's use of the clear-statement rule to enjoin the Offset Provision contravenes fundamental tenets of the Spending Clause analysis.[4] Whatever vagueness exists in the Act is of no moment to our prospective inquiry today; at most, it may make recoupment actions for the government more difficult tomorrow.

II.

For these reasons, I respectfully dissent and would grant the government's petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

[4] I acknowledge that the Eleventh Circuit subsequently held the Offset Provision to be unconstitutional. *West Virginia*, 59 F.4th at 1146. But that case is of little support to the panel decision here—while it reached the same basic result as the panel, it enjoined the Offset Provision as unconstitutional, not as a matter of statutory interpretation. That conclusion departs from all established precedent that the clear-statement rule is a matter of *statutory* interpretation that does not allow such an injunction. *See Pennhurst*, 451 U.S. at 24–25; *accord City of Pontiac*, 584 F.3d at 284 (Sutton, J., concurring); *Sandoval v. Hagan*, 197 F.3d 484, 495 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2001). Consequently, that opinion suffers from similar downfalls to those described here.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *et al.*,	)	Civil No. 3:21-cv-00017-GFVT-EBA
Plaintiffs,	)	
V.	)	**OPINION & ORDER**
JANET YELLEN, *et al.*,	)	
Defendants.	)	

*** *** *** ***

This case is informed by an old conversation between Thomas Jefferson and Alexander Hamilton. The topic was one of trust. Hamilton put his in a strong federal government with considerable power.[1] Jefferson, the agrarian, fought against the expansion of federal power at the expense of the States.[2] Here, the federal government wants to give Kentucky and Tennessee a lot of money. These funds are desperately needed in the midst of a pandemic. But, they come with a price—states must forego the exercise of important flexibility and power when it comes to making their own taxing decisions.

As explained below, this is a coercive grant of federal money. The spending power of the federal government does not go so far. The price for accepting the funds is unconstitutional.

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[1] *See* Alexander Hamilton, *Report on a National Bank*, in ALEXANDER HAMILTON: WRITINGS, 647, 575, 599 (Joanne B. Freeman ed., 2001) ("[A national] Bank is not a mere matter of private property, but a political machine of the greatest importance to the State").
[2] *See* Thomas Jefferson Letter to George Washington, Feb. 15, 1791, *Opinion on Bill for Establishing a National Bank* ("I consider the foundation of the Constitution as laid on this ground that 'all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people' … To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition").

Accordingly, summary judgment will be **GRANTED** in favor of the Commonwealth of Kentucky and the State of Tennessee.

I

President Biden signed into law the American Rescue Plan Act on March 11, 2021. Pub. L. No. 117-2, § 9901(a) (codified at 42 U.S.C. § § 802–805). The ARPA appropriates funds in order for the States to respond to pandemic-related expenses. *Id.* The ARPA provides that, through December 31, 2024, the States may use the recovery funds "to cover costs incurred":

> (A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
> (B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;
> (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1). The ARPA also includes restrictions or conditions on the grant of federal funds. *Id.* § 802(c)(2). The condition of importance here (the "Tax Mandate") prohibits a State from using the federal funds to "directly or indirectly offset a reduction in 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)." *Id.* § 802(c)(2)(A). If a State accepts the funds and fails to comply with the Tax Mandate, it "shall be required to repay the Secretary [of the Treasury] an amount equal to the amount of funds used in violation [thereof]." *Id.* § 802(e). In other words, the State will be required to repay either the amount of funds used to offset the "reduction to net tax revenue"

or "the amount of funds received," whichever is less. *Id.* Further, on May 17, 2021, the Treasury Department published an Interim Final Rule, seeking to clarify the Tax Mandate and the eligible uses of ARPA funds. *See* 86 Fed. Reg. 26,786 (May 17, 2021).

