No. 21-3787

In the United States Court of Appeals for the Sixth Circuit

STATE OF OHIO,

Plaintiff-Appellee,

v.

JANET YELLEN, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

Brief of Amicus Curiae New Civil Liberties Alliance in Support of Plaintiff-Appellee State of Ohio

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ John J. Vecchione

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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power and conditions imposed on spending as another means of legislating outside proper constitutional channels.[1] NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing amicus curiae briefs, and petitioning for a redress of grievances in other ways. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

Congress's practice of imposing "conditions" on federal spending is particularly disturbing. Far too often, Congress attaches conditions on the receipt of federal funds, thereby insidiously defeating constitutional guarantees. This historically unprecedented case goes even further and usurps core power exclusively assigned to the States—the power to change or reduce the taxation of its citizens. Worst of all, Congress has done so by ambiguous legislation and unconstitutional delegation to the

[1] No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

U.S. Department of Treasury ("Treasury"), which in turn published an Interim Rule that only compounds the constitutional injury. When Congress purports to tell States what laws their legislatures can—and cannot—pass, or what their tax policies must be, whether by law or agency regulation, it violates state sovereignty. This structural violation of the Constitution intrudes upon the States' core sovereignty to direct their own fiscal affairs and make choices about how to tax residents.

NCLA was founded to restore constitutional limits on administrative power and to protect the civil liberties of all Americans—including their right as citizens of the United States to be governed only by federal and state legislation passed via constitutional channels and their right as self-governing state citizens to have the States alone set tax policy in their respective legislatures. As explained below, Congress's attempted usurpation of state legislative powers, which were reserved to the several States by the enumeration of limited congressional powers and the Tenth Amendment, violates several bedrock provisions of the U.S. Constitution that define and constrain federal lawmaking.

INTRODUCTION

The condition in the America Rescue Plan Act of 2021 ("ARPA" or "the Act") that States accepting ARPA funds not reduce their own taxes upends the Constitution's structure. This result is true regardless of whether, as Ohio alleges, it is compelled to accept ARPA funding. Setting aside the coercive aspects of this scheme, the Constitution's limits are not alterable by private, state, congressional or executive

consent. Accordingly, the federal government cannot lawfully escape its constitutional bounds by purchasing the consent of any lesser body, whether individuals or States. In *New York v. United States*, 505 U.S. 144, 182 (1992), the Supreme Court recognized that "[w]here Congress exceeds its authority relative to the states, … the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." Looking at it through the lens of enumerated powers, the court concluded, "[s]tate officials … cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.*

Whatever else the Constitution permits, state taxation must remain firmly in the hands of locally elected legislatures. Taxation can be a source of deep discontent, as our Founding proved, and it is not only unconstitutional but dangerous to centralize control over taxes in the hands of federal officials, whether members of Congress, the Executive Branch, or both branches. The state electorate votes for *state* officials to decide—and be accountable for—state fiscal policy. Congress's arrogation of power over state taxation and delegation of it to the Treasury Department breaks that social compact, disenfranchises state electorates, and violates the Constitution as elucidated in *New York*.

BACKGROUND

ARPA, enacted on March 11, 2021, offers approximately $195 billion to States to assist with economic recovery from the Covid-19 pandemic. But there is a catch: States must not use the funds "to either directly or indirectly offset a reduction in the

net tax revenue of such State … resulting from a change in law, regulation, or administrative interpretation … that reduces any tax." 42 U.S.C. § 802(c)(2)(A). Treasury issued an Interim Rule on May 17, 2021, purporting to implement the Tax Cut Ban, and it invited comments regarding how the interim regulation may be revised in a future final rule. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) ("Interim Rule"). The Interim Rule concocted a convoluted four-step process whereby a State is required to estimate whether any change in law or policy reduces tax revenue and the amount of such reduction that was offset directly or indirectly by ARPA funds. 86 Fed. Reg. at 26,807-09. *See* 31 C.F.R. § 35.8 (b)(1)-(4). Treasury monitors state tax and spending and has the final say whether to seek recoupment of any reduction in tax revenue it considers to be "an evasion of the restrictions." 86 Fed. Reg. 26,810; 31 C.F.R. § 35.10.

