IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

STATE OF OHIO, Plaintiff, vs. 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 Treasury; and U.S. DEPARTMENT OF THE TREASURY, Defendant.	Case No.: 1:21-cv-181

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF THE STATE OF OHIO

INTRODUCTION

The American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, provides State, local, territorial, and Tribal governments with $350 billion in "emergency funding" at a time of genuine nationwide emergency. But, in exchange for this funding, Congress imposed a vague and open-ended condition requiring the States to give up unprecedented autonomy over their taxing power. Rather than specify the contours of this intrusion on State authority—rather than draw any kind of line—Congress expressed its general intention that States not use the provided funds to lower taxes even "indirectly" and left the details of what exactly it is that States are forbidden to do for the Secretary of the Treasury and her Inspector General to figure out as they go along. In so doing, Congress failed to carry out its obligation to legislate "unambiguously" when it seeks to impose conditions on "the States' receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In the absence of a clear and

unambiguous line defining the contours of Congress's incursion into States' sovereignty and the scope of what the States are permitted and what they are forbidden, there is no condition that could lawfully be enforced.

ARPA's "Tax Mandate" provides that States and territories must agree not to use federal funds to:

> either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

ARPA, § 9901 (codified at 42 U.S.C. § 602(c)(2)(A)).[1] If the Secretary of the Treasury determines that a State has violated this mandate, the Secretary is authorized to recoup "the amount of the applicable reduction to next tax revenue attributable to such violation" or the amount of funds received by the State under ARPA, whichever is less. *Id.* (codified at 42 U.S.C. § 602(e)).

The fundamental vagueness of this provision results in a complete capture of the levers of State policy by the federal government. It potentially freezes into stone State policy—across potentially any field implicating economic activity, not just the field of taxation—for an undetermined period of time. While it is not uncommon for Congress to impose requirements on States in exchange for federal funding, Congress has never before used this spending power to attempt such a broad intrusion on States' central policymaking authority. This override of States' sovereignty interferes so substantially with their integral governmental functions—and so fails to "comport with the federal system of government embodied in the Constitution"—that it would have been deemed invalid on its face under the rule of *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469

[1] The covered period ends "on the last day of the fiscal year . . . in which all funds received by the State" under ARPA "have been expended or returned to, or recovered by" the Secretary of the Treasury. ARPA, § 9901 (codified at 42 U.S.C. 602(g)(1)(B))

U.S. 528 (1985). Even after *Garcia*, it raises serious questions about the extent of Congress's authority *vel non* to intrude on State authority by putting a "gun to the head" of State policymakers through unduly coercive conditions on the receipt of federal funds and by effectively commandeering State taxing power to carry out federal policy.

Amicus curiae agrees with the State of Ohio that Congress lacks such authority, but the Court need not answer that fraught question in this case. Whatever the extent of Congress's power in this area in the abstract, *this enactment* falls far short of the clarity required for Congress to intrude on States' traditional sovereign authorities. When Congress encroaches upon the States' sovereignty, it must do so with perfect clarity—both so that the State may police Congress's incursion and so as to avoid miring them in uncertainty and chilling their exercise of their retained sovereign power. "[I]mperfect confidence will not suffice given the special constitutional concerns in this area." *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). That is why, when Congress exercises its power under the Spending Clause, Art. I, § 8, cl. 1, as it has in ARPA, any "conditions on the States' receipt of federal funds" must be imposed "'unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole,* 483 U.S. at 207 (quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (cleaned up)).

The Tax Mandate's prohibition on the "*indirect*" use of funds to offset potentially any State source of tax revenue could be read, at the sole discretion of the Secretary, to reach an astonishingly broad swath of State and local government activity, including potentially anything that impacts revenue generation, from income taxes to all manner of police-power regulation. But Congress did not specify the boundaries of this intrusion on State sovereignty, and that is the bare minimum that Congress was required to do to impose an effective condition on States' exercise of their traditional powers.

The Tax Mandate's lack of clarity in its unprecedentedly broad sweep is so overwhelming that this Court need not even address the broader, knottier questions of whether Congress had the authority to enact it in the first instance: "[a]pplication of the plain

statement rule" allows this Court to "avoid [the] potential constitutional problem" of Congress's ultimate authority in this area. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). The Court should enjoin enforcement of the Tax Mandate.