Plaintiffs Kentucky and Tennessee bring the present suit and move for summary judgment. [R. 25.] Plaintiffs seek both a declaratory judgment finding the Tax Mandate unconstitutional and a permanent injunction enjoining the Treasury Secretary's enforcement of the Tax Mandate. [*Id.*] Plaintiffs argue that they have standing on two grounds, arguing that the Tax Mandate: (1) unconstitutionally narrows the range of permissible tax policies States may enact, injuring the Plaintiffs; and (2) imposes administrative burdens, injuring Plaintiffs. [R. 25 at 23–24.] Plaintiffs then cite four different ways in which the Tax Mandate of the ARPA is unconstitutional. Plaintiffs believe that the Tax Mandate is unconstitutionally ambiguous and coercive in violation of the Spending Clause, that it is not reasonably related to the federal interest in passing the ARPA, and that it violates the anticommandeering doctrine. [R. 25.] Defendants, in response, argue: (1) that Plaintiffs are attempting to manufacture standing where it does not exist; (2) that this case is not ripe; and (3) that Congress has not exceeded the bounds of its authority for Spending Clause purposes. [R. 31.]

II

A

It is well-established that standing is a threshold inquiry in every federal case. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). Each federal court is "under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the

jurisdictional doctrines." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotations and citation omitted).

"To satisfy the 'case' or 'controversy requirement' of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted). To show injury-in-fact, a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v, Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In pre-enforcement challenges, like this one, the "Supreme Court has recognized that an allegation of future injury may satisfy the injury-in-fact requirement if the alleged threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (cleaned up)). More specifically, plaintiffs satisfy the injury-in-fact requirement where they allege: (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that is "proscribed by a [law]," and (3) "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). As sovereign entities, Kentucky and Tennessee also enjoy "special solitude in [the Court's] standing analysis. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518–20 (2007). The Court will consider, in turn, whether Plaintiffs have met each element.

In order to satisfy the first *Dreihaus* factor in this context, the Court must, necessarily, look to the substance of the "constitutional interest" at issue in this case. Plaintiffs Kentucky and Tennessee are alleging that the Tax Mandate, a condition attached to the receipt of funds under

the ARPA, is unconstitutional on a variety of grounds. [R. 25.] The States contend that they wish to accept the funds—indeed, that they *need* the funds—but seek to enjoin the Treasury Department from enforcing the Tax Mandate. [*Id.*] There is *at least* one valid argument that the Tax Mandate is unconstitutional. *See generally Ohio v. Yellen*, 2021 WL 2712220, 1:21-cv-00181-DRC (S.D. Ohio July 1, 2021). Accordingly, the States have met the first factor. Next, the Tax Mandate may fairly be considered a guardrail as to how States may spend ARPA funds. Tennessee and Kentucky, however, interpret the Tax Mandate as proscribing use of the funds for their "preferred tax policies in the coming years." [R. 25 at 11.] The second factor is met. Finally, Treasury Secretary Yellen penned a letter to various attorneys general on March 23, 2021, indicating her intent to enforce the Tax Mandate. [*See* R. 1-2.] Thus, a credible threat of prosecution exists, Plaintiffs have met their burden, and this Court has standing to turn to the merits of the case.

B

Plaintiffs, in their summary judgment motion, cite four different ways in which the Tax Mandate of the ARPA is unconstitutional. [R. 25.] The Court will begin by addressing the Plaintiffs' contention that the Tax Mandate is unconstitutionally coercive and then turn to remaining arguments, as needed.

The Spending Clause gives Congress the power "to pay the Debts and provide for the ... general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. As a part of its Spending Clause powers, Congress may offer conditioned funds to the States. *See South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (threatening to withhold federal funds if South Dakota did not raise drinking age to twenty-one). To that end, Spending Clause legislation has often been characterized as "much in the nature of a *contract*" between two co-sovereigns. *Pennhurst State*

School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). In exercising its spending power, however, Congress itself must abide by certain limitations. The limitation pertinent here holds that Congress may not enact Spending Clause legislation that uses "financial inducements to exert a 'power akin to undue influence.' " *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Although Congress may "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices," *Id.* (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)), Congress oversteps its powers when "pressure turns into compulsion." *Id.* at 576–77. (quoting *Steward Machine Co.*, 301 U.S. at 590).

Article III courts exercise restraint in second-guessing the policy judgments of Congress. Members of Congress are subject to the political whims of the American citizens; Article III courts are insulated from political processes and "possess neither the expertise nor the prerogative to make policy judgments." *NFIB*, 567 U.S. at 538. Courts must step in, however, where Congress's policy judgments threaten the independent sovereignty of the States. "Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *Id.* at 577. In keeping with the contract analogy, when a State alleges coercion, courts must consider whether the State is able to "voluntarily and knowingly accept[] the terms of the 'contract.' " *Pennhurst*, 451 U.S. at 17.