ARGUMENT

I. CONGRESS CANNOT PURCHASE STATES' SOVEREIGN POWER OF TAXATION

A. The Tax Cut Ban Commandeers State Officials

The anti-commandeering doctrine serves as "one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). The Constitution "divides authority between federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181. It does so by "confer[ring] on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy*

v. NCAA, 138 S. Ct. 1461, 1476 (2018). No enumerated power in the Constitution confers authority upon Congress to pass statutes that direct, let alone micromanage, state tax policy. The Commerce Clause, by its very terms, does not, nor is ARPA either "necessary" or "proper" and thus authorized by the Sweeping Clause. U.S. Const., art. I, § 8, cl. 18.[2] The Supreme Court has recognized that state tax powers are a sphere of authority the federal government cannot invade and hence invading that province cannot possibly be necessary and proper to the exercise of an enumerated power.

B. Federal Direction of State Tax Policy Is a Structural Violation

Courts have affirmed some Spending Clause conditions under a contract-based theory of state consent. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). But that legal fiction is strained because state consent is almost always purchased by funds taken from the State's own tax base, *i.e.*, federal taxation of state citizens and businesses. There is no parity between contracting parties if one of those parties, the federal government, always has one of its hands in the pockets of its counterparties, the States. The district court correctly "recognized that unfettered use of [spending] power, especially when coupled with Congress's power to tax, could quickly alter the balance

[2] "The [Necessary and Proper] clause … restricts Congress to carrying into execution only the powers *vested* by the Constitution in different persons and parts of government. The clause thus reinforces vested powers and carefully does not authorize Congress to divest any part of government of its powers or to vest such powers elsewhere." PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER AND FREEDOM (2021), pp. 99-100 (emphasis in original).

of powers between the federal government and the States," *Ohio v. Yellen*, --- F. Supp. 3d ---, 2021 WL 2712220, at *11 (S.D. Ohio July 1, 2021) ("*Ohio II*").

Courts must therefore vigilantly police the boundaries of consent to ensure Spending Clause conditions do not violate the Constitution's structure. Two important limitations are relevant. *First*, Congress may not coerce States into accepting a spending condition by threatening to withhold return of large amounts of federal taxes taken from the States' own citizens and businesses. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) ("*NFIB*"). *Second*, the federal government may not use spending conditions to "direct the functioning of the state [government], and hence to compromise the structural framework of dual sovereignty." *Printz*, 521 U.S. at 932. As explained below, the Tax Cut Ban violates both limitations and thus unconstitutionally commandeers state officials.

The Supreme Court explains that commandeering is especially dangerous because "where the federal government compels states to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. Congress cannot direct States in their choices of how to govern; it cannot require them to carry out specific federal regulations; nor can it "require the States to govern according to Congress' instructions." *Id.* at 162, 178. The federal government simply lacks power to direct or command the States to adopt regulatory, spending, or other policies, whether by statute or administrative edict, and this "is true whether Congress directly commands

a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578.

Financial inducement crosses over into unconstitutional commandeering if it is so large it amounts to "a gun to the head." *Id.* at 581. Here, the $195 billion in Americans' tax dollars dangled by ARPA in front of the States exceeds 23% of state governments' revenue nationwide,[3] a sum that eclipses even the massive Medicaid funding held to be coercive in *NFIB*. Regarding Medicaid expansion, the Supreme Court held that "[t]he threatened loss of over 10 percent of a State's overall budget … is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582. The Tax Cut Ban's threat to withhold even larger amounts from states thus crosses the line into unconstitutional commandeering. The only federal court that has considered the Tax Cut Ban on coercion grounds agreed: Judge Van Tatenhove permanently enjoined the Tax Cut Ban as to Kentucky and Tennessee because he concluded the threat to withhold vast sums of ARPA funds transformed the Tax Cut Ban into an unconstitutional "'gun to the head' contract of adhesion." *Kentucky v. Yellen*, --- F. Supp. 3d ---, 2021 WL 4394249, at *4, 6 (E.D. Ky. Sept. 24, 2021) (quoting *NFIB*, 567 U.S. at 575).

