No. 23-48

IN THE

Supreme Court of the United States

INDIANA MUNICIPAL POWER AGENCY, MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION, NORTHERN ILLINOIS MUNICIPAL POWER AGENCY, AMERICAN MUNICIPAL POWER, INC., ILLINOIS MUNICIPAL ELECTRIC AGENCY, AND KENTUCKY MUNICIPAL POWER AGENCY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The **International Municipal Lawyers Association** has been an advocate and resource for local government attorneys since 1935. Owned by its 2,500-plus members, IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States and state and federal appellate courts.

The **Government Finance Officers Association** is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and identifying and promoting best practices. Its more than 22,000 members are dedicated to the sound management of government financial resources.

The **National Association of Counties** is the only national organization representing county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[1] Amici Curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from Amici Curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties was notified of Amici Curiae's intent to file this brief.

The **National League of Cities**, founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where over 218 million Americans live.

The **National Association of Bond Lawyers** is a nonprofit organization dedicated to promoting municipal market integrity by educating its members on state and municipal bond law. NABL's members serve clients across the market, including state and local issuers, borrowers, and other municipal securities market participants.

The **National Association of State Treasurers** is the nation's foremost authority for responsible state treasury programs and related financial practices, policies, and education. NAST members and their staff include about 11,000 individuals across all states, the District of Columbia, and territories. Members are responsible for state-level debt issuance and management, college savings programs, ABLE savings programs, unclaimed property, and financial wellness promotion.

The **American Public Transportation Association** is a nonprofit international association of 1500 public- and private-sector organizations representing a $79 billion industry that directly employs 430,000 people and supports millions of private-sector jobs. APTA's member organizations include public transit systems; high-speed intercity passenger rail agencies; planning, design, construction, and finance firms;

product and service providers; academic institutions; and state associations and state departments of transportation.

The **National Association of College and University Business Officers**, established in 1962, is a nonprofit professional organization representing chief administrative and financial officers from over 1,700 nonprofit and public colleges and universities nationwide. NACUBO's mission is to advance economic vitality and business practices and to support higher education institutions pursuing their missions.

The **American Public Gas Association** is the trade association representing more than 730 communities across the U.S. that own and operate their retail natural gas distribution entities. These include not-for-profit gas distribution systems owned by municipalities and other local government entities, all accountable to the citizens they serve.

The **Council of Infrastructure Financing Authorities** is a nonprofit organization of the Clean Water and Drinking Water State Revolving Funds (SRFs), the nation's primary programs for subsidizing water infrastructure that protects public health and the environment. The organization's mission is to foster investment in water infrastructure by advocating for sound public policy and encouraging increased federal funding and engaged capital markets. Since these subsidized loan programs were established, the SRFs have turned nearly $74 billion in combined federal funding into more than $215 billion in total financial assistance, with $85 billion in loan repayments permanently revolving in the programs.

The **National Special Districts Coalition** is the only national organization representing and advocating for all special districts. NSDC consists of associations and businesses serving and supporting the nation's 35,000 local special district governments providing critical infrastructure and essential services. Uniting special districts and stakeholders as one voice, NSDC fosters strong national collaboration to strengthen and advance essential community services, enhancing thousands of American communities' quality of life.

This case is of acute concern not only to the thousands of state and local governmental entities that issued Build America Bonds but to the 40,000 state and local governments in the United States cooperating with the federal government to implement critical programs and deliver essential services. Because Amici and their members advise states, cities, counties, and other local governments on financing, spending, and budgeting, they are uniquely positioned to describe the practical implications of allowing the federal government to renege on its obligations to state and local issuers under the Build America Bonds program. Amici respectfully submit this brief to emphasize the substantial negative impact that the decision below will have on state and local government operations and the future ability of states and localities to partner with the federal government to promote important national aims.

SUMMARY OF THE ARGUMENT

The Court should grant certiorari to address whether the federal government can renege on its binding commitments to state and local governmental

entities under the Build America Bonds program—the first-ever direct federal subsidy program for general-purpose state and local borrowing. The import of this case extends far beyond the group of public power providers that have sued and now seek a writ of certiorari from this Court. If this Court permits the Federal Circuit's reasoning to stand, it will have adverse long-term implications for state and local governance in the United States.