INTERESTS OF *AMICUS CURIAE*

Amicus curiae the Buckeye Institute was founded in 1989 as an independent research and educational institution—a "think tank"—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. Through its Legal Center, the Buckeye Institute engages in litigation in support of the principles of federalism enshrined in the U.S. Constitution. The Buckeye Institute is dedicated to upholding the balance of power between States and the federal government as prescribed by the U.S. Constitution. Federalism is perhaps the greatest check on federal power that the Constitution enshrines. It is crucial that we ensure our system of dual sovereignty be maintained to allow the governments closest to the people to determine policies that impact daily life and encourage States to compete with one another to attract residents, businesses, jobs, and opportunities. The Tax Mandate is an unprecedented arrogation of power by the federal government that ham-handedly disturbs this careful balance in the name of pandemic response.

The Buckeye Institute is also dedicated to creating a pro-growth economic tax system and ensuring responsible government spending. It strives to reform taxes to reward work and encourage entrepreneurship, while also encouraging sustainable state spending to secure prosperity for Ohio residents. In recent years, the State of Ohio has been receptive to its arguments, repeatedly implementing pro-growth rate reductions. The Tax Mandate's capacious, open-ended prohibition on any state activity that could directly or indirectly offset a reduction in the State's tax revenue frustrates these efforts.

ARGUMENT

I. Congress May Impose Conditions on States' Receipt of Federal Funds Only if It Does So "Unambiguously"

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Concomitant to this power, Congress "may attach conditions on the receipt of federal funds." *Dole*, 483 U.S. at 206. Congress's ability to so condition these funds is not absolute, however, and is subject to several general restrictions—including that attempts "to condition the States' receipt of federal funds" must be imposed "'unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.* at 207 (quoting *Pennhurst*, 451 U.S. at 17 (cleaned up)). Since the Rehnquist Court, this clear statement rule has served as a significant check on federal (usually Congressional) overreach and has helped to correct prior underenforcement of the proper boundaries between the federal government and the States. *See* Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statements Rules*, 2004 MICH. ST. L. REV. 123, 132. As Justice O'Connor noted in *New York v. United States*, 505 U.S. 144 (1992), clear statement rules to protect the rights of States have been used since the early years of our Republic. *Id.* at 155 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816)). In *Fairfax's Devisee v. Hunter's Lesee*, 11 U.S. (7 Cranch) 603, 623 (1812), for example, the Court applied the rule that "the common law…ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."

The modern approach was first established by the Supreme Court in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1. The Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the DDA), 89 Stat. 486, created a federal-state grant program, under which the federal government provided financial assistance to States to aid them in implementing programs for the developmentally disabled. 451 U.S. at 11. Congress tied the grant of federal funding to compliance with conditions set forth in the DDA. *Id.* At issue in

the case was the DDA's "bill of rights," which set forth minimum standards and stated that "'the Federal Government and the states both have an obligation to assure that public funds are not provided to any institutio[n]'" that did not meet those standards. *Id.* at 13 (quoting 42 U.S.C. § 6010). The question for the Court was whether this bill of rights created enforceable obligations on the States. The Court held that it did not.

"Legislation enacted pursuant to" the Spending Clause, "is much in the nature of a contract: in the return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. "The legitimacy of Congress's power to legislate" under the Clause "rests on whether the state voluntarily and knowingly accepts the terms of the 'contract,'" *id.*—"[j]ust as a valid contract requires offer and acceptance of its terms." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Because "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it," Congress may only "impose a condition on the grant of federal moneys, [if it] do[es] so unambiguously." *Pennhurst,* 451 U.S. at 17. And this already strong clear statement rule "applies with greatest force where…a State's potential obligations under the Act are largely indeterminate." *Id.* at 24. Put another way, a court is to ask: Did "Congress sp[ea]k so clearly that we can fairly say that the State could make an informed choice[?]" *Id.* at 25; *see also*, *Haight v. Thompson*, 763 F.3d 554, 568 (6th Cir. 2014) (Sutton, J.) (because of this clear statement rule "[c]larity is demanded *whenever* Congress legislates through the spending power"). Nothing in the DDA's bill of rights satisfied the rule, including its statement that the States have an "obligation" to ensure that public funds are not routed to a facility that does not meet minimum standards. *Pennhurst*, 451 U.S. at 18–19.

