No. 22-10168

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF THE TREASURY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND 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.

Pursuant to Eleventh Circuit Rule 26.1-1 and 26.1-2, the undersigned counsel certifies that there are no persons who may have an interest in the outcome of this case other than those persons already listed in Appellants' January 27 Certificate of Interested Persons, Appellees' February 18 Certificate of Interested Persons, and Appellants' February 23 Amended Certificate of Interested Persons

/s/ Richard Samp
Richard Samp

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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, which in turn published a Final Rule that only compounds the constitutional injury. When Congress purports to tell States what their tax policies must—or cannot—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 their 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 by the Tenth Amendment, violates bedrock provisions of the U.S. Constitution that define and constrain federal lawmaking.

INTRODUCTION

The condition in the American Rescue Plan Act of 2021 ("ARPA" or "the Act") that States accepting ARPA funds must not reduce their own taxes upends the Constitution's structure. This result is true regardless of whether, as the States allege, they are coerced into accepting ARPA funding, because 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 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 state taxes in the hands of federal officials. The state electorate votes for state officials to decide—and be held 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 by the Court in *New York*.

BACKGROUND

ARPA, enacted on March 11, 2021, offers approximately $195 billion to States and their residents 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 a Final Rule on January 27, 2022, purporting to implement the Tax Cut Ban, after inviting comments on a nearly identical Interim Rule. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4,338 (Jan. 27, 2022) ("Final Rule"); *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) ("Interim Rule"). The Final Rule adopted the Interim Rule's convoluted four-step process whereby a State is required to estimate and report to Treasury whether any change in state law or policy reduces tax revenue and the amount of such reduction that was offset directly or indirectly by ARPA funds. 87 Fed. Reg. 4,426-28; *see* 31 C.F.R. § 35.8 (b)(1)-(4). A fifth step gives Treasury the final say based on its consideration of "all relevant facts and circumstances" whether to recoup any reduction in tax revenue it identifies as violating the Tax Cut Ban. 87 Fed. Reg. 4,438; 31 C.F.R. § 35.10.

ARGUMENT

I. SECTION 802(c)(2)(A) USURPS STATES' TAXATION POWERS

Treasury insists that "by its explicit terms," § 802(c)(2)(A) "does not prohibit a State from cutting taxes; it merely prohibits a State from using the new federal funds to pay for a reduction in net tax revenue." Appellants' Br. at 6. Read in isolation, a prohibited "offset" under § 802(c)(2)(A) could mean *direct one-to-one matching* of state tax reductions with ARPA funds, thus permitting tax cuts that are not directly paid for with such funds. But that verb cannot be read in isolation because it is modified by the phrase "either directly *or indirectly*." 42 U.S.C. § 802(c)(2)(A) (emphasis added).

Because "[m]oney is fungible, … *any* ARPA funds the Plaintiff States receive could be viewed as indirectly offsetting *any* reduction in net tax revenue from a change in state law or policy. After all, a decrease in one part of a state's revenue is necessarily offset somehow to achieve a balanced budget." *West Virginia v. U.S. Dep't of Treasury*, 2021 WL 5300944, at *15 (N.D. Ala. Nov. 15, 2021) (emphases added). This appears to have been swing-vote Senator Manchin's motivation in adding the provision. *See* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts*, N.Y. TIMES (Mar. 12, 2021).[2] A Ninth Circuit panel expressed the same intuition during oral argument in another ARPA case: "I mean money is a very fungible object. So, if the State is not spending its money to fight COVID, and it's using $4 billion of federal government money to fight COVID, the $4 billion it's saving could be used to cut taxes. That would arguably be an indirect use and contrary to the statute." *Arizona v. Yellen*, No. 21-16227, Oral Argument at 25:55 (9th Cir., Jan. 13, 2022).[3] Counsel for Treasury in that case agreed that "Congress used the phrase 'directly [or] indirectly' to make clear the condition is a broad one. Because money is fungible, a State can't take these federal funds, use them to reduce its own spending, and use that saving to pay for a tax cut." *Id.* at 40:30. The fungibility of money means § 802(c)(2)(A) effectively prohibits States

[2] Available at https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html.

