

No. 22-10560

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; STATE OF MISSISSIPPI; STATE OF LOUISIANA,
Plaintiffs-Appellees,

v.

JANET YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY;
RICHARD K. DELMAR, IN HIS OFFICIAL CAPACITY AS ACTING INSPECTOR GENERAL OF
THE DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF THE
TREASURY; UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
No. 2:21-cv-00079

**BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF AFFIRMANCE**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 29(a)(4)(A), *amici* the Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center certify that they have no parent corporations and that no publicly held corporation owns 10% or more of the stock of either *amicus*.

Amici also certify, pursuant to 5th Cir. Rule 29.2, that they are aware of no additional attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal that are not included in the table provided below.

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STATEMENT OF INTEREST

Founded in 1912, the Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by participating as a litigant or *amicus curiae* in cases involving issues of concern to American businesses, such as this one.

The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center (“Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici have a strong interest in this case, as the tax mandate poses a grave threat not only to structural constitutional principles of federalism and the separation of powers, but also to the economic vitality of U.S. businesses. *Amici* are concerned that the tax mandate will hobble States seeking to ease tax burdens on businesses of all sizes and industries that have been substantially harmed through no fault of their own, but instead from government closures and restrictions imposed on them due to the pandemic. The tax mandate will stifle innovation in the States by unlawfully limiting their options to support economic activity, which are critical to their businesses' economic recovery and the general well-being of businesses and their employees. For these reasons and others described below, *amici* respectfully urge this Court to affirm.¹

INTRODUCTION

The novel tax mandate at the heart of this case is unprecedented and unconstitutional—and has now been permanently enjoined four times. *See Texas v. Yellen*, --- F.Supp.3d ----, 2022 WL 1063088, at *9 (N.D. Tex. Apr. 8, 2022); *West Virginia v. U.S. Dep't of Treasury*, 571 F.Supp.3d 1229, 1256 (N.D. Ala. 2021); *Kentucky v. Yellen*, 563 F.Supp.3d 647, 660 (E.D. Ky. 2021); *Ohio v. Yellen*, 547

¹ No party or counsel for any party authored this brief in whole or in part, and no one other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief.

F.Supp.3d 713, 741 (S.D. Ohio 2021). Never in the history of the Republic has the federal government conditioned the receipt of federal funds on a State's surrender of its power to control its own tax policies. It is beyond question that Congress cannot dictate state tax policy directly, and such an intrusion into core matters of state sovereignty is ultra vires even as a condition on federal funds. Congress has resisted the temptation to impose such a condition for over two centuries—not out of self-restraint, but because it lacks the power to do so. At a bare minimum, Congress cannot coerce States into surrendering a core aspect of sovereignty with an offer they cannot refuse—a massive federal relief package, ultimately funded by the States' own taxpayers, in the aftermath of a global pandemic.

In the American Rescue Plan Act of 2021 (“ARPA”), Congress has made \$195.3 billion in taxpayer dollars—i.e., money collected from the States' citizens—available to States if and only if States agree not to pass any laws or take any administrative actions that decrease their net revenue, whether that decrease comes through tax credits, rebates, reductions in tax rates, or new or expanded deductions. Pub. L. No. 117-2, §9901(b)(3)(A). And under the final rule recently promulgated by the Treasury Department, the net revenue baseline is measured for the next three years against a State's revenues from 2019. *See Coronavirus State and Loc. Fiscal Recovery Funds*, 87 Fed. Reg. 4,338, 4,423, 4,452 (Jan. 27, 2022) (to be codified at 31 C.F.R. pt. 35). For most States, the massive amount of funds available under

ARPA—nearly 20% of state government revenues nationwide—eclipses even the extraordinary volume of Medicaid funding held to be coercive in *NFIB v. Sebelius*, 567 U.S. 519, 581-82, 588 (2012). “[R]efusing to accede to the conditions set out in the [tax mandate] is not a realistic option.” *Kentucky*, 563 F.Supp.3d at 655. The coercion is especially acute here, given that the entire point of ARPA is to help alleviate the effects of a once-in-a-lifetime global pandemic that threw many States and their residents into financial shock. The notion that a State could refuse such a massive amount of federal relief money raised from its own taxpaying citizenry in these extraordinary times is fanciful. In effect, then, Congress has commandeered the taxing power of the States—something it plainly lacks the power to do.