The Court was again faced with a Spending Clause question in *South Dakota v. Dole*, 483 U.S. 203. The State of South Dakota challenged a federal law withholding certain highway funds otherwise allocable to States "in which the purchase or public possession…of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." 23 U.S.C. § 158. As relevant here, the Court concluded that Congress expressed this condition

unambiguously; indeed, "[t]he conditions upon which States receive the funds…could not be more clearly stated by Congress." 483 U.S. at 208. *See also New York*, 505 U.S. at 172 (concluding that provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985, 99 Stat. 1842, unambiguously imposed conditions on certain milestones that must be hit to receive federal funds). *But see id*. at 177 (concluding that other provisions of the Act were unduly coercive and eroded State sovereignty to the point of being unconstitutional).

The Supreme Court also applied its clear statement rule in a series of cases concerning Title IX of the Education Amendments of 1972, 86 Stat. 373. *See,e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Indp't Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992). The cases deal primarily with the question whether Title IX created a private right of action and, later, the scope of that right. They demonstrate the staying power and expansion of the clear statement rule by the Supreme Court: not only did the Court's "decision in *Gebser* [make] clear that the Spending Clause clear-notice rule requires…that the recipients [of federal funding] be on general notice of the kind of conduct the statute prohibits," but also "at least when money damages are sought[,] that they be on notice that illegal conduct is occurring in a given situation." *Davis*, 526 U.S. at 672 (Kennedy, J., dissenting). *See also Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 629 (6th Cir. 2019) (Thapar, J., concurring) (noting in the Title IX context that, under the clear statement rule, "any ambiguity" in the statute cuts in favor of the State).

The strength of the clear statement rule did not wane with the end of the Rehnquist Court. The Roberts Court applied the clear statement rule in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). There, parents filed suit against a local school board under the Individuals with Disabilities Education Act (IDEA) which provides that a court may award a prevailing family "[r]easonable attorneys' fees as part of the costs" of litigation. 20 U.S.C. § 1415(i)(3)(B). When they prevailed, the family sought reimbursement for expert witness fees under this provision. 548 U.S. at 294. Recognizing the importance of clear demarcation lines for the ordering of State's activities, the Supreme Court

"view[ed] the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." *Id.* at 296. The Court asked "whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." *Id.* In other words, was the text of the statute sufficiently clear to demarcate the boundaries between permissible and impermissible behavior by the State? The Court emphasized that the text of the statute was the touchstone of the inquiry, rejecting reliance on language in the Conference Report stating that "attorney's fees" included "fees of expert witnesses." *Id.* at 304 "[T]he key," the Court said, "is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.*; *cf. Dellmuth*, 491 U.S. at 230 (holding in the Eleventh Amendment context that "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate" State sovereignty). The IDEA's bare reference to attorney's fees was not deemed to be sufficiently clear to have provided the States with notice that they may be responsible for reimbursing expert witness fees.

The Supreme Court has applied this clear statement rule in other contexts implicating the delicate balance between federal and State power. For instance, the Court asks whether Congress made "its intention unmistakably clear in the language of a statute" when considering whether it abrogated a State's immunity from suit under the Eleventh Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *see also*, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Dellmuth*, 491 U.S. at 228 (referring to this as a "simple but stringent test"). The Court similarly requires a "clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority." *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op. of Scalia, J.) (internal quotations omitted); *Gregory*, 501 U.S. at 461. As a general matter, "unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Indeed, "[f]ederal statutes impinging

upon important state interests 'cannot…be construed without regard to the implications of our dual system of government….[W]hen the Federal Government takes over…local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (Scalia, J.) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUMBIA L. REV. 527, 539–40 (1947)).

II. The Unambiguous-Condition Requirement Is Essential To Preserving Our System of Dual Sovereignty

The clear statement rule is not formalism for formalism's sake. It is an essential limitation necessary to police and maintain the boundaries between federal and State power; indeed, as one scholar noted, it prescribes a "constructive and workable role for the courts in determining the balance between stability and change in the assignment of powers between the federal government and the States." Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 826 (2005).[2]

Maintaining equilibrium in this assignment of powers is crucial to the operation of our constitutional system. The Founders created "a Union of separate state governments" and believed "that the National Government will fare best if the States and their institutions are left free to perform their sperate functions in their separate ways." *Younger v. Harris*, 401 U.S. 36, 44 (1971). This concept—"Our Federalism"—represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests" should endeavor to do so "in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

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[2] Professor Merrill contrasts the clear statement rule with the "prohibitory rule" of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), arguing that the former is normatively preferable. 9 LEWIS & CLARK L. REV. at 851.