[3] Available at https://www.ca9.uscourts.gov/media/video/?20220113/21-16227/.

from reducing their net tax revenue. Therefore, that provision is properly understood to comprise a Tax Cut Ban for States that accept ARPA funds.

In this case, Treasury's contention that the prohibition against net tax reductions "is not implicated" "if a State offsets tax cuts by other means—such as by revenue derived from macroeconomic growth, by tax increases, or by spending cuts in areas in which the State is not using the [ARPA] funds" misses the point. *See* Appellants' Br. at 7. There is obviously no *net* reduction if States increase their tax revenue due to "macroeconomic growth" or impose "tax increases." Treasury thus makes the wholly irrelevant point that the Tax Cut Ban does not prohibit States from collecting additional tax revenue. Treasury also claims that tax cuts are permissible if paid for by "spending cuts in areas where the State is not spending [ARPA] Funds." *Id.* But as the district court explained, Treasury "does not define 'areas'" from which such spending cuts can come. 2021 WL 5300944, at *18. In any event, "because the Final Rule 'provides benefits across several areas' due to the breadth with which ARPA funds can be used, few [if any] 'areas' of State spending will be suitable candidates for spending cuts that could offset a decrease in revenue." *Id.* (quoting 86 Fed. Reg. at 26,816). The inescapable conclusion is that Congress has used revenue raised through federal taxation of States' residents and businesses to purchase States' sovereign taxation power.

II. 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).

The Tax Cut Ban unconstitutionally commandeers state tax policy, and Treasury's Final Rule compounds this violation by forcing state officials to establish and staff an unwanted and convoluted accounting-and-reporting bureaucracy. 87 Fed. Reg. 4,426-28; *see* 31 C.F.R. § 35.8 (b)(1)-(4). 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. ARPA is neither "necessary" nor "proper" and thus it also cannot be authorized by the Sweeping Clause. U.S. Const., art. I, sec. 8, cl. 18.[4]

[4] "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).

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 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, has its hands in the pockets of its counterparties, the States. Accordingly, "unfettered use of [spending] power, especially when coupled with Congress's power to tax, could quickly alter the balance of powers between the federal government and the States." *Ohio v. Yellen*, 547 F. Supp. 3d 713, 729 (S.D. Ohio July 1, 2021) ("*Ohio II*"), *appeal pending*.

Courts therefore must police the boundaries of consent vigilantly 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 the return of large amounts of federal taxes taken from the States' own citizens and businesses. *See 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 traduces both limitations.

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. "The 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. Here, the $195 billion in Americans' tax dollars dangled in front of the States exceeds 23% of state governments' revenue nationwide,[5] a sum that eclipses even the massive Medicaid funding held to be coercive in *NFIB*. *See Kentucky v. Yellen*, --- F. Supp. 3d ---, 2021 WL 4394249, at *4, 6 (E.D. Ky. Sept. 24, 2021) (holding that unconstitutional coercion occurs where spending condition threatened States with loss "amounts equal to roughly *one-fifth* of their general

[5] *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%.).

fund revenues for the preceding year.") (Emphasis in original). There can be no doubt the threat to withhold the return of such vast sums—collected in large part by the federal government from States' own residents—transforms the Tax Cut Ban into an unconstitutional "'gun to the head' contract of adhesion." *Id.* at *6 (quoting *NFIB*, 567 U.S. at 575).

But it isn't just the size of the carrot that demotes States from independent sovereigns to mere federal vassals—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). So too here, running in the other direction, the federal government's insistence that States maintain their current level of net taxation is equally destructive of sovereignty. *See 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.).

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* involved 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(b)(4). 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 may control state taxes, they would greenlight the destruction of federalism.

It makes no difference that the instrument of such destruction is a spending condition to which a State nominally consented, 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 mess of pottage or the vast sums at stake herein); a State can no more sell its sovereignty than an individual may lawfully 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. Otherwise, Congress's tax-and-spend powers "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 a grant 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 mean anything at all, they must prohibit the Tax Cut Ban.

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

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.

"[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*, 547 F. Supp. 3d at 717.