Without a permanent injunction, the mandate will continue to irreparably harm the Plaintiffs and other States, imperiling their efforts to implement revenue-related measures to foster a healthy business community and promote recovery from COVID-19’s economic devastation, which disproportionately harmed certain industries and carried particularly harsh effects for small businesses. *See Kentucky*, 563 F.Supp.3d at 655-56. Many States have recently enacted legislation to help businesses—and the economy as a whole—recover. These measures, which include new tax deductions and credits for restaurants and small businesses, reductions in corporate tax rates, and fee waivers for eating and drinking establishments, are designed to facilitate recovery. Under ARPA, however, these measures may subject

the States to a Treasury recoupment action if they correspond to a short-term revenue decrease. That threat will constrain State policymaking now and in future legislative sessions. *See Ohio*, 547 F.Supp.3d at 725. The district court correctly determined that the tax mandate irreparably harms States, as well as their citizens and the businesses operating within them, while any contrary federal interest is minimal, if not entirely ultra vires. The Court should affirm the judgment entering a permanent injunction against this unprecedented and patently unconstitutional prohibition.

ARGUMENT

ARPA offers approximately \$195 billion to States to aid them and their residents in financial recovery from the COVID-19 pandemic. Like most spending power legislation, the Act expressly enumerates the purposes to which States may put those funds. States may use the money to: (a) “respond to the public health emergency with respect to [COVID-19] or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality”; (b) “respond to workers performing essential work” during the pandemic by providing premium pay or grants; (c) provide government services “to the extent of the reduction” in local revenue “due to [COVID-19] relative to revenues collected in the most recent full fiscal year ... prior to the emergency”; and (d) “make necessary investments in water, sewer, or broadband infrastructure.” Pub. L. No. 117-2, §9901(c)(1)(A)-(D).

In addition to those conditions, the Act includes a section titled “further restriction” on the “use of funds.” *Id.* §9901(c)(2). One such restriction provides:

A State or territory shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

Id. §9901(c)(2)(A). If a State violates that prohibition, it must repay the funds in “an amount equal to the amount of funds used in violation” of the Act. *Id.* §9901(e). The Act also prohibits States from using the funds for “deposit into any pension fund.” *Id.* §9901(c)(2)(B).

By its plain terms, this mandate is breathtakingly broad. As the district court noted, “because [m]oney is fungible,” any ARPA funds that States receive could be deemed “to have ‘either directly or indirectly offset’ ... a reduction” in tax revenues. *Texas*, 2022 WL 1063088, at *4. By prohibiting States from “indirectly” offsetting a decrease in state revenue, the provision appears to reach any action that effects a reduction in rate, rebate, deduction, or credit, regardless of whether any federal funds were used to finance that tax measure. It also appears to preclude any state official from adopting any pro-taxpayer interpretation of a disputed provision. The mandate even goes so far as to forbid a State to delay the imposition of a tax or tax increase, even as a hardship allowance for the pandemic’s crippling financial consequences.

To be sure, Treasury has purported to limit the scope of the tax mandate by promulgating an interim and then final rule that allows States to replace revenue reductions with spending cuts in “areas not being replaced by” ARPA money. 87 Fed. Reg. at 4,423. But an administrative “regulation[] cannot provide the clarity needed” for an ambiguous spending condition to pass muster under the Spending Clause. *Tex. Educ. Agency v. U.S. Dep’t of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021).

In all events, the final rule (like the interim rule that preceded it) ultimately creates more problems than it solves. Among other things, the rule dictates that States may not decrease their net tax revenues relative to their revenues in 2019—a baseline that implicitly locks in policy choices of past legislatures and governors all the way through 2024. The rule also requires States to provide a detailed accounting of their tax measures to ensure compliance with the mandate. Such micromanaging of a core sovereign function is unprecedented. *See Ohio*, 547 F.Supp.3d at 738. The only proper judicial course is to enjoin the provision.

I. The District Court Was Correct That ARPA’s Tax Mandate Is Plainly Unconstitutional.

A. The Tax Mandate Commandeers the Taxing Power of States.

The power to tax or not to tax lies at the absolute core of sovereignty. Misguided taxes spurred the “successful revolution” that produced our Republic. *McMillen v. Anderson*, 95 U.S. 37, 41 (1877). Our founding document includes multiple specifications of what federal and state governments can and cannot tax.

See, e.g., U.S. Const. art. I, §8, cl.1; *id.* art. I, §9, cl.1, 4, 5; *id.* art. I, §10, cl.2. Amendments reallocating the taxing power have had a profound effect on the federal-state balance. *See id.* amend. XVI. And our earliest judicial decisions recognize that “the power to tax involves the power to destroy.” *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