Under our federal system, "the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The several States are "endowed with all the functions essential to separate and independent existence" and without them "there could be no such political body as the United States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) (Chase, C.J.) (internal quotations omitted). The Constitution requires that there be "no loss of separate and independent autonomy to the States, through their union under the Constitution," and their preservation is "as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Id.*

This "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Atascadero*, 473 U.S. at 242 (quoting *Garcia*, 469 U.S. at 572 (1985) (Powell, J., dissenting)). It serves as a powerful "check on abuses of government power"; much like the separation of powers between three, coordinate federal branches that "serve[s] to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458; *see also* The Federalist No. 28 ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."). In Federalist 51, James Madison referred to this concept as "double security," and if it is to be effective "there must be a proper balance between the States and the Federal Government" as "[t]hese twin powers will act as mutual restraints only if both are credible." *Gregory*, 501 U.S. at 459; *see also* William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV 1167 (2002).

This is not federalism's only benefit. Our federalist structure also "preserves to the people numerous" other "advantages": it guarantees "a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458.

Maintaining controls on Congress's Spending Clause power is crucial to preserving these benefits. Congress's power "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *Dole*, 483 U.S. at 207 (internal quotation omitted). Congress can use this power to "pursue objectives outside of 'Article I's "enumerated legislative fields"' by attaching conditions to the grant of federal funds." *Davis*, 526 U.S. at 654 (Kennedy, J., dissenting) (quoting *Dole*, 483 U.S. at 207). Therefore, "if wielded without concern for the federal balance," the Spending Clause "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Id.* Without limits on the Clause, "the reality, given the vast financial resources of the Federal Government," is that the Spending Clause gives "'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such are self-imposed.'" *Dole*, 483 U.S. at 217 (O'Connor J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

Against this background, the clear statement rule is a vital safeguard countering the possibility of ever-expanding federal power by ensuring that any intrusion into State power is cabined to its precise scope. The clear statement rule requires that federal incursion into States' sovereign powers be precisely limited—so that States may jealousy guard their sovereignty, exercise what of it remains solely theirs to the fullest extent, and police against attempted usurpations. It serves as "concrete safeguard," giving the States themselves the

power to "guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power." *Davis*, 526 U.S. at 655 (Kennedy, J., dissenting). And it serves as a reminder that "the States retain substantial sovereign powers under our constitutional scheme,…with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

In a similar vein, the clear statement rule also helps to ground policy and decision making as close to the People as possible. When "Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences" and "state officials remain accountable to the people." *New York*, 505 U.S. at 168. The clear statement rule reflects this principle—both by ensuring that their State representatives make decisions reflecting the will of their constituents and ensuring laypeople understand the requirements that Congress is imposing on their State and local government. This, in turn, ensures that that the People "retain the ultimate decision as to whether or not the State will comply" and if they "view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.*

III. The Tax Mandate Is Unprecedented in Its Ambiguity and Violation of the Principles of Federalism

A. The Tax Mandate Fails To Draw Any Kind of Enforceable Line

The exceedingly vague and potentially unbounded Tax Mandate falls far short of satisfying the clear statement rule. Congress has failed to properly mark its incursion into State sovereignty with clear lines and boundaries, instead enacting a provision that reaches potentially any policy a State might enact that has some direct or indirect impact on economic activity and therefore tax revenues. The Constitution requires far greater clarity, so that States may police the boundaries of federal intrusions and are not chilled in the exercise of retained sovereign power. *See Davis*, 526 U.S. at 655 (Kennedy, J., dissenting) (the rule is a "concrete safeguard" allowing States to "guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power").

Determining whether Congress has delimited its incursion into a State's power with sufficient clarity is not merely a matter "of routine statutory construction alone." *Id.* at 657 (Kennedy, J., dissenting). The inquiry is not simply whether a State could understand what the words meant. Instead "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (internal quotations omitted), in a manner both "unequivocal and textual." *Dellmuth*, 491 U.S. at 230. Put simply, Congress must draw a clear line demarking the permissible from the impermissible. The Constitution does not permit Congress to issue vague statements of principle to deprive States of the ability to guard the boundaries of their autonomy and chill otherwise acceptable exercises of State authority.