The Build America Bonds program was an unprecedented federal intervention in the municipal bond market that induced thousands of state and local entities to issue taxable bonds, giving up the considerable advantages of tax-exempt bonds. State and local issuers made this election in reliance on Congress's promise to refund 35% of the interest payments on the bonds.

Because the Federal Circuit's opinion would allow IRS officials to cancel such federal tax refund payments on Build America Bonds through an administrative interpretation of general spending legislation, the opinion would have grave implications for our constitutional structure. Allowing the federal government to renege on its commitments under the Build America Bonds program would make intergovernmental cooperation harder, compromise core state functions that merit constitutional protection, and allow unelected and unaccountable administrators to skirt the "political safeguards of federalism."

Moreover, if the Federal Circuit's opinion escapes further review, it could force states and localities to shoulder unexpected financial burdens, affecting their ability to provide essential services and projects. The

potential destabilizing effects of the decision below will reach both constitutional principles and practical governance.

ARGUMENT

I. Congress's enactment of the Build America Bonds program was an unprecedented Federal intervention in state and local public financing that induced *thousands* of state and local entities to give up the affordability and flexibility of issuing tax-exempt bonds to launch new infrastructure projects through taxable bonds.

The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 ("ARRA") created the Build America Bonds ("BABs") program. BABs were an "innovative"—indeed, unprecedented—tool for state and local governments and their instrumentalities in financing infrastructure and capital projects. I.R.S. News Release IR-2009-33 (Apr. 3, 2009). The BABs program was the first *direct* federal refund payment for general purpose state and local borrowing, *see* Cong. Rsch. Serv., *Tax Credit Bonds: Overview and Analysis*, R40523 (Apr. 1, 2021), marking a startling departure from the long-standing *indirect* federal subsidy of exempting interest income on municipal bonds from federal taxation.

To understand the severe consequences for state and local governments of allowing the federal government to renege on its commitments under the BABs program, it is necessary to consider the sharp differences between traditional municipal debt instruments and BABs, as well as the vast scale of state and local

infrastructure investment induced by the program. Each issue is discussed in turn below.

A. States and localities typically issue tax-exempt municipal bonds—a special financing tool with important advantages—to finance new infrastructure projects.

To finance infrastructure and capital projects, states, cities, counties, and other governmental entities issue debt securities called municipal bonds. Municipal bonds act like loans, with bondholders becoming creditors. Investors are promised interest on their principal balance in exchange for borrowed capital.

Subject to certain restrictions, interest payments on municipal bonds are exempt from taxation. *See* 26 U.S.C. § 103(a). Federal law has exempted the interest on municipal bonds from taxation since the federal income tax was enacted in 1913.[2] Indeed, for much of the 20th century, municipal bonds were widely believed to be constitutionally immune from federal taxation based on principles of federalism. *South Carolina v. Baker*, 485 U.S. 505, 516 (1988) ("Under [the reasoning of *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895)], a tax on the interest income derived from any state bond was considered a direct tax on the State and thus unconstitutional."). Although this Court ultimately disavowed this broad view of intergovernmental tax immunity, *id.* at 520, municipal

[2] *See* Martin J. Luby, *Federal Intervention in the Municipal Bond Market: The Effectiveness of the Build America Bond Program and Its Implications on Federal and Subnational Budgeting*, 32 Pub. Budgeting & Fin. 46, 47 (2012).

bonds have remained largely tax-exempt through the present day, with state and local governments enjoying lower borrowing costs as a result—a powerful reflection of Congress's continued solicitude for state and local governments' unique and irreplaceable role in developing and maintaining the nation's infrastructure.[3]

Tax-exempt bonds generally appeal to investors who, for a host of different reasons, seek to reduce their taxable income. The major purchasers of tax-exempt municipal bonds are financial institutions, casualty insurers, investment portfolio managers, and individual taxpayers in high tax brackets.[4]

State and local governments can also issue taxable bonds to finance projects that do not meet federal tax exemption requirements. *See* 26 U.S.C. § 103(b). Taxable municipal bonds appeal to certain categories of investors that do not typically buy tax-exempt bonds. Investors in taxable bonds tend to be large institutional investors who either do not have income tax liability or otherwise cannot benefit from traditional municipal bonds' tax-exempt interest. These tax-indifferent investors include pension funds, university

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[3] *Id.* at 47; *see also* Cong. Rsch. Serv., *Tax Exempt Bonds: A Description of State and Local Government Debt*, RL30638, at 3–4 (Feb. 15, 2018), https://crsreports.congress.gov/product/pdf/RL/RL30638; *see also* Emilia Istrate, *Municipal Bonds Build America*, 1 NACo Pol'y Rsch. Paper Series 1, 10 (2013) ("Counties, states, and other localities are the stewards of infrastructure in the United States.").