It is no surprise, then, that the Supreme Court recognizes that the taxing power is “central to state sovereignty,” *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994), and that the “power of self government ... cannot exist distinct from the power of taxation,” *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 546, 548 (1830). Thus, it has been settled law from the Republic’s earliest days that a State “alone” may, “within its own jurisdiction,” “judge and determine how, in what manner, and upon what objects [the taxing] power shall be exercised.” *Id.* at 544. Simply put, it is difficult to conceive of a greater threat to the “integrity, dignity, and residual sovereignty of the States” than the loss of their taxing power. *Bond v. United States*, 564 U.S. 211, 221 (2011). Indeed, “[o]f all the powers the Constitution reserves to the States, there is no power more central to state sovereignty than the power to tax.” *Texas*, 2022 WL 1063088, at *5; *see West Virginia*, 571 F.Supp.3d at 1241 (“the Supreme Court has long recognized the States’ sovereign authority to tax as ‘indispensable’ to the States’ very ‘existence’” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824))); *Kentucky*, 563 F.Supp.3d at 657 (similar).

If anything, that core attribute of state sovereignty has taken on even greater importance in the wake of the Sixteenth Amendment, which empowers the federal government to tax the income of the States' citizenry. *See* U.S. Const. amend. XVI. Taxation is a zero-sum game. No matter how many sovereigns tax them, citizens cannot be taxed more than 100%, and they begin avoiding taxable activity at far lower rates. The States' power to set their own tax policy in the shadow of the Sixteenth Amendment is therefore critical not only to their ability to sustain their own governments, but also to check the effects of the federal government's own taxing power. States may not be able to stop the federal government from taxing the income their citizens produce. But at least States can try to alleviate the burden on their citizens by reducing their own reliance on tax revenues. The States' ability to play this safety-valve role is critical to preserving the framers' vision of dual sovereignty that would enhance, rather than threaten, individual liberty. *See Bond*, 564 U.S. at 221.

These bedrock tenets of federalism resolve this case. Some matters are simply too close to the core of state sovereignty for the federal government to dictate their terms, even when framed as conditions. *See, e.g., Coyle v. Smith*, 221 U.S. 559, 577 (1911) (holding unconstitutional an effort to prevent Oklahoma from relocating its capital as a condition of its admission to the Union). Just as the federal government may not dictate the location of a State capital, it may not dictate whether a State can

lower or raise taxes. That Congress purports to do so here as a condition on the receipt of federal funds (or, more aptly, federal tax revenues collected from the States' citizens) makes no difference. As *Coyle* recognizes, some conditions are per se ultra vires.

That is clearly true of this unprecedented effort to dictate state tax policy. If the power to tax is indeed the power to destroy, then the federal government has no more business dictating what state governments may and may not tax than States have taxing federal instrumentalities. Indeed, where the Constitution puts certain revenue sources off-limits to States, it does so directly—as in its express prohibition of state taxes “on Imports or Exports” without Congress’s consent. U.S. Const. art. I, §10, cl.2.

The idea that Congress can add to the Import-Export Clause via conditions on federal funding should be a non-starter. That likely explains why Congress—in an unbroken and “regular course of practice”—has never taken this extraordinary step. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S.Ct. 2111, 2136-47 (2022). Congress’s “prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); see also *NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (noting, in the context of the OSHA vaccine mandate, that a “‘lack of historical precedent,’ coupled with the

breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach”).

The intrusive effects of the tax mandate only became more apparent when Treasury promulgated its interim and final rule purporting to clarify the statute post hoc. *See* 86 Fed. Reg. 26,786 (May 17, 2021); 87 Fed. Reg. 4,338. Far from clarifying or narrowing the tax mandate’s sweep, the rule requires each State to perform a multi-step assessment every year of how the amount of funds received under ARPA compares with any reductions in the State’s tax revenue. Each State must also “provide to the Secretary periodic reports providing *detailed accounting* of the uses of funds, *modifications* to a State or Territory’s tax revenue sources, and such *other information* as the Secretary may require.” 87 Fed. Reg. at 4,448 (emphases added). And “the Secretary may request other additional information as may be necessary or appropriate.” *Id.* As one article advised, the “many new requirements to gather and report non-financial data on these ARPA funded projects” represent “a significant change from past grants management practices.”²

The burdensome system of “accounting” is not the only way in which Treasury’s rule exacerbates the constitutional problems with the tax mandate. The

² Jack Reagan, *Reporting Requirements for the American Rescue Plan Act Money—What Cities and Counties Should Consider*, Am. City & County (Sept. 9, 2021), <https://bit.ly/3u0FGSD>.

rule also requires States to measure a “reduction” in net tax revenue by reference to the 2019 fiscal year. Although Treasury justifies this requirement by describing 2019 as the “last full fiscal year prior to the COVID-19 public health emergency,” 87 Fed. Reg. at 4,426, it necessarily “bind[s] state and local officials to the policy preferences of their predecessors” and thus “insulate[s]” those policy decisions “from review and modification by tomorrow’s political processes.” *Allen v. Louisiana*, 14 F.4th 366, 375 n.* (5th Cir. 2021) (Oldham, J., concurring in the judgment). Thus, Treasury subverts the will of each State’s voters on an always-important election issue.