The Supreme Court, in *South Dakota v. Dole*, considered whether Congress overstepped its spending powers where it threatened to withhold five percent of South Dakota's federal highway funds if the State refused to raise the minimum-drinking age to twenty-one. 483 U.S., at 211. The Supreme Court determined that the conditional offer was not coercive because

"Congress ha[d] offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Id.* In other words, the State was not so reliant on the five percent of highway funds—"otherwise obtainable under specified highway grant programs"—to the point where they had no real choice; the decision to comply with the condition "remain[ed] the prerogative of the States not merely in theory but in fact." *Id.*, at 211–12.

NFIB, on the other hand, represents the sole example of the Supreme Court enforcing the anticoercion principle where Congress's spending legislation deprived the States of any meaningful choice. 567 U.S., at 519. In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"), seeking to expand healthcare access for millions of Americans. The ACA contained a Medicaid expansion, which threatened the States with a complete loss of federal funding of Medicaid—funding equal to ten percent of a State's total budget—if any State refused to comply with the expansion. Chief Justice Roberts, delivering the opinion of the Court, found the Medicaid expansion provision to violate "the basic principle that the 'Federal Government may not compel the States to enact or administer a federal regulatory program.' " *NFIB*, 567 U.S., at 575 (quoting *New York*, 505 U.S., at 188)). In finding the Medicaid provisions of the ACA coercive, the Supreme Court considered: (1) the expanded obligations that States must comply with; (2) the fact that Congress threatened to withhold *both* new and existing funding for the States' Medicaid programs;[3] and (3) whether Congress's "financial inducement" was "mild encouragement" or "a gun to the head."[4] *Id.* at 581.

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[3] While the issue of existing funds was a factor considered by the Supreme Court in *NFIB*, it was one of many factors weighed. Accordingly, the Court will not accept Defendants' argument that *NFIB* is factually distinct from the present case. [*See* R. 31.]

[4] *See Dole*, 483 U.S., at 211 ("all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% [of her highway funds]"). In fact, South Dakota was only poised to lose "less than half of one percent of South Dakota's budget at the time." *NFIB*, 567 U.S., at 581.

Similarly, in his concurring Opinion in *School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Educ.*, Judge Sutton noted the coercive nature of the contract that States were offered at the onset of the No Child Left Behind Act. 584 F.3d 253, 284 (6th Cir. 2009) (Sutton, J, concurring). Stuck between Congress's funding conditions and "fiscally challenging times … [no State] would have the fortitude to turn down hundreds of millions of dollars in education funding." *Id.* The "choice-bending" nature of Congress' s contract of adhesion was underscored by the fact that "no State refused aid under the Act, notwithstanding the conditions that came with it." *Id.*

The States here know, as Kentucky and Tennessee show, that "refusing to accede to the conditions set out in the [law] is not a realistic option." *See NFIB*, 567 U.S., at 681 (Scalia, J., dissenting). Whereas roughly ten percent of a State's annual budget was at stake in *NFIB*, the ARPA offers States and the District of Columbia $195.3 billion dollars. *See* Jared Walczak, *Four Questions Treasury Must Answer About the State Tax Cut Prohibition in the American Rescue Plan Act*, Tax Found. (Mar. 18, 2021), https://bit.ly/3cYu0YB. For context, that is roughly *twenty percent* of the annual state tax collections brought in by state governments. *Id.* If both Kentucky and Tennessee choose to accept the ARPA funds—if it can be referred to as a choice—they will both receive amounts equal to roughly *one-fifth* of their general fund revenues for the preceding year.[5] *See How the COVID-19 Pandemic is Transforming State Budgets*, Urb. Inst. (last visited June 25, 2021), https://urbn.is/3jsU9ni; *see also* Jared Walczak, *State Aid in American Rescue Plan Act is 116 Times States' Revenue Losses*, Tax Foundation (Mar. 3, 2021),