[4] Randle B. Pollard, *Who's Going to Pick Up the Trash?—Using the Build America Bond Program to Help State and Local Governments' Cash Deficits*, 8 Pitt. Tax Rev. 171, 201 (2011).

endowments, foreign investors, life insurance companies, and 401(k) retirement accounts.

To access the broader market for taxable bonds, however, state and local issuers must pay higher interest rates to attract investors, forgoing the considerable cost advantages of tax-exempt bonds. As a result, although the overall conventional taxable bond market dwarfs the tax-exempt bond market 10 to 1 ($30 trillion to $2.8 trillion), *see* U.S. Dep't of Treasury, *Treasury Analysis of Build America Bond Issuances and Savings* 3–4 (May 16, 2011) ("Treasury Analysis"), between 1986 and 2009, with one exception, taxable municipal bond issuance made up only between 3% to 7% of the total municipal bond market each year.[5]

B. When the 2008 global financial crisis raised borrowing costs for state and local governments, Congress intervened by creating BABs, a new and unprecedented public financing tool with unique characteristics.

In 2008, the United States faced its most significant economic downturn since the Great Depression. This crisis did not spare the municipal bond market. Traditional municipal bond investors pulled out of the market, and interest rates soared. By the fourth quarter of 2008, monthly issuance had fallen to 68% of precrisis levels, the relative cost of borrowing had increased by over 100%, and many municipal issuers

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[5] *See* Lorena Hernandez Barcena & David Wessel, *Why the surge in taxable municipal bonds?*, Brookings (Dec. 21, 2020), https://bit.ly/3QAy7j3.

had no access to the capital markets. Treasury Analysis at 1. Without access to financing, state and local governments put infrastructure and capital projects on hold, further contracting the economy.

Congress aimed to fix this. To provide liquidity to these markets—and to stimulate the economy by encouraging the sorts of infrastructure investments that municipal bonds finance—the ARRA created the BABs program. § 1531, 123 Stat. 358-60. BABs were "innovative bonds" that gave state and local governments and their instrumentalities an alternative to tax-exempt bonds to finance infrastructure and capital projects. I.R.S. News Release IR-2009-33.

The ARRA created two types of BABs. Tax-credit BABs, which proved to be much less popular, entitled bondholders to a 35% tax credit for interest received on their BABs. §§ 1531(a)-(b), 123 Stat. 358. Direct payment BABs, the BABs at issue here, entitled the bond issuer to receive a refund from the Treasury Department equal to 35% of the interest paid. §§ 1531(b), (g)(1), 123 Stat. 358-59. To benefit from direct-payment BABs, state and local governments had to make two elections. First, issuers had to elect that an otherwise tax-exempt bond with a lower interest rate should be taxable.[6] § 1531(d)(1)(C), 123 Stat. 358. Second, issuers had to elect to accept direct payments instead of tax credits to the bondholders and agree to use the bond proceeds for specific capital

[6] A bond issued under the BABs program met the same basic prerequisites as a traditional, general-governmental-purpose, tax-exempt municipal bond. For this reason, any bond issued under the BABs program could have been issued as a tax-exempt bond.

expenditures. § 1531(g), 123 Stat. 359. In sum, each BABs issuer needed to make two special elections—and such choices amounted to accepting a substantial legal detriment by giving up benefits associated with issuing a tax-exempt bond.

Congress's reasoning for introducing BABs was two-fold. Congress wanted to expand the municipal bond investor pool by appealing to the tax-indifferent investors willing to invest in taxable assets. This feature gave state and local governments access to the much larger taxable bond market. On top of access to a new investor pool, Congress hoped to lower the cost of borrowing when many state and local governments struggled to borrow. BABs provided cost savings even though issuers paid a higher interest rate on the taxable bonds. How? Because the Federal Government promised to provide a tax refund of 35% of the interest cost for state and local issuers.