The Tax Mandate draws no line at all. Every exercise of a State's police power regulates human activity, which in turn affects economic activity and taxation. After all, "taxation, in reality, is life."[3] Updates to the building code, for example, may reduce new construction and thereby tax revenues. Requiring licensure of a profession may thin out the field, with a corresponding hit to tax collections. Lowering the speed limit may save lives, but it is also likely to reduce gas-tax collections and taxable commerce. Each of these policies may, depending on how things play out, "reduce[] any tax" and thereby run afoul of the Tax Mandate. A State has no way to predict with any certainty whether the Mandate permits any given exercise of its police power. Practically any measure may "directly or indirectly" reduce tax revenues, thereby violating the Mandate. The Mandate, in turn, provides no standard at all by which to judge a State's compliance with the rules; its scope is not "plain to anyone reading the Act." *Gregory*, 501 U.S. at 467. It is situations like this, where "a State's potential obligations under the Act are largely indeterminate," the clear statement rule "applies with greatest force," *Pennhurst*, 451 U.S. at 24.

[3] Jeffrey. M. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch* 289 (1987) (quoting Sheldon Cohen).

The defect is even apparent in the narrower field of State tax policy. The Tax Mandate could touch upon every facet of State taxation in ways that Congress never considered or specified. It prohibits "any law, regulation, or administrative interpretation" that "either directly or *indirectly*" leads to a reduction in taxes or delays an increase in taxes. And in its vagueness, the Mandate very well could disable broad swaths of state policymaking on taxation for an uncertain period of time—its language could be interpreted to freeze everything from tax rates to pet registration fees. It may even require states to desist from properly enforcing their existing tax laws, through its prohibition of "administrative interpretation[s]"—including those that correct previous misinterpretations—that result in a reduction of net tax revenue.

The Tax Mandate's prohibition on the use of funds to indirectly offset a reduction in the net tax revenue is particularly difficult to grasp. Given the fungibility of money, this is a potentially limitless requirement effectively freezing nearly every aspect of State government. Any activity that might lead to a reduction in any form of revenue, not just tax revenue, could violate the Tax Mandate and trigger recoupment by the Treasury. Uncertainty about this boundary could case State and local governments to trim their policy sails in any number of ways that *could conceivably* implicate the Mandate—a matter to which Congress gave no apparent thought because it never fleshed out the details of what it was requiring States to do.

Even if the Tax Mandate might be said to provide an "intelligible principle" of the sort required for Congress to delegate authority to a federal agency, *see Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019), that only underscores how far it is from providing what is required here, a clear and administrable line. There being no such line, there is nothing that could be enforced.

Contrast the Tax Mandate with two provisions that the Supreme Court concluded *were* sufficiently unambiguous to pass constitutional muster: the highway funding provision in *Dole*, 483 U.S. 203, and the rebates in *New York*, 505 U.S. 144. In *Dole*, the bargain was clear: If a State wants extra highway funds, its minimum drinking age must be 21-years old. That is

a model of clarity. 483 U.S. at 208. The same is true of the condition at issue in *New York*: to receive a payment out of the Secretary of Energy's escrow account, a State must satisfy certain federal benchmarks in its handling of low-level radioactive waste. 505 U.S. at 172. In both cases, the Congress provided an unmistakably clear line cabining its abrogation of State authority. There could be no doubt as to what states were required to do—and what they were otherwise free to do.

The Tax Mandate, by contrast, provides no line at all. As illustrated below, it potentially intrudes on every area of state policymaking, limited only by the preferences of a federal official, the Secretary of the Treasury.

B. The Tax Mandate's Fundamental Vagueness Renders It Incapable of Principled Application and Unsusceptible to Any Limiting Principle

The consequences of the Tax Mandate's fundamental vagueness and broad scope are easy to demonstrate. Failing to provide any administrable line, it may well disable States like Ohio from exercising policymaking authority in nearly every domain. After all, practically any State policy one might imagine—from setting speed limits to limiting use of harmful chemicals—has some impact on human activity and thereby on economic activity and tax revenue. There is no limiting principle that could cabin the Tax Mandate's possible reach.