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[5] Kentucky will receive roughly $2.4 billion from the ARPA. [*See* R. 1 at 11] Relative to the $11.2 billion in revenue that Kentucky received from the General Fund during the last fiscal year, the ARPA aid package for Kentucky amounts to more than one-fifth of Kentucky's entire yearly General Fund revenue. [*Id.*] Tennessee will receive roughly $3. Billion from the ARPA. [*Id.*] Relative to the $17.8 billion in revenue that Tennessee received from the General Fund during the last fiscal year, the ARPA aid package for Kentucky amounts to more than one-fifth of Tennessee's annual general revenue. [*Id.*]

https://taxfoundation.org/state-and-local-aid-american-rescue-plan/. The amount of money at stake is especially pressing for Kentucky and Tennessee who, unlike the federal government, are constitutionally required to enact balanced budgets. See Ky. Const. §§ 49–50, 171; Tenn. Const. Art. II, § 24.

Putting aside the sheer size of the federal government's offering, the past year-and-a-half has presented anything but ordinary and stable conditions for the States. Not only have the States been forced to combat the health ramifications of the coronavirus, the pandemic has thrown many States and citizens into severe economic hardship. *Amici Curiae* Chamber of Commerce and National Federation of Independent Business Small Business Legal Center highlight some of the economic devastation the pandemic has brought:

> Small businesses, in particular, have faced unprecedented economic hardship. In surveys of small business owners, 81% of participants reported losing sales opportunities because of a labor shortage.[6] More than half had employees take pandemic-related sick leave or family leave; 87% of those businesses reported at least some of that leave was paid leave.[7] The hospitality industry was also ravaged: At the beginning of this year, foodservice sales were down $240 billion from expected levels in 2020.[8] Nearly a third of all restaurant and hospitality workers lost their jobs in the first few months of the pandemic,[9] and many have yet to return.[10] More than 100,000 businesses of all stripes have permanently shuttered

[6] *See* NFIB Res. Ctr., *Covid-19 Small Business Survey (18)* at 10 (June 30, 2021), https://bit.ly/3y Mg4KD.

[7] *See* NFIB Res. Ctr., *Covid-19 Small Business Survey (17)* at 8-9 (Apr. 28, 2021), https: //bit.ly/3ycOcyO.

[8] *See Nat'l Restaurant Ass'n, Restaurant Sales Fell to Their Lowest Level Since June* (Jan. 15, 2021), https:// bit.ly/3d5gVwu; *see also Alex Sherman, Five Charts That Show How COVID-19 Stopped the U.S. Economy In Its Tracks*, CNBC (Mar. 11, 2021), https://cnb.cx/3cZ97O0.

[9] Erin Huffer & Aravind Boddupalli, *The Leisure & Hospitality Sector Has an Employment Crisis—and It Might Be Getting Worse*, Urb. Wire (July 20, 2020), https://urbn.is/397ptlz.

[10] *See Nat'l Restaurant Ass'n, 49 States and DC Added Restaurant Jobs in May 2021* (June 24, 2021), https://bit.ly/3hn5jHA (restaurant employment in all but four states remains below its prepandemic level); *Nat'l Restaurant Ass'n, Restaurant Employment Fell for the Third Consecutive Month* (Feb. 5, 2021), https://bit.ly/31b0pG3 (nearly 450,000 restaurant jobs lost in the three months preceding February 2021); *State-by-State Job Loss: COVID-19 Continues to Devastate Hotel Industry*, Am. Hotel & Lodging Ass'n (Feb. 2021), https://bit.ly/3uG0H47 (hospitality industry unemployment rate 300% higher than rest of economy); Michael Ettlinger & Jordan Hensley, *Covid-19 Economic Crisis: By State*, Univ. of N.H. Carsey Sch. of Pub. Pol'y (June 29, 2021), https://bit.ly/3dBzklI (nationwide employment in the accommodation and food services industry is down 13.9% since last year).