Moreover, the rule does not take account of the many things that could transpire between 2022 and 2024 that make freezing in amber the 2019 fiscal year an especially burdensome and intrusive requirement. And tying recoupment to the year 2019 forces States to look to the past rather than the future in gauging their policy priorities. Thus, even if a State projects that a tax cut will increase its revenue in the long run, the State must weigh that benefit against the risk that one year’s revenue will dip below the 2019 level and subject the State to a potential recoupment action. In short, the tax mandate and the final rule install Treasury in a supervisory capacity over States’ core sovereign functions that is entirely foreign to our system of federalism. *See Billings*, 29 U.S. at 544.

B. The Tax Mandate Exceeds the Spending Power of the Federal Government.

On top of all that, the mandate suffers from the additional infirmity of being impermissibly coercive under Congress’s Spending Clause power. As the Supreme Court reaffirmed in *NFIB*, when Congress offers federal funds to States on the condition that they enact or refrain from enacting certain policies, the condition is permissible only if the offer is, in fact, voluntary. *See* 567 U.S. at 577. This remains true regardless of whether the condition is framed as a grant or a withdrawal of funds. In either instance, the limitation is critical because, “[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.” *New York v. United States*, 505 U.S. 144, 178 (1992). By circumventing that rule, efforts to use the power of the federal purse to coerce States to do Congress’s bidding “undermine the status of the States as independent sovereigns in our federal system.” *NFIB*, 567 U.S. at 577. It is thus incumbent on courts to carefully “scrutinize” spending legislation to ensure that Congress is “not using financial inducements to exert a ‘power akin to undue influence’” on the States. *Id.* Federal “pressure turns into compulsion” when States no longer have a “legitimate choice whether to accept the federal conditions in exchange for federal funds.” *Id.* at 577-78.

ARPA is clearly coercive by that standard. In *NFIB*, the threatened “loss of over 10 percent of a State’s overall budget” was “surely beyond” constitutional

permissibility. *Id.* at 582, 585. Here, the \$195 billion available to States and the District of Columbia eclipses that by a wide margin. For Plaintiffs Texas, Louisiana, and Mississippi, ARPA relief represents approximately 13%, 8%, and 31%, respectively, of their 2021 budgets. *Texas*, 2022 WL 1063088, at *5.³ In other States, the number is still higher. The amount available to Arizona, for example, is equivalent to about 40% of that State’s general fund budget.⁴ Indeed, the total amount available across all states is equivalent to a whopping 20% of the annual tax collections of state governments.⁵ As in *NFIB*, the sheer amount of money at issue “leaves the States with no real option but to acquiesce.” 567 U.S. at 582.

Numbers alone do not tell the whole story. Over the past two years, the COVID-19 pandemic forced the whole world to endure extreme economic hardship. Entire industries shut down for months on end, while others operated with reduced hours and customer capacities, all under the continued pressure of supply chain constraints. Thousands of Americans lost their jobs, had to forgo higher education, and were crushed by medical bills related to COVID-19 treatments. *Amici* have

³ Compl. ¶¶46, 48-51, *Texas v. Yellen*, No. 2:21-cv-00079-Z (N.D. Tex. May 3, 2021); *How the COVID-19 Pandemic Is Transforming State Budgets*, Urb. Inst. (Feb. 4, 2022), <https://urbn.is/3jsU9ni>.

⁴ Compl. ¶11, *Arizona v. Yellen*, No. 2:21-cv-00514-DJH (D. Ariz. Mar. 25, 2021).

⁵ Jared Walczak, *Four Questions Treasury Must Answer About the State Tax Cut Prohibition in the American Rescue Plan Act*, Tax Found. (Mar. 18, 2021), <https://bit.ly/3cYu0YB>.

witnessed firsthand the economic devastation of the pandemic. Small businesses, in particular, faced unprecedented hardship as a result—and follow-on supply chain and inflation challenges have not improved matters. In recent surveys of small business owners, 91% of participants reported having to work more hours to compensate for a labor shortage,⁶ and 88% of owners stated that their businesses were negatively affected by supply chain disruptions.⁷

The hospitality industry was also ravaged: In response to a 2022 survey by the National Restaurant Association, 96% of restaurant operators reported experiencing disruptions in the supply of key items that would likely continue throughout 2022, 80% to 90% reported that food costs remain above pre-COVID levels and will continue to rise this year, and nearly half reported that they still are not open to full capacity.⁸ Nationwide, hotels lost \$111.8 billion in room revenue over the past two years and the industry will likely not reach pre-pandemic revenue

⁶ NFIB Research Center, *COVID-19 Small Business Survey Part 22* at 7, 10 (Mar. 11, 2022), <https://bit.ly/3NC5QEM>.