[3] *See* National Association of State Budget Officers, Fiscal Survey of the States, (Fall 2020), 58, 64 ("current total estimate" of state revenue nationwide in 2021 is $838.8 billion, hence $195 billion in ARPA funds amounts to 23.25%.).

The unprecedented need for assistance arising from the Covid-19 pandemic combined with the dramatic financial carrot of ARPA funds makes it impractical for the States to refuse the enormous funding levels to which they are entitled under ARPA. Only the federal government has the means to provide such funds because it can raise taxes across the entire nation and because it can deficit spend, unlike most state governments cabined by balanced-budget requirements.[4] So, States are in no political or practical position to turn down the funds.

But it isn't just the size of the carrot that effectively demotes the States from independent sovereigns to mere federal foot soldiers—it is the price of surrender that also renders this scheme unconstitutional. The Tax Cut Ban is an attempt by Congress to purchase "the taxation authority of state government," which is "recognized as central to state sovereignty." *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). In *McCollough v. Maryland*, Chief Justice Marshall held that a State cannot tax a federal entity because "the power to tax involves the power to destroy." 17 U.S. 316, 431 (1819); *see also Providence Bank v. Billings*, 29 U.S. 514, 544 (1830) (recognizing "[t]he power of taxation is 'an incident of sovereignty;' and the government in whom it resides is alone competent, within its own jurisdiction, to judge and determine how, in what manner, and upon what objects that power shall be exercised.") (Marshall, C.J.). Here, running in the other direction, the federal government's insistence that States maintain

[4] *See* Tax Policy Center, *What are State Balanced Budget Requirements and How Do They Work?* (2015), *available at* https://tinyurl.com/z8u6tdne.

their current level of taxation for a span of about three years, makes the violation equally structural.

In prior commandeering cases, federal intrusion had been limited to a particular area of state government decision-making—*New York* concerned disposition of nuclear waste and *Printz* concerned gun control. The Tax Cut Ban, however, is not so limited because tax policy affects *every* aspect of state government. The Tax Cut Ban further seeks to control States' spending powers, since spending levels to support various state programs determine whether a State can pay for a reduction in tax revenue using non-ARPA funds. *See* 31 C.F.R. § 35.8. A State must consult Treasury's rule to test its every policy decision or else risk clawback. Even after such consultation, the answer may still elude the State, which must then rely on the mercy of its federal master. Without full state control over tax and spending policy, the Constitution's guarantee of dual sovereignty transforms into a "Mother may I" relationship between the States and the federal government. If federal courts were to agree that the political branches possess the power to control state taxes, the courts would greenlight the destruction of federalism.

It makes no difference that the instrument of such destruction is a spending condition to which a State has agreed, as opposed to a direct federal mandate. Under the Tax Cut Ban, the federal government imposes high tax rates on residents and businesses of the 50 States and then offers each State a portion of those federal proceeds to purchase control over that State's tax and spending policies. Because a

State's tax and spending powers are so integral to sovereignty, purchasing such powers is tantamount to purchasing state sovereignty itself. But that is simply not permitted under the Constitution's dual-sovereign structure: irrespective of the amount of money being offered, a State can no more sell its sovereignty than an individual can contract him or herself into bondage.

The Supreme Court has long acknowledged the clear danger posed to federalism by the unfettered use of federal tax power, on one hand, and spending power on the other. The line between legitimate and abusive spending power is drawn best in *United States v. Butler*, 297 U.S. 1 (1936). Where Congress has no enumerated power to legislate, it "may not indirectly accomplish those ends by taxing and spending to purchase compliance." *Id.* at 74. If the taxing and spending powers are not so limited, they "would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.* at 75.