Consider, for example, the question of whether a State would run afoul of the Tax Mandate if it issued an order prohibiting property-tax assessors from making their rounds during the pandemic. Such a decision would likely reduce or delay tax revenue by pushing out revised valuations used to calculate property taxes. Would it matter on what basis the tax assessment was being reduced? And would it matter whether the property tax was imposed by the State, county, or municipality? On the face of the statute the answer to these questions is: "Maybe?" That is no answer at all when State sovereignty hangs in the balance.

Or suppose another wave of COVID-19 cases leads a governor to prohibit indoor dining in her State. These restaurant closures would almost certainly lead to a reduction in restaurant sales in the State and, as a result, a reduction in sales-tax revenue received by the

State, as well as perhaps income-tax revenue and other revenues. Undoubtedly the governor's order is a "change in law, regulation, or administrative interpretation" and it would appear to "otherwise" "reduce any tax." But would it run afoul of the Tax Mandate? Again, there is no way to know, short of asking the Secretary of the Treasury for her opinion and thereby substituting the Secretary's discretion for the State's police power.

Indeed, the Mandate may well bar State policymaking in fields far removed from taxation. Many States, for example, provide an array of benefits for those who qualify under State law as disabled. If a State provides, among other things, a tax credit to disabled residents, is it then barred under the Tax Mandate from revising its regulatory definition of disability to include, say, partial blindness or "long COVID" syndrome? The effect of such a change would be to reduce tax revenue, and so the possibility cannot be dismissed even as the question cannot be answered definitively. In this way, the Tax Mandate may well prohibit a State from revising any part of its laws that "directly or indirectly" affect tax revenues. And there are, as noted, precious few areas of the law that lack consequences for tax collections.

The Court, though, need not rest on hypotheticals to see the havoc inherent in the standardless Tax Mandate. As Ohio undergoes its biennial budgeting process and otherwise goes about the business of governing, it will be faced with innumerable decisions related to taxes and revenue generation that potentially implicate the Mandate. For example:

1. On March 9, 2020, Ohio Governor Mike DeWine issued Executive Order 2020-01D ("the Emergency Declaration"), to declare the pandemic a state of emergency in Ohio. *See* Emergency Declaration, ¶¶ 1,4,7.[4] The Ohio Legislature subsequently enacted H.B. 197,[5] a measure designed to address various aspects of the ongoing pandemic. The statute provides,

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[4] *Available at* https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/signs-emergency-order-regarding-coronavirus-response.

[5] *Available at* https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb197/EN/06?format=pdf

among other things, that employees working from home would be retroactively deemed to be working at their typical work location, for municipal income taxation purposes until 30 days after the state of emergency is concluded. When the state of emergency ends—either through action by the Governor or legislative override authorized by recently enacted S.B. 22[6]—that will trigger a change in municipal income tax revenues, causing a drop in revenue for municipalities containing offices whose employees continue to work remotely. Indeed, municipalities have complained that without the tax revenues provided for in H.B. 197, they would face budget shortfalls or potential bankruptcy. These same cities are set to receive hundreds of millions of dollars as part of ARPA.[7]

Will Ohio's ending its declared Coronavirus emergency, then, run afoul of the Tax Mandate? The revenue changes will be the product of individual and company decisions as to the working locations for employees, and accomplished by a legislative trigger that was enacted prior to ARPA. But is the end of the declared emergency a "change in law" leading to the reduction in tax revenue? And will the ARPA funds given to the cities be deemed to offset this loss of municipal income tax revenue? Could the State cure any deficiency by enacting a new legislation extending the extraterritorial (and unlawful) provisions of H.B. 197, which allows municipalities to tax individuals who neither live in nor work in those cities? Is the State required to do so under ARPA? One would search in vain for clear answers to these questions in the Tax Mandate's text.

2. Governor DeWine recently proposed that the State might use money from ARPA to pay down the State's $1.46 billion unemployment debt. But doing so will offset

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[6] *Available at* https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb22/EN/05?format=pdf.