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 the federal government's defense of a broadly interpreted Tax Cut Ban as a valid prohibition against 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 Controul 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 the taxing powers of States 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 beyond the Import-Export Clause 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]

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

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 May Not 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 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, as the States of Missouri

and Arizona were when courts held they lacked 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 force. As put by Chief 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 eviscerating federalism and the individual freedom it safeguards.

III. REGULATION CANNOT CURE THE TAX CUT BAN'S IRREDEEMABLE AMBIGUITY

A. The Tax Cut Ban Is Ambiguous on Its Face

Setting aside for a moment that Congress may never purchase state taxation power, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously[.]" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). This additional requirement ensures States' knowing consent on which the constitutionality of Spending Conditions rests. *Pennhurst*, 451 U.S. at 17. "States cannot knowingly accept

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

conditions … 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). A clear statement that is "plain to anyone reading the [statute]" is especially 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).

The Tax Cut Ban's condition that States must not use ARPA funds to "indirectly offset" a net tax revenue reduction has proven indecipherable to courts. The district court "determined that the Tax Mandate falls short of the clarity required when Congress exercises its powers under the Spending Clause." *West Virginia*, 2021 WL 5300944, at *19. The Southern District of Ohio likewise "could not ascertain what an indirect offset may (or may not) be. And the Court was not alone in that [bewilderment]. At oral argument …, the Secretary declined to take any position on that term either." *Ohio II*, 547 F. Supp. 3d at 732.

Treasury's own ever-shifting interpretations reinforce the Tax Cut Ban's ambiguity. In *Missouri*, 538 F. Supp. 3d at 910, the State objected that a "broad interpretation [of § 802(c)(2)(A)] would prohibit a State from enacting any tax-reduction policy that would result in a net reduction of revenue[.]" Treasury persuaded the court there was no alleged injury to Missouri's taxation authority by "explicitly assert[ing] that [it] do[es] not agree with the 'broad interpretation' proposed by Missouri." *Id.* at 910,

914. Treasury took the same position in Arizona's ARPA case, claiming in its brief that "'directly' and 'indirectly' are adverbs that cannot alter the meaning of the word that they modify (here, 'offset')." *Arizona v. Yellen*, No 21-cv-00514-DJH, Dkt. 31 at 18 (Apr. 30, 2021). But then it argued on appeal that "Congress used the phrase 'directly and indirectly' to make clear the [offset] condition is a broad one. … That's not ambiguous, they just don't like it's a broad condition." *Arizona v. Yellen*, No. 21-16227, Oral Argument at 40:30 (9th Cir, Jan. 13, 2022).[8] Treasury's Final Rule, published two weeks after the *Arizona* oral argument, also adopts a broad interpretation in which "offset" is modified by "indirectly," contradicting Treasury's prior interpretation to inflict the very injury Treasury disclaimed in the Missouri and Arizona cases. 87 Fed. Reg. 4,424 ("[B]ecause 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[.]").

Remarkably, Treasury attempts to reverse course once again in this case to assert that "[t]he phrase 'directly or indirectly' simply underscores that a State cannot circumvent Congress's restriction on the use of federal funds through a mere formality" and that "[e]ven if that phrase were stricken from [§ 802(c)(2)(A)], the restriction on using federal funds to 'offset' a reduction in net tax revenue would properly be read to

[8] Available at https://www.ca9.uscourts.gov/media/video/?20220113/21-16227/.

mean the same thing." Appellant's Br. at 13. To summarize, Treasury first said "indirectly" unambiguously does not modify "offset," then it said "indirectly" unambiguously broadens "offset," and now it reverts to its original interpretation. "The legitimacy of Congress's exercise of the spending power … 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). A State cannot voluntarily and knowingly accept a condition that Treasury interprets narrowly one day, broadly the next, and narrowly again the day after that.