Take California, which became the largest BABs issuer by a wide margin. Treasury Analysis at 7. In April 2009, when BABs were first available for issue, California paid an annualized rate of 7.4% on thirty-year BABs.[7] With the federal government subsidizing 35% of BABs' interest costs, California's net rate on BABs fell to 4.8%. This rate was well below the 5.65% market interest rate that California paid on thirty-year tax-exempt bonds issued at the same time. In dollars and cents, California projected saving over $1.1 billion in interest over thirty years on BABs, compared with conventional tax-exempt municipal bonds. Had California—and all other issuers, for that

[7] Tom Petruno, *Muni yields fall as issuers turn to U.S.-backed bond plan*, L.A. Times (Apr. 22, 2009), https://bit.ly/3DW9lCm.

matter—known that the federal government would renege on its commitment to refund 35% of the interest payments to offset borrowing costs, it would not have issued taxable bonds carrying a *higher* interest rate.

In short, the larger investor pool and borrowing cost savings were designed to work in tandem to encourage states to issue BABs. And they did. State and local governments took Congress up on its offer, partnering with the federal government to create jobs, stimulate the economy, and rebuild American infrastructure. BABs were "the biggest thing to hit the municipal-bond market in a generation."[8]

C. State and local governments responded to the BABs program by issuing $181 billion in long-term debt obligations and undertaking major new investments in infrastructure.

BABs were enormously popular with State and local issuers. Put simply, Congress's plan worked. Between April 2009 and December 2010, the window for issuing BABs, there were 2,275 separate BABs issues in all 50 states, the District of Columbia, and two territories, totaling over $181 billion. Treasury Analysis at 2, 7. These issues accounted for 21.6% of the total debt issued in municipal bonds over the period[9]—a

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[8] Stephen Gandel, *A Stimulus Success: Build America Bonds Are Working*, Time (Nov. 17, 2009), https://bit.ly/3sdDtGZ.

[9] Nasiha Salwati & David Wessel, *What are Build America Bonds or direct-pay municipal bonds?*, Brookings (Aug. 4, 2021), https://www.brookings.edu/%E2%80%8Carticles/what-are-build-america-bonds-or-direct-pay-municipal-bonds/.

staggering increase from the yearly percentage of taxable municipal bonds issued since 1986. In total, the $181 billion of BABs issued should have allowed state and local governments to save an estimated $20 billion in borrowing costs compared to issuing traditional tax-exempt bonds. *Id.* at 11.

From small issuers like Cass County School District in Nebraska, who used BABs to finance the construction of local schools, firehouses, and community centers, to large issuers like the Bay Area Toll Authority, who used BABs to finance major infrastructure initiatives, state and local governments used BABs to build up the American economy. Treasury Analysis at 6. They financed school construction, water and sewer improvements, hospital and other health care system upgrades, highway and mass transit investments, and energy transmission, generation, and distribution systems—the things that make our country go. About 30% of the money state and local governments raised in BABs went to educational facilities, 14% to water projects, 14% to roads and bridges, and 9% to transit.[10] These projects created jobs and stimulated the economy, fulfilling Congress's objectives.

II. Allowing federal administrative officials to renege on the federal government's obligation to refund interest payments to state and local issuers on BABs would have grave ramifications for our constitutional structure.

Until the end of 2012, the federal government kept its word, refunding 35% of interest payments due on

[10] *Id.*

BABs. This reciprocation was short-lived. In 2013, federal agencies decided to stop making the full 35% refund payments to BABs issuers. Ten years later, estimates based on Office of Management and Budget reports show that tax refund payments for BABs have already been cut by about $2.4 billion, with at least $1 billion more in cuts before sequestration ends at the end of FY 2031.[11]

Permitting the federal government to renege on promises specifically made to state and local governments—as the decision below would—not only strains state and local budgets but "would upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Canceling federal tax refund payments on BABs through an administrative interpretation of general spending legislation that does not clearly address BABs conflicts with the constitutional structure envisioned by the Framers and undermines principles of federalism and subsidiarity.