⁷ NFIB Research Center, *Small Business Economic Trends 2-3* (Sept. 2022), <https://bit.ly/3DFSPHy>.

⁸ Nat'l Restaurant Ass'n, *2022 State of the Restaurant Industry* (Jan. 31, 2022), <https://bit.ly/3L16lIE>; Nat'l Restaurant Ass'n, *Report: Pandemic Leads to Long-term Industry Changes* (Feb. 2, 2022), <https://bit.ly/3FnuOWX>.

levels until 2025 after adjusting for inflation.⁹ Labor-side figures are grim too: Nearly a third of all restaurant and hospitality workers lost their jobs in the first few months of the pandemic.¹⁰ Although some hospitality jobs have returned, the U.S. Department of Labor projects they will not reach pre-pandemic levels until 2031.¹¹

More than 100,000 businesses across *all* industries have permanently shuttered their doors,¹² and most states still have tens of thousands of fewer jobs than they did in February 2020.¹³ In Louisiana alone, the number of jobs fell by 11% in the first half of 2020—nearly double that state’s job loss figures (6%) after Hurricane Katrina.¹⁴ Follow-on effects from the pandemic continue to inflict harms on small

⁹ Am. Hotel & Lodging Ass’n, *The Year of the “New” Traveler 2* (Jan. 24, 2022), <https://bit.ly/34lxbct>; Am. Hotel & Lodging Ass’n, *2022 Midyear State of the Hotel Industry Report 3* (July 27, 2022), <https://bit.ly/3zoem4G>.

¹⁰ Erin Huffer & Aravind Boddupalli, *The Leisure & Hospitality Sector Has an Employment Crisis—and It Might Be Getting Worse*, Urb. Wire (July 20, 2020), <https://urbn.is/397ptlz>.

¹¹ Bureau of Labor Statistics, U.S. Dep’t of Labor, *The Economics Daily* (Oct. 17, 2022), <https://bit.ly/3TJ51N8>.

¹² Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments That Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, Fortune (Sept. 28, 2020), <https://bit.ly/3t6dpci>.

¹³ See Econ. Policy Inst., *State Jobs and Unemployment* (June 2022), <https://bit.ly/3Frvafo>; see also Congressional Res. Serv., *U.S. Economic Recovery in the Wake of COVID-19: Successes and Challenges 9-10* (May 31, 2022), <https://bit.ly/3U5FxJJ> (noting that “[a]s of April 2022, employment remains over 760,000 jobs below its level in February 2020” and the labor force participation rate “is still lower than at any point between the 1970s and the start of the pandemic”).

¹⁴ Compl. ¶50, *supra* n.3.

businesses, as they grapple with supply chain interruptions, a tight labor market, increased costs, and rising inflation.¹⁵

These economic hardships not only impact States' residents, but have a direct impact on States' budgets, many of which have faced sharp reductions in tax revenues alongside rising healthcare costs and record unemployment claims during the pandemic.¹⁶ The Plaintiffs are no exception. For example, in Texas almost 1 million additional individuals enrolled in Medicaid between February 2020 and February 2021, expanding the rolls from 3.86 million to 4.6 million people.¹⁷ Meanwhile, Louisiana's economy contracted at an annualized rate of 6.6% in the first quarter of 2020—a rate topped by only four other States.¹⁸

Under normal circumstances, to refuse such a massive influx of tax dollars would be unthinkable; in these extraordinary times, to do so would border on

¹⁵ NFIB Research Center, *Small Business Economic Trends 2-3* (Sept. 2022), <https://bit.ly/3DFSPHy>.

¹⁶ See U.S. Census Bureau, *Quarterly Summary of State and Government Tax Revenue for Third Quarter 2021* (Dec. 16, 2021), <https://bit.ly/3rrY33b> (total state tax revenue decreased by 1.6% year over year from Q3 2020); Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, Council on Foreign Relations (Mar. 19, 2021), <https://on.cfr.org/3f9vjqm>; see also Stacey Barchenger, *States Have Billions of Dollars from the American Rescue Plan*, NorthJersey.com (May 5, 2021), <https://njersy.co/3jvHOi5> (reporting Maryland's intent to spend more than 25% of its ARPA funds "to refill the state's unemployment trust fund and stabilize unemployment insurance tax rates").

¹⁷ Compl. ¶43, *supra* n.3.