> their doors,[11] and the country has lost more jobs since February 2020 than were lost during the Great Recession of December 2007 to June 2009.[12]

[R. 34 at 24–25.] Looking beyond the impacts on private businesses, state and local governments have likewise felt the economic brunt of the pandemic. Many state and local governments are grappling with "severe budget shortfalls." Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, Council on Foreign Relations (Mar. 19, 2021), https://on.cfr.org/3f9vjqm. This, in part, can be explained by the necessary steps these governments have been forced to take in response to the pandemic, including: making budgetary cuts, freezing spending and hiring, laying off workers, and drawing down rainy day funds. *Id.* State and local officials have even remarked in the public sphere that the money available through the ARPA represents a life preserver thrown to drowning governmental bodies. *See* Manny Fernandez & Sabrina Tavernise, *Stimulus Bill Transforms Options for State and Local Governments*, N.Y. TIMES, Mar. 15, 2021, https://www.nytimes.com/2021/03/13/us/stimulus-biden-states-cities.html ("The American Rescue Plan – that's a proper term for the situation we're in … it's pretty amazing that we're still standing up"). Local governments have incurred "[t]hree quarters of the the more than 1.3 million jobs lost among state and local governments since February 2020 … the vast majority of them from school districts." *Id.* In fact, the full extent of the fiscal damage incurred by local governments may not yet be known, as many counties have "complained that funds from previous rounds of pandemic stimulus had not reached them because the funds were routed through states for smaller counties." *Id.*

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[11] Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments That Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, Fortune (Sept. 28, 2020), https://bit.ly/3t6dpci; Paul Davidson, *Vaccines Could Help Steady Economy; Yet Pandemic Isn't Over, Effects Are Likely to Linger*, USA Today at 3B (Dec. 31, 2020).

[12] Michael Ettlinger & Jordan Hensley, supra n.8; *see also* Congressional Rsch. Serv., *Global Economic Effects of COVID-19* at Fig. 19 (June 17, 2021), https://bit.ly/3AitAqJ (in none of sixteen measured sectors has the number of jobs lost in April 2020 been fully recovered); U.S. Bureau of Labor Statistics, *All Employees, Total Nonfarm [PAYEMS]*, retrieved from FRED, Fed. Rsrv. Bank of St. Louis (July 8, 2021), https://bit.ly/3dPMhbQ (total nonfarm employment in the United States is still more than 6.7 million jobs below its February 2020 level).

At the risk of straining the analogy, the pandemic has many state and local governments treading water. The federal government's rescue boat has arrived in the form of the ARPA, but instead of offering a hand to hoist up its sinking co-sovereigns, it has offered a pen and paper listing conditions of rescue. The States have no voluntary or knowing choice in the matter, *Pennhurst*, 451 U.S. at 17, and face a "gun to the head" contract of adhesion. *NFIB*, 567 U.S., at 575. This is exemplified by the fact that all but thirteen States, to-date, have certified to receive ARPA funds, with more likely to follow. *See, e.g., ARPA State Fiscal Recovery Fund Allocations*, National Conference of State Legislatures, https://www.ncsl.org/research/fiscal-policy/arpa-state-fiscal-recovery-fund-allocations.aspx (last visited Sept. 17, 2021). Further, an untold number of local governments and cities will likewise receive funding directly from the Treasury Department. *See, e.g. American Rescue Plan Act (ARPA)*, Lexington-Fayette Urban County Government, https://www.lexingtonky.gov/ARPA (last visited Sept. 17, 2021). The numbers speak for themselves. *See City of Pontiac*, 584 F.3d 253, at 284. Given the "choice bending" nature of Congress's offer, *id.*, the Court finds the Tax Mandate of the ARPA coercive, and the condition cannot be sustained under the spending power.[13]

If you think about it, the coercion presented in the ARPA is exactly the kind of intrusion on state sovereignty that the Constitution prohibits. Accordingly, the Court rests on the abovementioned considerations in finding the federal government's offer coercive, but feels compelled to mention the particularly injurious nature of the Tax Mandate. The Constitution recognizes limitations on the States, but does not abolish the States' "residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). Accordingly, our federalist

[13] As a note, whereas an Interim Final Rule from the Treasury Department has the potential to clarify an unconstitutionally ambiguous offer, *see Ohio*, 2021 WL 2712220, at *3–4, such a Rule has no bearing on whether Congress's offer is unconstitutionally coercive. Accordingly, the Treasury Department's May 17, 2021 IFR, *see* 86 Fed. Reg. 26,786 (May 17, 2021), has no bearing on this Court's coercion analysis.