More recently, the Supreme Court has refined this analysis, holding that Congress may "grant federal funds to the States, and may condition such grants upon the States' taking certain actions that Congress could not require them to take." *NFIB*, 567 U.S at 581-82 (internal quotation marks omitted). But the Court also "recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives … . 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 576. As such, spending conditions must not be imposed coercively,

and "Spending Clause legislation [must] not undermine the status of the States as independent sovereigns in our federal system." *Id.* at 577.

If these limits are to mean anything at all, they must prohibit the Tax Cut Ban. Congress says to the States, here is an offer you can't refuse: we know you are over the barrel for funds to fight the pandemic and its economic consequences, so surrender your sovereignty, account to us for your legislation and stewarding of the public fisc, and if you are lucky and your legislation over the next several years passes muster with us, we won't throw your certifying public officials in jail.[5] It is hard to envision a more coercive scheme or one more injurious to state sovereignty.

C. Commandeering Infringes Americans' Right of Self-Government at the State Level

The Tax Cut Ban also offends the Constitution's requirement that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV, § 4, cl. 1. Whatever else this provision secures, it at least protects Americans from federal interference in their freedom of elective self-government in the States. Even an elected government is not "Republican" if it is deprived of the power to enact its own laws. Federal efforts that disrupt the fiscal powers essential to *all aspects* of such a government are surely anathema to the Guarantee Clause.

[5] Possible criminal consequences exist under ARPA because state officials signing the initial certification in 42 U.S.C. § 802(d)(1) could be subjected to criminal fraud penalties if federal officials disagree with the accuracy of the certification. *See* 18 U.S.C. § 287.

"[T]he Constitution divides authority between federal and state governments for the protection of individuals," and a "healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 180-81 (alteration in original)). "'[T]his is not division for division's sake.' At its founding, the Framers insisted upon these state and federal checks and balances to protect and preserve individual liberty." *Ohio II*, 2021 WL 2712220, at *1.

No constitutional provision authorizes the federal government to abridge the state power to cut taxes. Article I, Section 10, Clause 2 of the Constitution provides: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." This is the sole express restriction on state taxing power in the Constitution, and it is flatly inapplicable to defend the validity of a broadly interpreted Tax Cut Ban to bar any state tax reduction during the "covered period."

The Import-Export Clause even prescribes where any state inspection-related revenues must be deposited: "[T]he net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." *Id.* This, along with the fact that the Constitution carefully defines in several provisions the extent of federal tax power, reveals that the Framers knew how to limit tax powers when they wanted to. *See* U.S. Const. Art. I, § 8, cl. 1; *id.* Art. I, § 9, cl. 1, 4, 5; amend.

XVI. Constitutional silence thus dictates that Congress must respect state prerogatives to tax or relieve tax burdens as the States see fit, as long as they do not run afoul of other, broad-gauge constitutional restrictions (*e.g.*, by trenching upon the rights of due process or equal protection).

Further restrictions on state tax power cannot be read into the Constitution. "The fact of a single exception [to offset state inspection laws] suggests that no other qualification of the absolute prohibition was intended." *Richfield Oil Corp v. State Corp. of Equalization*, 329 U.S. 69, 76 (1946). *See Dep't of Revenue of State of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 759-60 (1978) (the Import-Export Clause does not even bar all forms of state taxation on imports and exports but only those that qualify as "imposts" or "duties"). Under this constitutional brand of *expressio unius* reasoning, even if both (a) the Tax Cut Ban were not ambiguous but clearly banned state tax reductions;[6] *and* (b) a State somehow opted to earmark any new ARPA monies it received to fund a reduction in a preexisting state tax, the State Tax Cut Ban would still be unconstitutional.