¹⁸ Compl. ¶50, *supra* n.3.

unconscionable given that the States’ taxpayers will be the ultimate source of those funds whether or not a State accepts them. In short, “the threat to Plaintiffs’ budgets here is ‘economic dragooning’ that exerts ‘undue influence’ rather than ‘relatively mild encouragement.’” *Texas*, 2022 WL 1063088, at *5-6. The tax mandate should be seen—and rejected—as exactly what it is: an unconstitutional effort to brandish the Spending Clause as a sword to coerce state tax policy.

II. The District Court Rightly Enjoined The Tax Mandate To Prevent Dire Consequences.

Not only is the tax mandate unconstitutional; its ostensible ban on *any* tax measure that reduces a State’s net revenues also creates ongoing hardships for state and local governments, as well as businesses and citizens who rely on tax relief or other changes in tax policy to promote economic growth—especially in times like these. The Supreme Court has long recognized that any “delay” in a State’s ability to enforce its tax policies “may derange the operations of government,” causing “serious detriment to the public.” *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). That is as true today as it was 150 years ago. If anything, the threat is even more pronounced at this critical juncture in our Nation’s history because many of the policies States are pursuing or wish to pursue are designed to reduce the financial strain of the pandemic within their respective borders. Many State legislatures recently passed measures specifically aimed at reducing tax burdens on businesses; many of these laws were designed to bolster small businesses and industries that

have suffered substantial harm as the result of government-mandated closures and other restrictions. The ability to reduce the tax burdens of these businesses is a critical tool for the States in their efforts to restore economic vitality within their borders,¹⁹ but to the extent those measures or others like them contribute to a reduction in net tax revenue, the States' ARPA funds may be in jeopardy.

For example, Ohio has doubled the amount available for tax credits under its rural-business growth program, which “provides an incentive to investors that capitalize companies with principal business in a county with less than 200,000 people.”²⁰ The same bill extends sales-tax exemptions to employment-placement services, which help find temporary jobs for prospective employees. Louisiana recently reduced its small-business franchise tax rate and extended certain pandemic-related tax-relief measures.²¹ New Mexico passed a bill establishing a gross receipts tax deduction for food and beverage establishments, which were hit

¹⁹ Jack M. Mintz, *Tax Policy and Fiscal Sustainability Post-Covid*, BloombergTax.com (Feb. 2, 2021), <https://bit.ly/3641G47> (“[c]urrent tax policy is supportive of households and businesses through deferrals or tax reductions as governments continue to deal with health restrictions,” and a “first priority is to support private investment and improve productivity with corporate and personal tax rate reductions”).

²⁰ Ohio Dep't of Dev., *Ohio Rural Business Growth Program*, <https://bit.ly/3BwyTmK>; Am. Sub. H.B.110, 134th Gen. Assemb. (Ohio, enrolled June 30, 2021).

²¹ S.B.161, 2021 Leg., Reg. Sess. (La. 2021).

particularly hard by pandemic-related closures and restrictions.²² In May 2021, Oklahoma reduced its corporate income tax rate by 2%.²³ And California's February 2021 relief law included \$2.1 billion for grants to small businesses impacted by the pandemic, as well as fee waivers for the nearly 60,000 restaurants and bars licensed throughout the State.²⁴

The States' efforts also provide critical aid to individuals. New Mexico recently passed a \$600 income tax rebate for families and individuals who receive that State's Working Families tax credit.²⁵ Maryland's relief law provides direct stimulus payments to low-income residents—a total of \$178 million in relief to 400,000 Marylanders.²⁶ Texas recently passed a property-tax bill that accelerates new homeowners' eligibility for a tax exemption.²⁷

In addition, many States are considering or recently enacted tax measures that have nothing to do with COVID-19 relief, but that are manifestly in the public interest. Last year, Tennessee legislators debated a bill to create tax credits for small

²² S.B.1, 55th Leg., 1st Sess. (N.M. 2021).

²³ H.B.2960, 58th Leg., Reg. Sess. (Okla. 2021).

²⁴ Office of Gov. Gavin Newsom, *Governor Newsom Signs Legislative Package Providing Urgent Relief to Californians Experiencing Pandemic Hardship* (Feb. 23, 2021), <https://bit.ly/2Q6wXOU>.

²⁵ S.B.1, 55th Leg., 1st Sess. (N.M. 2021).

²⁶ Office of Gov. Larry Hogan, *The RELIEF Act of 2021*, <https://bit.ly/2O6yoMG>.

