IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

WEST VIRGINIA, et al.,	)	
	)	
Plaintiff,	)	**Case No.:**
	)	
v.	)	**7:21-cv-00465-LSC**
	)	
U.S. DEPARTMENT OF THE TREASURY, et al.,	)	
	)	
Defendant.	)	

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF WEST VIRGINIA, ET AL.

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CORPORATE DISCLOSURE STATEMENT

The Buckeye Institute was founded in 1989 and is an independent research and educational institution whose mission is to advance free-market public policy in the States. It has no parent corporation, nor does any publicly held corporation own 10% or more of its stock. No counsel for any party authored this brief in whole or in part, and no one other than *amicus curiae* or its counsel made a monetary contribution to fund the brief's preparation or submission.

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 along with this funding came a vague and open-ended condition purporting to require the States to surrender unprecedented autonomy over their taxing and police 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," leaving the details of what exactly it is that States are forbidden to do to the discretion of the Secretary of the Treasury and her Inspector General. 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. *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). 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 net tax revenue applicable 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 "Tax Mandate" results in a complete capture of the levers of State policy by the federal government. It potentially freezes into stone State policy—across any field implicating economic activity—for an indeterminate period of time. Congress has never before used its Spending Clause power to affect 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 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.

[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))

Amicus curiae agrees with the Plaintiff States that Congress lacks such authority, but the Court need not reach that 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. *See* 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, 1180 (2002) ("This rule of statutory construction allows the Court to avoid more difficult issues of the constitutional limits of federal power.") [hereinafter Pryor, *Madison's Double Security*].

When Congress exercises its power under the Spending Clause to encroach upon the States' sovereignty, any "condition on the grant of federal moneys" must be imposed "unambiguously." *Pennhurst,* 451 U.S. at 17. Congress may only invade States' authority if it so identifies "the consequences of their participation," *id*., in a federal spending program with perfect clarity—both so that the State may police Congress's incursion and so as to avoid miring States in uncertainty and unduly chilling the exercise of their traditional authorities. But the Tax Mandate's prohibition on the "indirect" use of funds to offset any source of tax revenue potentially reaches an astonishingly broad swath of State government activity, including anything that impacts revenue generation, from income taxes to all manner of police power regulation. It draws no enforceable line at all. For that reason, this 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. The Buckeye Institute is dedicated to upholding the balance of power between States and the federal government as prescribed by the U.S. Constitution, to creating a pro-growth economic tax system, and to ensuring responsible government spending. The Tax Mandate's capacious, open-ended prohibition on any State activity that could directly or indirectly offset a reduction in a 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 Defense 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." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Congress's ability to condition funds is subject to several limitations, 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)). This clear statement rule serves as

a significant check on federal overreach and permits enforcement of the proper boundaries between State and federal power. *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 (2004).

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*, 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." 11 U.S. (7 Cranch) 603, 623 (1812).

The clear statement rule traces its modern origins to *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, where the Supreme Court considered whether certain provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, created enforceable obligations on the States. The Court held that Congress may only "impose a condition on the grant of federal moneys, [if it] do[es] so unambiguously." 451 U.S. at 17. Spending Clause legislation, it reasoned, "is much in the nature of a contract," and the "legitimacy of Congress' power to legislate" under the Clause depends on the clarity with which it acts. *Id*. This already strong clear statement rule "applies with greatest force where…a State's potential obligations under the Act are largely indeterminate." *Id*.

In *South Dakota v. Dole*, 483 U.S. 203, the Supreme Court considered a federal law withholding 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. The Court concluded that Congress expressed the relevant 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 (provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985, 99 Stat. 1942, 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 clear statement rule has also been implicated in a series of cases arising under 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 Vista Indp't Sch. Dist.*, 524 U.S. 274 (1998), *Franklin v. Gwinett Cnty. Pub. Schs.*, 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. But the cases 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).

The Supreme Court similarly applied the clear statement rule in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006),

concluding that the Individuals with Disabilities Education Act (IDEA) did not permit a court to shift expert witness fees paid by a prevailing party. 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 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." "[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.* at 304; *cf. Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (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). And the IDEA's bare reference to attorney's fees was deemed insufficiently clear to have provided the States with notice that they may be responsible for reimbursing expert witness fees.

The Supreme Court has applied clear statement rules in other contexts implicating the balance between federal and State power, as well. The Court asks whether Congress made "its intention unmistakably clear in the language of a statute" when considering whether it abrogated States' immunity from suit under the Eleventh Amendment. *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"). And the Court has concluded that the Constitution similarly requires a "'clear and manifest' statement

from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op. of Scalia, J.); *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991).