D. Courts Have a Duty to Uphold the Law, Including the Constitution, and Cannot Abandon States to the "Political Safeguards of Federalism"

By vesting Congress with only limited federal powers, the Constitution simultaneously protected the States and individuals from federal incursions into the

[6] But the Tax Cut Ban, in fact, is unclear and ambiguous and remains so after Treasury's Interim Rule. *See* Argument Section II.A, *infra*.

spheres of state sovereignty on the one hand and private rights on the other. But even while protecting state sovereignty, the Constitution indirectly secures individual rights as well, for what is called *federalism* is, at the most fundamental level, the freedom of individuals to enjoy localized self-government. Federalism is itself a matter of guaranteeing personal liberty. *See NFIB*, 567 U.S. at 536 ("[F]ederalism protects the liberty of the individual from arbitrary power.") (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).

Judges have a duty to uphold these freedoms. The federal government increasingly dictates state policy on matters far outside federal authority and of inherently localized concern, such as state taxation, land use, and K-12 education. *See* HAMBURGER, PURCHASING SUBMISSION, at 139-41. Indeed, federal conditions have restructured internal state governance in line with federal administrative models. *See id.* at 41-45. So, the notion that States can protect themselves politically is an illusion. *See id.* at 137-39. When States are denied constitutional protection in the courts, as the States of Missouri and Arizona were when courts denied them standing to enforce the structural integrity of their fiscal powers,[7] individuals are profoundly affected.

Political power is not a substitute for law. The Constitution was adopted precisely to enable Americans and their institutions to rely on law in place of mere power or

[7] *See Arizona v. Yellen*, 2021 WL 3089103 (D. Ariz. July 22, 2021); *Missouri v. Yellen*, 2021 WL 1889867. (E.D. Mo. May 11, 2021).

force. As put by Justice Marshall, it is "emphatically" the duty of the judges "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Judges must not abdicate their constitutional role to enforce the Constitution when States come into court. To do so is to abandon judicial duty, misunderstand the political process, and lawlessly expand federal power, thereby demolishing federalism and the individual freedom it safeguards.

II. THE TAX CUT BAN'S IRREDEEMABLE AMBIGUITY CANNOT BE CURED BY REGULATION

A. The Tax Cut Ban Is Ambiguous on Its Face

"[I]f Congress desires to condition the States' receipt of federal funds, it must do so unambiguously." *South Dakota v. Dole*, 483 U.S. 203, 203 (1987). This requirement ensures States' knowing consent on which the constitutionality of Spending Conditions rests. *Pennhurst*, 451 U.S. at 17. "States cannot knowingly accept conditions of which … they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). Additionally, a clear statement that is "plain to anyone reading the [statute]" is needed where, as here, the condition, infringes on federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). *Gregory*'s clear-statement rule "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

ARPA, however, does not define the ambiguous and amorphous term "directly or indirectly" at all. The term is thus open to speculation, to post-distribution-of-funds

rulemaking (as already exists in Treasury's Interim Rule), to recoupment demands, or to other enforcement actions that could be brought against the States.

From one perspective, the key verb in the Tax Cut Ban is "offset." The most natural reading of "offset" requires an *explicit one-to-one matching* of state tax reductions during the "covered period" with the federal "funds provided under this section," and so would continue to allow state tax cuts that have nothing to do with receiving ARPA COVID-relief funds.[8] The Treasury appears to have adopted this interpretation when ARPA was enacted. *See* Laura Davison, *Treasury Clears States to Cut Taxes—But Not With Stimulus*, BLOOMBERG (Mar. 18, 2021), *available at* https://tinyurl.com/2s5eb6fv; Letter from Janet L. Yellen to 21 State Attorneys General (Mar. 23, 2021), *available at* https://tinyurl.com/tsn9t9a7 ("[T]he Act does not deny States the ability to cut taxes in any manner whatsoever. It simply provides that funding received under the Act may not be used to offset a reduction in net tax revenue resulting from certain changes in state law.") (cleaned up).