²⁷ S.B.8, 87th Leg., 2d Spec. Sess. (Tex. 2021).

businesses that convert to employee ownership.²⁸ Ohio created a new education tax-credit program that prioritizes low-income Ohioans²⁹ and has exempted payments made to taxpayers by the Ohio Bureau of Workers' Compensation from the State's commercial-activity tax.³⁰ Missouri extended tax credits for families who adopt a child out of foster care.³¹ Georgia did the same.³² Alabama established tax deductions for residents who purchase storm shelters to protect their families from tornadoes.³³

On its face, the tax mandate may implicate—and imperil—all of these measures, and more. That is because, once again, it requires States to “forego the exercise of important flexibility and power when it comes to making their own taxing decisions.” *Kentucky*, 563 F.Supp.3d at 651.

To be sure, the federal government has argued that the mandate need not be read so broadly and has purported to fix any ambiguity in the statutory language with a Treasury Department regulation. The district court rightly concluded that this development “does not affect” any of the analysis laid out above. *Texas*, 2022 WL

²⁸ H.B.2100, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022).

²⁹ Am. Sub. H.B.110, *supra* n.20.

³⁰ Sub. S.B.18, 134th Gen. Assemb. §6 (Ohio, enrolled Mar. 29, 2021).

³¹ H.B.429, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

³² H.B.114, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

³³ H.B.227, 2021 Leg., Reg. Sess. (Ala. 2021).

1063088, at *6 n.3. State and local officials remain unsure as to how they may permissibly exercise their own sovereign taxing powers without risking a federal objection and recoupment action.

In a public comment submitted to Treasury last June, leadership on New Hampshire’s House Ways and Means Committee indicated the committee was “struggling with the implications of the tax provisions in ARPA.”³⁴ The State faced particular confusion over the interaction of New Hampshire’s “distinctive version of the corporate income tax” with the rule’s carve-out for “income tax changes ... that simply conform with recent changes in Federal law.”³⁵ And “questions about major timing issues” remain, regarding the measurement and collection of recoupment amounts.³⁶ The Speaker of the House in Iowa expressed similar hesitation, remarking that the State is being “cautious” with its policies to ensure that it is “not using” ARPA funds “in a way they’re not intended.”³⁷ And in California, a local regulator expressed his concern, observing, “[w]hen we first got the ARPA, we were

³⁴ Comment from Almy, Rep. Susan, *Coronavirus State and Loc. Fiscal Recovery Funds*, Regulations.gov (June 29, 2021), <https://bit.ly/3Ae135X>; 86 Fed. Reg. at 26,808.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Barchenger, *supra* n.16.

told it was going to be, ‘You can use it for whatever you want[]’ ... And then when we got the guidance we realized that that’s not really the case.”³⁸

Unsurprisingly, some governments have been forced to enlist additional resources simply to try to interpret how they can spend the money. Earlier this year, one local official in Texas reported that, because “there’s no one in the county that can have that expertise,” Midland County decided to hire “a law firm to help us determine what the rules and regulations [are] that the federal government has put on this money.”³⁹ In Ohio, local administrators told reporters last June that they were “waiting for a couple of law firms to come out with their interpretations” of the Treasury guidelines and that they were “expecting some seminars on the topic.”⁴⁰

This lack of clarity alone is a fatal problem, as Congress must impose any conditions “unambiguously[,] enabl[ing] the States to [be] cognizant of the consequences of their participation.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Appellants’ desire to fixate on “implementing regulations” from the Treasury Department rather than on the text Congress passed, *see* Opening BOM 3-

³⁸ Malea Martin, *As Cities Await Finalized American Rescue Plan Act Guidelines, Some Funding Decisions Remain in Limbo*, Santa Maria Sun (June 16, 2021), <https://bit.ly/3qHcn5S>.

³⁹ Rachel Robinson, *Midland Co. Hires Law Firm to Plan How to Use American Rescue Plan Act Funds*, NewsWest9.com (Jan. 24, 2022), <https://bit.ly/3gmGlli>.

⁴⁰ Linda Gandee, *Avon to Receive Almost \$4.6 Million From the American Rescue Plan Act of 2021*, Cleveland.com (June 14, 2021), <https://bit.ly/2TiSwy1>.

4, 8-9, amounts to a case-dispositive “acknowledgment” that ARPA’s conditions are *not* unambiguous and that *Congress* therefore has not provided the clarity the Constitution demands. *Tex. Educ. Agency*, 992 F.3d at 361-62; *see also Va. Dep’t of Educ. v. Riley*, 106 F.3d 559, 563 (4th Cir. 1997) (en banc) (“[I]n order for the States to be bound by a condition upon the receipt of federal monies, the Congress must have affirmatively imposed that condition in clear and unmistakable statutory terms.”); *Sch. Dist. of Pontiac v. Secretary of U.S. Dep’t of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (Sutton, J., concurring) (similar).