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

In addition to arguing that the Tax Cut Ban is somehow both unambiguously narrow and unambiguously broad, Treasury contends in this case that the Tax Cut Ban "may be largely indeterminate." RE 76 at Page 25 (cleaned up). According to Treasury, Congress merely needs to notify States of "the existence of [an indeterminate] condition" and leave it to "[a]gencies responsible for implementing statutory conditions … [to] resolve such details by regulation." Appellants' Br. at 16-17 (citations and internal quotations marks omitted). This approach, however, would amount to an unconstitutional delegation of legislative and Spending Clause 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."). While an agency may sometimes supply administrative details, *see* Appellants' Br. at 14-15 (citing *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 666 (1985)), that is possible only if "[t]he requisite clarity … is provided by [the statute]" in the first place. *Bennett*, 470 U.S. at 666; *see also Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (adopting Judge Luttig's dissenting opinion at the panel stage to conclude that *only* statutory language, not any regulatory follow-on, matters for Spending Clause clarity purposes).

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 it. When the Southern District of Ohio 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 v. Yellen*, 539 F. Supp. 3d 802, 818 (S.D. Ohio, May 12, 2021) (*Ohio I*) (quoting 42 U.S.C. § 802(c)(2)(A)). A second round of briefing "further confirm[ed] the [district] Court's suspicion that the phrase is *unintelligible*." *Ohio II*, 547 F. Supp. 3d at 733 (emphasis added).

Treasury's contention that ARPA authorizes it to "issue such regulations as may be necessary or appropriate" to implement the otherwise 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.

"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*, 547 F. Supp 3d at 734 (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 "specific and detailed" ones. *Fox*, 556 U.S. at 536.

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." *American Trucking*, 531 U.S. at 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*, 547 F. Supp. 3d at 733. Nor does Treasury have special insight into the Tax Cut Ban's unintelligible requirements—it has

repeatedly confessed confusion on that count. *See, e.g.*, *supra* at Argument Section III.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. As Treasury's conceded to the trial court, "agencies cannot impose funding conditions that Congress itself has not attached[.]" *West Virginia*, 2021 WL 5300944, at *18 (quoting Treasury's brief).

Moreover, "the Final Rule still leaves States guessing as to how they may exercise their sovereign power to tax." *Id.* The power Treasury gave itself in 31 C.F.R. § 35.10 to recoup state tax cuts that, in its judgment, "are not paid for with other, permissible sources," *see* 87 Fed. Reg. 4,428, offers the easiest way to see that the Final Rule fails to purge ambiguity out of the ARPA deal. The Final Rule adopted the Interim Rule's 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 a fifth step gives Treasury the final word on whether an indirect offset has taken place. The Interim Rule stated that Treasury would be free to consider "all relevant facts and circumstances" whether "a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue." 86 Fed. Reg. at 26810. Commenters (including NCLA) objected that this circular approach under which the existence of an "offset" is determined based on "'all facts and circumstances'

provide[s] Treasury with too much authority and create[s] ambiguity." 87 Fed. Reg. 4,438. The Final Rule recognized these concerns but added no substantive standards to Treasury's catch-all recoupment power. *Id.*

This arrogation of power renders opaque Treasury's system 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 unchecked and uncheckable power over how, when, and from which States it will choose to claw back billions in ARPA funds. The resulting potential for abusive and arbitrary enforcement is deeply troubling. Treasury's enforcement decisions are largely beyond review, so there would be nowhere for a State to turn if that extensive power were used for political or other illegitimate purposes—or even if that power were just executed capriciously or incompetently. By exceeding Congress' enumerated powers, ARPA has created the potential for Treasury to assert arbitrary prerogatives historically exercised by a royal sovereign over his duchies—powers that the Constitution expressly forbids to the federal government.

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 the bulk of legal principles that may be brought to bear against this breathtaking federal arrogation of

power. That said, the sheer volume of offended doctrines stands as sure proof that a critical underpinning of federalism and state sovereignty has been eroded. Indeed, the very structure of American government is in jeopardy. The Founders who first put state constitutions in place would recoil at the notion that Congress could 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.

Congress knows that it could never hope to defend legislation that explicitly shifted control of state budgets to the federal government. So instead, it has attempted federal regulation of States' fiscal decisions through conditions on federal largesse. But proceeding this way 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 such 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."). This Court must not allow Congress to abuse its spending powers to regulate state taxation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, an electronic copy of the foregoing brief *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Eleventh 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 6,495 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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