Across all these fields of federal legislation, "unless Congress conveys its purpose 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 Statute*s, 47 COLUM. 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 essential to policing and maintaining the boundaries between federal and State power. As Professor Thomas Merrill has 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).

Maintaining equilibrium in the 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 separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 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*.

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.). 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 (internal quotations omitted). It serves as a powerful "check on abuses of government power"; much like the separation of powers between the 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 469; *see also* Pryor, *Madison's Double Security*, 53 ALA. L. REV. at 1170 ("Madison's double security is, in modern parlance, the separation of powers federalism.").

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.

Checking Congress's Spending Clause power is crucial to preserving this balance. 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 quotations 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 power "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy…in areas which otherwise would lie outside its reach." *Id*. at 654–55. Ultimately, "the vast financial resources of the Federal Government" may be leveraged to give "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) (internal quotations omitted).

To avoid that result, the clear statement rule ensures any intrusion into State power is cabined to its precise scope. It allows States to jealousy guard their sovereignty, exercise what of it remains 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 positions policy and decision making as close to the People as possible. It helps to ensure both that State representatives make decisions reflecting the will of their constituents and that laypeople understand the requirements that Congress is imposing on their State government. This, in turn, ensures 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." *New York*, 505 U.S. at 168.

As then-Alabama Attorney General William H. Pryor wrote, the clear statement rule is "Madison's 'double security' in modern operation":

> The Court is performing its role as a check of the abuse of power by the federal government itself. The states are performing their role as a check of the abuse of federal power, and the federal government is operating as a check of the abuses by the states. True to Madison's vision, each of these structural restraints of government abuse protects our freedom.

Pryor, *Madison's Double Security*, 53 ALA. L. REV. at 1171.

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

The exceedingly vague, potentially limitless 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).

Determining whether Congress has delimited its incursion into a State's power with sufficient clarity is not merely a matter "of routine statutory construction." *Id*. at 657 (Kennedy, J., dissenting). The inquiry is not simply whether a State could understand what the words meant. Instead if "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," *Atascadero*, 473 U.S. at 242, in a manner both "unequivocal and textual," *Dellmuth v. Muth*, 491 U.S. at 230. Put simply, Congress must draw a clear line demarking the permissible from the impermissible. If Congress fails to clearly cabin its intrusion on State autonomy in this way, Congress is not legislating under the Spending Clause legitimately and those vague provisions are facially invalid. *Pennhurst*, 451 U.S. at 17. The Constitution does not permit Congress to issue vague statements of principle subject to ad hoc interpretation by a federal agency, which have the effect of depriving States of the ability to guard the boundaries of their autonomy and unnecessarily chilling otherwise acceptable exercises of State authority.

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. 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, 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, in contrast, draws no line at all. It potentially intrudes on every area of State policymaking, limited only by the preferences of a federal official, the Secretary of the Treasury. Every exercise of a State's police power regulates human conduct, which in turn affects economic activity and taxation. After all, "taxation, in reality, is life."[2] 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. Every policy may, depending on how things play out, "reduce[] any tax" and thereby run afoul of the Tax Mandate if funds received under ARPA are used to "indirectly" offset the loss. A State has no way to predict with any certainty whether the Mandate permits any given exercise of its police

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

power. 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 in situations like the Tax Mandate, where "a States' potential obligations under the Act are largely indeterminate," that the clear statement rule "applies with greatest force," *Pennhurst*, 451 U.S. at 24.

And 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.

This defect is just as 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 very well could disable broad swaths of State policymaking on taxation for an uncertain period of time, as its language could be interpreted to freeze everything from tax rates to car registration fees. Through its prohibition of "administrative reinterpretation[s,]" it may even require States to perpetuate error by leaving in place misinterpretations of their tax codes—if issuing corrections would result in net tax revenue reductions.

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 tax revenue by delaying revised valuations used to calculate property taxes. Would it matter on what basis the tax assessment was being reduced? On the face of the statute the

answer to this question is: "Maybe?" That is insufficient 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 view on the matter. *But see Whitman v. Am. Trucking Ass'ns, Inc*., 531 US 457, 472–73 (2001) (rejecting the argument that "an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power").

Consider a State program providing 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.

Or what of a State decision to decrease court filing fees to promote greater access to justice? Regardless of whether a State uses these fees to support the operation of the courts or the fees are paid into the State's general fund, ARPA funds could be used to "indirectly" offset the loss. Would the Secretary of the Treasury use her discretion to interfere with a State's maintenance of its judicial system? Would she abstain from doing so because she supports the policy goal? What could possibly justify her assuming the role of superintendent of all States' courts?