system is one of dual sovereignty. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). Out of all of the powers reserved to the States, there is no power more central to a state government's sovereignty than the power to tax, *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994), which the Supreme Court, long ago, recognized as "indispensable to [the States'] existence." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824). In fact, the "power of self-government … cannot exist distinct from the power of taxation." *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 546, 548 (1830). Thus, where the federal government unduly influences the States' power to set their own tax policies, the federal government oversteps its bounds. Not only does this threaten the dual nature of our federalist system, but such federal overreach threatens individual liberties that "derive[] from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011). As mentioned above, the Court draws no conclusion here as to whether, for instance, the Tax Mandate violates the anticommandeering doctrine. [*See* R. 25.] The Court simply notes that the federal government's condition implicates not only powers at the core of state sovereignty, but individual liberties reserved to citizens, as well. *See Bond*, 564 U.S. 211, at 222 ("When government acts in excess of its lawful powers, [individual] liberty is at stake").

C

Beyond the anticoercion principle, Plaintiffs contend that the Tax Mandate is unconstitutional in three other respects. [R. 25.] Plaintiffs argue that the Tax Mandate: (1) violates the anticommandeering doctrine because it seizes powers reserved to the States, via the Tenth Amendment, to set their own tax policies [*id.* at 34]; (2) is not reasonably related to the federal interest in passing the ARPA, which Plaintiffs define as "providing relief to the States

(and their citizens) from hardships caused by Covid-19" [*id.* at 36]; and (3) is unconstitutionally ambiguous in violation of the Spending Clause where the plain language of the Tax Mandate is simply incomprehensible. [*Id.* at 27.]

Kentucky and Tennessee may very well be correct about these alternative grounds. But, having found the Tax Mandate unconstitutionally coercive, this Court will refrain from anticipating further questions of constitutional law "in advance of the necessity of deciding [them]." *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 450–51 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936)).[14]

D

Turning to the remedies, Plaintiffs pray for both declaratory relief and a permanent injunction enjoining the Treasury Secretary from enforcing the Tax Mandate provision of the ARPA. [R. 1 at 24.] To obtain a permanent injunction, a plaintiff "must first establish that [she has] suffered a constitutional violation." *Womens Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006). As explained above, Tennessee and Kentucky have clearly suffered violations of their constitutional rights as a result of the Tax Mandate's coercive nature. The four factors for courts to consider before granting a request for a permanent injunction also weigh in the Plaintiffs' favor. These factors require the Court to find (1) that the Plaintiffs have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that an equitable remedy is warranted upon considering the balance of hardships between the parties; and (4) that the public interest would not be disserved

[14] Suffice it to say, for an excellent exposition on the question of the Tax Mandate's ambiguity, *see generally Ohio*, 2021 WL 2712220. Further, for additional opinions regarding the constitutionality of the Tax Mandate or district courts' standing to hear them, *cf. W. Va., et al. v. U.S. Dep't of Treasury, et al.*, 2021 WL 2952863 (N.D. Al. July 14, 2021) (denying preliminary injunction, citing lack of irreparable injury); *Ariz. v. Yellen*, 2021 WL 3089103 at *3–4 (D. Ariz. July 22, 2021) (denying ambiguity challenge where ARPA provides clear notice that conditions are attached to funds, whether or not conditions are largely indeterminate).

by a permanent injunction. *See eBay Inc. v. MercExchange*, LLC, 547 U.S. 388, 391, 126 (2006); *see also Wedgewood Ltd. Partnership I v. Twp. of Liberty*, 610 F.3d 340, 349 (6th Cir. 2010). First, the Plaintiffs' irreparable harm flows naturally from the constitutional violation. *See Overstreet v. Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (explaining that "a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights"). Next, whereas monetary damages might otherwise be an adequate remedy if recoupment were to take place, Defendants enjoy sovereign immunity against such relief. *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"). The balance of hardships also weighs in Plaintiffs' favor. As explained above, Plaintiffs will endure hardship if forced to accept this unconstitutional contract of adhesion that impedes on their sovereign powers. Defendants, on the other hand, will suffer no hardship if this Court enjoins them from enforcing the Tax Mandate. The Court sees no cognizable interest of the federal government in enforcing the Tax Mandate and, given the limited scope of the permanent injunction, the Defendants will be free to enforce every other provision of the ARPA as they see fit. Lastly, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control, Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The public interest is safeguarded with a decision in favor of the Plaintiffs; the States' ability to set their taxing policy as a co-sovereign enhances, rather than threatens, individual liberty. *Bond*, 564 U.S., at 221.