[7] *See, e.g.*, Andrew Tobias, *Cleveland, Ohio Governments to Get Big Money as Part of New Federal Stimulus Plan. How Will They Spend It?,* Cleveland.com (Mar. 12, 2021), *available at* https://www.cleveland.com/open/2021/03/cleveland-ohio-governments-to-get-big-money-as-part-of-new-federal-stimulus-plan-how-will-they-spend-it.html (citing analysis from CRS estimating that Cleveland alone would receive $541 million from ARPA stimulus).

approximately $658 million in tax increases for employers over the next three years.[8] Such a move would be fiscally prudent and generally consistent with other provisions of ARPA that bolster State unemployment systems. But such a move might also lead to a reduction in taxes to be charged to business. Would this be considered a piece of legislation that delays the imposition of an already planned tax increase? Would the State have to pass a law raising taxes on businesses, even with the debt paid down, to avoid violating the Tax Mandate? Again, there is no way to know.

3. Ohio is a biennial budget State, and 2021 is a budget year. While *amicus curiae* is unaware of any tax changes yet proposed in the budget, there will inevitably be some. Indeed, the last three budgets all contained tax cuts,[9] with the last biennial budget reducing State income tax by 4 percent. Budgets contain thousands of minor provisions that increase taxes and revenues in some places, and lower them in others, to achieve desired policy outcomes. All of those changes big and small may—or may not—be prohibited by the Tax Mandate. It is simply not clear how a State's budgeting process is impacted by the text of the statute. The problem, again, is Congress's failure to draw any clear administrable line.

4. Ohio's Tax Credit Authority holds meetings every month at which it regularly approves tax credits for businesses that agree to add new jobs.[10] At its most recent meeting in March, the Tax Credit Authority approved $9.63 million in tax credits for 7 new projects

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[8] *Governor Unveils Unemployment Debt Payoff Plan, Calls for Fix*, Gongwer News Service (Apr. 8, 2021), *available at* https://www.gongwer-oh.com/news/?a=900680201.

[9] FY 2020-2021 Operating Budget, *available at* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-166; FY 2018-2019 Operating Budget, *available at* https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-HB-49; FY 2016-2017 Operating Budget, *available at* https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-64.

[10] While the State of Ohio has the constitutional authority to grant tax credits and subsidies, *amicus curiae* is on record of opposing all taxpayer-funded subsidies as a matter of policy.

"expected to lead to $778 million in private sector investments in Ohio."[11] Given the vagueness of the Tax Mandate, though, it is possible that the Department of the Treasury might view these as revenue reductions that are being indirectly offset by funds granted to the State under ARPA. Again, it is unclear. Is the Tax Credit Authority effecting a "change in law, regulation, or administrative interpretation"? Does it matter if these tax credits will be more than offset by additional investment and tax dollars created? Without answers to these questions, the State cannot order its affairs or carry out its longstanding programs.

5. As a final example, consider Ohio's annual Sales Tax Holiday. In 2018, Ohio Rev. Code § 5739.02 was amended to create a three-day sales tax "holiday" each August. During that weekend, unofficially kicking off the "Back to School" period, sales of clothing items costing less than $75 and school supplies are exempt from sales and use tax. With an anticipated return to full-time, in-class instruction in the fall, one can imagine that this year's Sales Tax Holiday will be a busy one. It is a safe bet that most schoolchildren will not fit into their old school clothes or uniforms, and that a year of education over videoconference will lead to a spike in sales of pencils, paste sticks, and protractors. But could the State change the date, if doing so would make the holiday more convenient for parents and thereby reduce revenues? Could Ohio extend the holiday to prevent crowding in stores because of the pandemic? Could it add additional supplies to the approved list, such as masks and hand sanitizer? It may be that these potential violations of the Tax Mandate would become apparent only *post hoc*, after Ohio changes the law in a way that turns out to reduce tax revenues. The same could be said of most any policy that implicates taxes, directly or indirectly. There is no way for the State to know whether the Tax Mandate permits it to do any of these things.

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[11] *State Tax Breaks To Support 992 New Jobs*, Gongwer News Service (Mar. 29, 2021), *available at* https://www.gongwer-oh.com/news/index.cfm?a=900600205.

To protect Our Federalism, the sovereignty of the States, and, ultimately, liberty, the Constitution requires that the answers to all of these questions be discernable based on the plain text of the statute. Instead, ARPA and the Tax Mandate hopelessly confuse things. The Constitution requires more from Congress.

CONCLUSION

The Court should enjoin enforcement of the Tax Mandate.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I caused the foregoing brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

Dated: April 9, 2021

/s/ *Robert Alt*______________
Robert Alt