A. A lack of trust in the integrity of federal spending commitments and guarantees will hinder future intergovernmental cooperation.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Id.* at 457. The federal government is thus a "[g]overnment of limited powers," where States "retain substantial sovereign authority under our constitutional system." *Id.* at 457. This system of dual

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[11] Am. Pub. Power Ass'n, *Sequestration of Build America Bond Credit Payments* (Jan. 2022), https://bit.ly/3s9MUam.

sovereignty "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," "increases opportunity for citizen involvement in democratic processes," "allows for more innovation and experimentation in government," and "makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. Aside from these "numerous advantages," "a healthy balance of power between the States and Federal Government tends [to] reduce the risk of tyranny and abuse from either front." *Id.*

Although principles of federalism have been invoked by this Court to prevent the federal government from unduly coercing or displacing state and local governments, *voluntary* cooperation by states and localities with federal authorities to achieve national objectives has been treated as consistent with our constitutional structure. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167 (1992). Such arrangements reflect our unique system of federal and have rapidly proliferated to become a fundamental aspect of modern governance.[12] Indeed, such partnerships have become critical to implementing public policy in various of spheres and offer many advantages over federal-only efforts to implement new programs and policies nationally. A collaborative, intergovernmental approach leverages the diverse expertise and localized knowledge of states and localities—the boots on the ground—to tailor policies and programs that align with local conditions. Such partnerships may also

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[12] Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 668–73 (2001).

promote experimentation with innovative approaches to policy challenges.

The decision below would make this cooperation harder. Such partnerships are possible only if states and localities can trust the federal government to meet its fiscal commitments. The "bait and switch" entailed in the federal government's retreat from its commitments under the Build America Bonds program—powerfully denounced by Petitioners—will only foment distrust of its spending commitments and guarantees. The inevitable result is that states and localities will have less incentive to cooperate with federal authorities in implementing policy, potentially impairing the accomplishment of important national priorities.

This breakdown in intergovernmental relationships will have a ripple effect on federal policies and programs, including recent legislation that the current Administration is counting on to address pressing national challenges, such as rising prices, infrastructure development, climate change resilience, and energy security. Without state and local buy-in to such programs, federal policymakers may choose a more coercive—and less effective—approach to policy implementation, or they may resort to expanding direct federal involvement in various spheres of economic life, either of which poses constitutional risks.

B. Inducing states and localities into shouldering the financial burden of promoting federal policy aims would offend the same principles of federalism and subsidiarity implicated by federal commandeering of state and local fiscal decision-making.

"[T]he Tenth Amendment makes explicit that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *New York*, 505 U.S. at 155. Under this principle, the federal government likely could not direct state and local entities to issue long-term debt obligations or undertake particular infrastructure projects: "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161 (citation omitted).

Yet under the lower court's reasoning, the federal government can make explicit promises to state and local governments to induce investments in infrastructure, only to later renege on such commitments, leaving states and localities in a worse fiscal condition than had they used traditional public financing instruments or even reconsidered the projects altogether. Such an outcome can be described only as compromising the fiscal "sovereignty" of states and localities, which otherwise have the right to set priorities regarding taxing, borrowing, and spending—"core state functions" that many have understood to be constitutionally protected in one form or another. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S.

528, 563 (1985) (Powell, J., dissenting) (warning against losing the "unique benefits of a federal system . . . through undue federal interference in certain core state functions"); *see also State of New York v. Mnuchin*, 408 F. Supp. 3d 399, 418 (S.D.N.Y. 2019), *aff'd sub nom. New York v. Yellen*, 15 F.4th 569 (2d Cir. 2021) (discussing the "uncontroversial proposition" that "Congress may not directly interfere with the states' exercise of their sovereign tax powers").

The sequestration event challenged by Petitioners does not directly compromise such functions, but its circuitous method of harm is far from excused. After all, "what cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (cleaned up).

The unfortunate outcome allowed by the Federal Circuit's decision may also implicate another objection to federal commandeering of state and local fiscal decision-making processes: lack of political accountability. If state and local governments can be induced into financing infrastructure investments with potentially unmanageable long-term debt obligations, federal officials can take credit for improvements while evading blame for any subsequent fiscal distress. The public would not know where to direct criticism of spending choices and priorities. *See Printz v. United States*, 521 U.S. 898, 930 (1997) ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."); *New York*, 505 U.S. at 168 ("[W]here

the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). Such far-reaching structural consequences further support granting the Petition.

C. Allowing IRS officials to cancel tax refund payments to states and localities without a clear legislative mandate would empower an administrative agency not subject to the same "political safeguards of federalism" as Congress to undermine state and local fiscal stability.

The decision below would allow IRS officials to reduce tax refund payments to state and local issuers based only on sequestration guidelines derived from general spending legislation. The lack of state and local input into this administrative process compounds the injury to the constitutional structure.