But from another perspective, the provision can also be read more broadly because it restricts state power "directly or indirectly." Under this view, *any* reduction

[8] *See* OXFORD ADVANCED AMERICAN DICTIONARY, defining "offset" as "*to use* one cost, payment, or situation to cancel or reduce the effect of another," *available at* https://www.oxfordlearnersdictionaries.com/us/definition/english/offset_1?q=offset (emphasis added); *see also* MERRIAM-WEBSTER DICTIONARY (defining the verb "offset" as "*to place over against something*" and "offset" in noun form as "something that serves to counterbalance or to compensate *for something else*," *available at* https://www.merriam-webster.com/dictionary/offset (emphasis added)).

in net tax revenue would be "indirectly" offset by fungible ARPA monies, and therefore no net tax reduction would be permitted. This appears to have been swing-vote Senator Manchin's reason for supporting the Tax Cut Ban. *See* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts*, N.Y. TIMES (Mar. 12, 2021), *available at* https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html. The open choice between these two interpretations—and everything in between—thus represents just the first of several fatal ambiguities under the *Dole* test currently applied by the Supreme Court to define proper Spending Clause restrictions on deals with States.

Pre-suit communications between the States and Congress on the one hand and Treasury on the other initially disclaimed that Treasury possessed free rein to choose between the two interpretations. Secretary Yellen assured Arizona that States would be "free to make policy decisions to cut taxes" so long as they do not "use the pandemic relief funds to pay for those tax cuts." Arizona Complaint in *Arizona v. Yellen*, No. 2:21-cv-00514-SMB, Dkt. #1, ¶ 3 (Mar. 25, 2021), *available at* https://tinyurl.com/rwp8jeks. But when pressed by Senators on what that statement means in a world where money is fungible and tax cuts are not paid for by invoice, she admitted that the issue is "thorny," introducing unconstitutional ambiguity. Hearing on CARES Act Quarterly Report, Sen. Banking, Hous. & Urb. Affairs Comm. (Mar. 24, 2021), *cited in* Rep. in Support of Mot. for a Prel. Inj., 2-3, in *Ohio v. Yellen*, 1:21-cv-00181-DRC, Dkt. #30, *available at* https://tinyurl.com/2wwfjz3r. In an exchange at that hearing about the Act's

bar on using relief funds that would even "indirectly" offset a revenue decrease, given the "fungibility of money," the Secretary conceded that it is "hard … to answer" exactly how ARPA may "hamstr[i]ng" the States. Toby Eckert, *Yellen: Treasury Faces 'Thorny Questions' About Restrictions On State Tax Cuts*, Politico (Mar. 24, 2021), *available at* https://tinyurl.com/4vmrpajz.

Treasury could not even articulate the meaning of the Tax Cut Ban in this litigation and conceded "the Tax Mandate may be ambiguous." *Ohio v. Yellen*, --- F. Supp. 3d ---, 2021 WL 1903908, at *13 (S.D. Ohio May 12, 2021) ("Ohio I"). On appeal, Treasury argues clarity is unnecessary and points to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which bars federal-assistance recipients from burdening religious exercise unless such burden "is the least restrictive means of furthering [a] compelling governmental interest." Doc. 18 at 22 (quoting 42 U.S.C. § 2000cc-1(a), (b)(1)). This argument is unavailing because RLUIPA provides a judicially administrable standard, which is similar to contractual standards, such as "best efforts," routinely enforced by courts. *See, e.g., First Union Nat. Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 172 (2003) ("Best Efforts Not Too Vague To Be Enforceable").

In contrast, "indirect offset" is indecipherable. The district court in this case stated that "it could not ascertain what an indirect offset may (or may not) be. And the Court was not alone in its bewilderment. At oral argument …, the Secretary declined to take any position on that term either. Perhaps unsurprisingly, Ohio too expressed confusion regarding the contours of the phrase." *Ohio II*, 2021 WL 2712220, at *14. In

other words, neither (1) the district court, nor (2) the Secretary of Treasury, nor (3) the State of Ohio could figure out what the Tax Cut Ban means. "The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577 (internal quotation marks and citations omitted). The Tax Cut Ban flunks the ambiguity test because it offers up only a black box.