Nor is there any basis to believe that Congress authorized the agency to supply via regulation the clarity the statute lacks. Absent a clear statement from Congress, agencies may not wield “transformative” interpretive power over “major questions” implicating “a significant portion of the American economy” and “billions of dollars in compliance costs.” *West Virginia v. EPA*, 142 S.Ct. 2587, 2604, 2607-09 (2022). That is all the more true in cases implicating sensitive issues of federalism. *Id.* at 2621 (Gorsuch, J., concurring) (major questions doctrine and federalism canon both counsel in favor of a clear-statement rule “where an agency seeks to intrude into an area that is the particular domain of state law”) (alterations omitted). ARPA’s tax mandate—part of a nearly \$200 billion program that restricts States’ core sovereign power to tax (or not) as they see fit—undoubtedly implicates a major question. And

ARPA nowhere states with unmistakable clarity that Congress delegated the answers to that question to the Treasury Department.

Even assuming Treasury could somehow fix the ambiguity inherent in the statute that Congress passed, States do not have time to wait for Treasury to engage in trial and error over the meaning of a statute intruding so deeply on a State's prerogatives. In its "final" rule, the Treasury Department did not see fit to define key terms like an "indirect[] offset." But States have been and will continue to be confronted with pressing public policy issues *immediately*. For example, Texas's new property-tax reform responds to polling showing that more than 75% of registered voters viewed property-tax obligations as a significant problem.⁴¹ And New York's "return-to-work" tax credit of \$5,000 per new employee for restaurant owners seeks to directly address the severe staffing shortage in the restaurant industry.⁴² Still other tax reductions are currently on the midterm ballot in states across the country.⁴³

⁴¹ Bethany Blankley, *Texas Lawmakers to Consider Property Tax Relief Measures*, Center Square (July 12, 2021), <https://bit.ly/3ASoj93>.

⁴² S.B.2500, 2021 Leg., Reg. Sess. (N.Y. 2021).

⁴³ Natalie Campisi & Korrena Bailie, *Midterms and Money: How the Elections Could Affect Your Wallet*, Politico (Oct. 20, 2022), <https://bit.ly/3W7LG9Q> (discussing potential tax exemptions in Florida and Georgia related to natural disasters, an across-the-board income tax reduction in Colorado, and property tax exemptions in Arizona, Louisiana, and West Virginia).

In sum, there is “no judicially cognizable interest in enforcing a provision—such as Section 802(c)(2)(A)—that is coercive and commandeers Plaintiffs” by prohibiting them from lowering the tax burden on their residents, businesses, and entrepreneurs at precisely the time when they need relief most. *Texas*, 2022 WL 1063088, at *7. “Congress may not impose conditions unrelated to the federal interest in enacting spending legislation.” *Ohio*, 547 F.Supp.3d at 729 (internal quotation marks omitted). And “‘the public ... has no interest in enforcing an unconstitutional law.’” *West Virginia*, 571 F.Supp.3d at 1255. Indeed, “it is in the public interest to prevent a violation of Plaintiffs’ constitutional rights” because the federalism principles that constrain Congress’s authority vis-à-vis the States are “meant to promote individual liberty.” *Texas*, 2022 WL 1063088, at *7.

Even assuming some countervailing federal interest exists, the balance of equities plainly favors an injunction. The tax mandate was an eleventh-hour addition to the bill, reflecting little legislative forethought and no formal legislative history.⁴⁴ Congress did not even bother to explain why it chose to rush in where two centuries of previous Congresses feared to tread. The whole point of ARPA is to provide economic relief to critical sectors of American society that were hit especially hard

⁴⁴ Patrick Gleason, *How Senator Joe Manchin’s Move to Block Tax Relief in His Own State Costs All U.S. Taxpayers*, *Forbes* (Mar. 16, 2021), <https://bit.ly/31vV782>.

by the pandemic.⁴⁵ Tax relief is one obvious means of achieving that policy objective, yet Congress placed it off limits to the States. *Cf. City of Philadelphia v. Sessions*, 280 F.Supp.3d 579, 657 (E.D. Pa. 2017) (requiring the city to forgo funds would prevent it from addressing opioid epidemic, which federal government had described as “a major public health crisis”). In short, even assuming there are some equities on the other side of the ledger, the balance is not close.

CONCLUSION

This Court should affirm the district court’s judgment awarding a permanent injunction.

Respectfully submitted,

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⁴⁵ Pub. L. No. 117-2, §9901(c)(1)(A); Press Release, *President Biden Announces American Rescue Plan*, White House (Jan. 20, 2021), <https://bit.ly/3f4S5Qe>.

CERTIFICATE OF SERVICE

I certify that on October 31, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Paul D. Clement
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CERTIFICATE OF COMPLIANCE

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). *See* Fed. R. App. P. 29(a)(4)(G).

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October 31, 2022

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