Unlike Congress, federal administrative agencies are not subject to the "political safeguards" of state participation in the federal legislative process. *Cf. Garcia*, 469 U.S. at 550.[13] That is particularly true of a quasi-executive, effectively independent agency like the IRS, which is subject to minimal direct control by the President. Accordingly, even if it were true that "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity," *Baker*, 485 U.S. at 512, that principle would likely counsel against the Federal Circuit's

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[13] *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546 (1954).

reasoning here—where states and localities have been excluded from participation in the sequestration process.

Any decision that interprets generic statutory language to empower an agency like the IRS to create fiscal distress for states and localities raises constitutional alarm bells. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). This interpretation contradicts the long-established principle that exceptional clarity is required when Congress threatens to intrude upon a critical constitutional value by diminishing core state powers. *See, e.g.*, *Gregory*, 501 U.S. at 470 ("In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment."); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). In sum, the precedent set would conflict with over three decades of this Court's enhanced sensitivity to and protection of constitutional structure.

III. If the federal government's obligation to refund tax payments on BABs is not honored in full, state and local issuers will inevitably face difficult fiscal choices with unpredictable consequences for providing essential services.

Besides these constitutional problems, states and localities will face significant and adverse practical consequences. States and localities face mandatory fiscal constraints that require them to respond to tax refund payment cancellation with cuts to important services and projects.[14]

The lost revenue from BABs refund payments has major fiscal consequences for state and local issuers. All but one state has constitutional or statutory balanced budget requirements with varying stringencies.[15] Expecting to receive 35% refund payments—like Congress promised—state and local governments budgeted for money coming in that never did. Without the promised revenue, state and local governments were (and will be) forced to revise their budgets,

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[14] For a host of financial and contractual conditions, it is impracticable—if not impossible—for outstanding BABs issuers to adjust to the federal government's duplicity by refinancing the long-term debt obligations incurred under the BABs program on more favorable terms.

[15] Nat'l Ass'n of State Budget Officers, *Budget Processes in the States* 61–65 (2021), https://www.nasbo.org/reports-data/budget-processes-in-the-states (Table 9 and notes describing balanced budget requirements of all fifty states). Many local governments must also operate a balanced budget. *See, e.g.*, N.C. Gen. Stat. § 159-8(a); Wash. Rev. Code § 35.33.075.

decreasing the funds available to provide essential public services for their residents.

Indeed, the decision below fails to respect the parallel, long-standing state constitutional tradition—not inferior in dignity to its associated federal counterpart—which places explicit and enforceable fiscal limits on state and local governments.[16] Unlike the Federal government, which faces few, if any, legal limits on its ability to borrow and spend, states and localities cannot sustain large operating deficits over extended periods. This limitation compels them to carefully manage their budgets, allocate resources strategically, and prioritize essential services and projects that directly affect the well-being of their constituents. Confronted with fiscal distress, they must often curtail or postpone initiatives that might otherwise contribute to economic growth, infrastructure development, and public welfare.[17]

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[16] *See, e.g.*, Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 936–40 (2003).

[17] Moreover, unlike private entities, most governmental entities, including States, do not have access to a bankruptcy process that would legitimately allow them to shift some of the impact of fiscal distress onto creditors. Although some municipalities may be eligible to file for bankruptcy under Chapter 9 of the United States Bankruptcy Code under certain conditions, the municipal bankruptcy process still imposes many of the same difficult fiscal choices already mentioned. There is no way to escape the conclusion that the federal government's duplicitous cancellation of BABs refund payments will impact many state and local entities' ability to provide essential services. Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 Duke J. Const. L. & Pub. Pol'y 117, 153–62 (2012); *see* Michael McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual*

State and localities that find themselves in fiscal distress typically respond by suspending new capital projects, deferring maintenance on existing infrastructure, or leaving crucial positions in the public workforce unfilled. These short-term measures are necessary to comply with the above fiscal constraints but may have significant long- and short-term consequences for residents. Postponing maintenance, for example, could jeopardize the safety, functionality, and longevity of public assets, such as roads, bridges, buildings, and utilities. Similarly, leaving positions vacant can lead to workforce shortages, reduced service quality, and increased workloads for remaining staff members. Essential roles in public safety, healthcare, education, and infrastructure management may be particularly impacted.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Introduction to Municipal Bankruptcy, Univ. Chi. L. Rev. 425, 427–50 (1993).

Respectfully submitted,

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