B. The Nondelegation Doctrine Prohibits Treasury from Clarifying the Tax Cut Ban Through Regulation

Treasury argues in this and related ARPA litigation that clarity is not needed because "Congress authorized Treasury Department 'to issue such regulations as may be necessary or appropriate to'" resolve the Tax Cut Ban's ambiguities. Doc. 18 at 10 (quoting 42 U.S.C. § 802(f)). This view, however, would amount to an unconstitutional delegation of Spending Clause and other legislative powers.

"Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 473 (2001) (cleaned up). Accordingly, it is Congress rather than an agency that must clearly articulate Spending Clause conditions. *Texas Educ. Agency v. United States Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021) ("The needed clarity cannot be [agency] provided—it must come directly from

the statute"). An agency may sometimes supply administrative details, but only if, as was the case in *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 666 (1985), "[t]he requisite clarity … is provided by [the statute]" in the first place. Here, the statute is hopelessly vague.

Where Congress delegates regulatory power to an agency, it must supply "an intelligible principle to guide the [agency]'s use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). While the Supreme Court is split regarding the precise parameters of the intelligible-principle test, *see id.* ("'intelligible principle' was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details") (Gorsuch, J. dissenting), there can be no doubt the Tax Cut Ban fails. When the district court attempted to decipher the Tax Cut Ban's text, it was forced to throw up its hands and say: "the Court cannot fathom what it would mean to 'indirectly offset a reduction in the net tax revenue' of a State, by a 'change in law … that reduces any tax.'" *Ohio I*, 2021 WL 1903908, at *12 (quoting 42 U.S.C. § 802(c)(2)(A)). A second round of briefing only "confirm[ed] the [district] Court's suspicion that the phrase is *unintelligible*." *Ohio II*, 2021 WL 2712220, at *14 (emphasis added).

Treasury's contention that ARPA authorizes it to "issue such regulations as may be necessary or appropriate" to implement the "unintelligible" Tax Cut Ban, ECF No. 19 at 32 (quoting 42 U.S.C. § 802(f)), is thus foreclosed as a "sweeping delegation of legislative power," *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646

(1980) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)). In *American Petroleum*, the Supreme Court rejected the Secretary of Labor's argument that the Occupational Safety and Health Act authorized him to promulgate regulations that were "reasonably necessary or appropriate to provide safe or healthful employment." *Id.* at 640-41 (quoting 29 U.S.C. § 652(8)). As the D.C. Circuit in *International Union v. OSHA* explained, authorizing an agency to regulate in whatever manner it deems "necessary or appropriate" to achieve vague policy objectives, such as workplace health and safety, would "raise a serious nondelegation issue" and thus must be rejected. 938 F.2d 1310, 1317 (D.C. Cir. 1991). Treasury's reliance on the same "necessary or appropriate" standard in 42 U.S.C. § 802(f) to regulate in furtherance of an equally vacuous anti-tax-cut objective likewise fails. *See* n.2 *supra*.

"If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be 'specific and detailed.'" *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 536 (2009). The ambiguities in the Tax Cut Ban, however, are so vast that allowing Treasury to resolve them would essentially rewrite the statute to say: "the Secretary may recoup ARPA funding to the extent that the Secretary determines, *in her discretion*, that [a tax] rate reduction resulted in the State losing tax revenues, and the Secretary further determines, *in her discretion*, that those losses were offset with ARPA funding," whether directly or indirectly. *Ohio II*, 2021 WL 2712220, at *14 (emphases added). Because it is

impossible to discern what indirectly offsetting a reduction in tax revenue with ARPA funds means, this grant of power would be devoid of any intelligible boundaries on Treasury's discretion, let alone a "specific and detailed" delegation.

Treasury cannot supply its own boundaries to self-license this unconstitutional discretion. "The idea that an agency can cure an unconstitutionally standardless delegation of power" is "internally contradictory." *Am. Trucking*, 531 U.S. 457, 473. This is because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority." *Id.* Courts and States are unable to ascertain what the Tax Cut Ban requires. *Ohio II*, 2021 WL 2712220, at *14. Nor does Treasury have special insight into the Tax Cut Ban's unintelligible requirements—it has repeatedly professed confusion on that count. *See, e.g.*, *supra* at Argument Section II.A. Hence, Treasury's attempt to "clarify" such requirements through regulation would amount to an impermissible enactment of its own agency-created Spending Clause condition, in clear breach of the Constitution's separation-of-powers safeguards.