As a real-world example of the Tax Mandate's standardless application, consider the State of Alabama's annual Sales Tax Holiday. Ala. Code §§ 40-23-211 and 40-23-213 establish a three-day sales tax "holiday" each July. During that weekend, unofficially kicking off the "Back to School" period, sales of certain school supplies, clothing, and the like 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 Alabama extend the holiday to prevent crowding in stores because of the pandemic, when doing so might reduce tax revenues? Could it add additional supplies to the approved list, such as masks and hand sanitizer? It may be that potential violations of the Tax Mandate would become apparent only *post hoc*, after Alabama changes the law in a way that turns out to reduce tax revenues. *See also* Iowa Code § 423.3(68)(a)(2) (Iowa Sales Tax Holiday); Okla. Admin. Code. § 710:65-13-511 (Oklahoma Sales Tax Holiday); S.C. Code. § 12-36-

2120(57) (South Carolina Sales Tax Holiday); W. Va. Code § 11-15-9s (West Virginia Sales Tax Holiday).[3] The same could be said of practically 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.

As another example, West Virginia earlier this month enacted S.B. 693 to conform West Virginia's tax code to federal tax law by, *inter alia*, exempting the first $10,200 in unemployment aid from State income tax.[4] Will the State of West Virginia be penalized for conforming State law to federal policy? Arguably, S.B. 693 reduces any tax by providing for a reduction in a rate, a rebate, a deduction, a credit or otherwise. So will the Secretary of the Treasury exercise her discretion to determine that this reduction in taxes does not violate the Tax Mandate? And, if so, why is the Secretary permitted to substitute her discretion for the State's police power? What about the Plaintiff States that automatically incorporate some or all changes made to the Federal tax code?[5] Federal law certainly encourages State tax conformity. *See* Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX.

[3] The Florida Legislature is considering a bill re-authorizing, *inter alia*, its annual Sales Tax Holiday for 2021. *See* Fla. H.B. 7061 (2021). Would this violate the Tax Mandate? Is the re-authorization of a previous program a change in law? Would it matter if Florida did not add items to the approved list? Or increased other taxes to serve as a "pay-for"? Again, the Tax Mandate provides no clear answer.

[4] West Virginia State Tax Department, "Coronavirus Aid, Relief and Economic Security (CARES) Act and American Rescue Plan Act," *available at* https://tax.wv.gov/Individuals/Pages/CoronavirusAidReliefAndEconomicSecurityAct.aspx.

[5] *See* Tax Foundation, *Tax Reform Moves to the States: State Revenue Implications and Reform Opportunities Following Federal Tax Reform* (Jan. 31, 2018), *available at* https://taxfoundation.org/state-conformity-federal-tax-reform/ (identifying Alabama, Alaska, Kansas, Montana, Oklahoma, and Utah as States that conform portions of their tax code to the Federal tax code on a rolling basis).

REV. 407, 423–24 (2010). Will each change to *Federal* tax laws that reduces revenue create a violation of ARPA by *States* adhering to tax conformity?

Lastly, consider the State of New Hampshire and current legislative proceedings over its biennial budget for Fiscal Years 2022 and 2023. The New Hampshire House of Representatives earlier this month passed a proposed budget containing cuts to corporate taxes, as well as taxes on rooms and meals.[6] While it remains to be seen whether the final budget will contain any tax changes, it is reasonable to assume that there will be some: budgets contain thousands of provisions that increase taxes and revenues in some places, and lower them in others, to achieve desired policy outcomes. Any of those changes big and small may violate the Tax Mandate. Or they may not. Perhaps the omnibus final budget is to be considered as whole such that the proposed cuts are offset by other tax policies enacted—there's simply no way to tell. The problem, again, is Congress's failure to draw any clear administrable line.

Whatever power Congress may have to condition States' receipt of federal funds, it cannot arrogate to the federal government what could amount to the whole of States' taxing and police powers through a fundamentally vague restriction administered by a federal official. Because that is what the Tax Mandate purports to do, it imposes no condition that could possibly be enforced consistent with the principles of federalism.

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[6] Josh Rogers, *In Party Line Vote, N.H. Passes State Budget Built on Tax Cuts*, N.H. PUB. RADIO (Apr. 7, 2021), *available at* https://www.nhpr.org/post/party-line-vote-nh-house-passes-state-budget-built-tax-cuts#stream/0.

CONCLUSION

The Court should enjoin enforcement of the Tax Mandate.

Respectfully submitted this 30th day of April, 2021.

/s/ Christopher W. Weller
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, I caused the foregoing to be served on all counsel of record, by filing the same through this Court's ECF system.

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