A permanent injunction is proper in this case, as enjoining the enforcement of the Tax Mandate alleviates the constitutional harm. Because a permanent injunction fully rectifies the Plaintiffs' harm, the Court need not address the issue of a declaratory judgment.

Lastly, the Court must consider the scope of its injunction. The Sixth Circuit has held that a "district court should limit the scope of [an] injunction to the conduct 'which has been found to have been pursued or is related to the proven unlawful conduct.' " *Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015) (quoting *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir.1994)). The Defendant has made an unconstitutionally coercive offer to Plaintiffs Tennessee and Kentucky. Defendants have made identical offers, however, to every State in the country. While it is true that the evidence presented by the parties primarily relates to Kentucky and Tennessee, this Court's ruling rests on the coercive elements that are universally present in the federal government's offer to all of the States. Consequently, this Court must consider the breadth of its injunction: Should it enjoin the Treasury Secretary's enforcement of the Tax Mandate as it relates to (1) the Eastern District of Kentucky (this Court's District); (2) Tennessee and Kentucky (the entities before the Court); or (3) all of the States (both parties and non-parties).

In *Trump v. Hawaii*, —U.S.—, 138, S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) Justice Thomas discussed the increasing frequency of "universal" or "nationwide injunctions." Justice Thomas expressed his skepticism of such injunctions, noting: (1) historical principles of equity in Article III courts; (2) the recency of nationwide injunctions; (3) and the properly limited role of district courts. *Id.* at 2425–2429 ("[In the past, as] a general rule, American courts did not provide relief beyond the parties to the case"). Justice Thomas found that the sweeping relief brought by nationwide injunctions likewise brings "forum shopping" and makes "every case a national emergency for the courts and the Executive Branch." *Id.* at 2425. Instead, district courts should allow legal questions to percolate through the federal court system. *Id.* Justice Gorsuch affirmed this notion in *Department of Homeland Sec. v. New York*, 140 S. Ct.

599, 600 (2020) (Gorsuch, J.J., concurring). Noting that "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit," Justice Gorsuch found that nationwide injunctions "raise serious questions about the scope of courts' equitable powers under Article III." *Id.* Not only are such injunctions impracticable, they "force judges into making rushed, high-stakes, low-information decisions." *Id.* Careful review by multiple district and circuit courts, on the other hand, allows the Supreme Court the benefit of thoughtful and, at times, competing outcomes. *Id.* The current state of affairs in the Sixth Circuit is a key example of this careful and deliberate process. One district court has answered a similar legal question regarding the Tax Mandate on dissimilar grounds. *see Ohio*, 2021 WL 2712220. The Sixth Circuit will likely consider both district court injunctions and issue its own opinion. Thereafter, the Supreme Court may choose to address the constitutionality of the Tax Mandate, with the added benefit of many competing views to inform its decision. Even if this Court were to consider relief beyond Tennessee and Kentucky, however, the Sixth Circuit has already defined the outer-bounds of this Court's powers. *See Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 474 (6th Cir. 2021) ("we do not decide the scope of the injunction, except to say that the scope may not exceed the bounds of the four states within the Sixth Circuit's jurisdiction and, of course, encompasses the parties themselves").

Although the debate over the proper scope of injunctions is ongoing, this Court believes that redressability in the present case is properly limited to the parties before the Court. Consequently, the scope of the permanent injunction shall apply to both Tennessee and Kentucky, in equal force.

III

Some might view Hamilton as having gotten the better of Jefferson in terms of the balance between federal and state powers.[15] Nevertheless, the balance exists. And here, the federal action intrudes on state sovereignty. Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** as follows:

1. The Plaintiffs' Motion for Summary Judgment [**R. 25**] is **GRANTED**;
2. The Treasury Secretary is **PERMANENTLY ENJOINED** from seeking enforcement of the Tax Mandate, 42 U.S.C. § 802(c)(2)(A), against Plaintiffs Tennessee and Kentucky;
3. The Plainitffs' request for declaratory relief, as argued in [R. 25], is **DENIED**; and
4. Defendant's Motion to Dismiss [**R. 32**] is **DENIED**;
5. Judgment shall enter promptly.

This the 24th day of September, 2021.

Gregory F. Van Tatenhove
United States District Judge

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[15] *See McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819).