The district court ultimately applied the "major questions" doctrine to conclude that Congress did not intend for Treasury to resolve deep questions of "economic and political significance" presented by the Tax Cut Ban. *Ohio II*, 2021 WL 2712220, at *20. However, the "major questions doctrine [merely serves] the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J. dissenting). Hence, its crux is

not intent but divesting: a clear statement is needed to authorize agency resolution of "major questions" not simply to evince Congressional intent but also because such statement would contain administrable guidelines to prevent the delegation from crossing into unconstitutional divesting of legislative power. Here, the absence of guidelines transforms ARPA into an enabling act that grants Treasury unbounded discretion to determine what is an "indirect offset" subject to recoupment.

The Interim Rule Treasury promulgated confirms this conclusion. Instead of providing clarity, it only further beclouds the Tax Cut Ban and illustrates the need for clear statutory boundaries. The power Treasury gave itself in 31 C.F.R. § 35.10 to recoup state tax cuts that, in its judgment, have not been "paid for," *see* 86 Fed. Reg. at 26,808 and 26,810, offers the easiest way to see that the Interim Rule fails to purge ambiguity out of the ARPA deal. The Interim Rule establishes a burdensome and convoluted four-step process by which States must report the effect on tax revenue of every change in law or policy and whether any net reduction is being paid for with spending cuts, as opposed to ARPA funds. 31 C.F.R. § 35.8. But at the end of the day, Treasury has the final say: "If … a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury may consider such change to be an evasion of the restrictions of the offset provision and seek recoupment." *Id.* at 26810. Under this catch-all power, which simply restates ARPA's unintelligible "indirect offset" language, Treasury would be free to

consider "all relevant facts and circumstances" in deciding whether to seek recoupment for unpaid-for tax cuts. *Id.*

This arrogation of power cloaks Treasury's system behind a dark and mysterious curtain and is particularly insidious because executive enforcement choices are often unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 833 (1985). The unintelligible Tax Cut Ban, combined with the standardless discretion Treasury has conferred on itself to consider "all relevant facts," thus gives Treasury nearly unchecked and uncheckable power over how, when, and against which States it will choose to claw back billions in ARPA funds. The potential for abusive and arbitrary enforcement is deeply troubling. Treasury's enforcement decisions are largely beyond review, and there is nowhere for a State to turn if that power is used for political or other illegitimate purposes—or even if that power is just executed incompetently. This policy reason alone proves that Congress has gone beyond its enumerated powers and has created the potential for arbitrary prerogatives historically exercised by a royal sovereign—powers that are expressly forbidden to the federal government by the Constitution.

CONCLUSION

The Tax Cut Ban runs afoul of a host of constitutional provisions and legal doctrines. But ultimately, this case is not only about *Dole*, *NFIB*, clear statements, ambiguity, reasonable relationships, coercion, commandeering, or this breathtaking federal arrogation of power—though the very wealth of offended doctrines stands as

sure proof that a critical underpinning of federalism and state sovereignty has been eviscerated. Indeed, the very structure of American government is at stake.

Congress knows that it could never hope to defend legislation that explicitly shifted control of state budgets to the federal government. This attempted federal regulation of Americans' state fiscal decisions through conditions on federal largesse, rather than through law, is "an irregular pathway of government control" that displaces *both* the lawful exercise of state power over the States' own fiscs *and* Americans' right to vote for those who will lawfully make those decisions. *See* HAMBURGER, PURCHASING SUBMISSION at 11; *see also New York*, 505 U.S. at 169 ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."). The Founders would recoil at the idea that Congress would use massive federal levies on state residents and businesses coupled with massive deficit spending to create an enormous pot of tax proceeds that could be used to purchase state submission to federal control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, an electronic copy of the foregoing *amicus curiae* brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,465 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

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