No. 21-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO,

Plaintiff–Appellee,

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; and the U.S. DEPARTMENT OF THE TREASURY,

Defendants–Appellants.

On Appeal from the United States District Court
For the Southern District of Ohio, No. 1:21-cv-00181-DRC
The Honorable Douglas R. Cole

Brief of Amicus Curiae The Buckeye Institute in Support of the State of Ohio

---

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org

ANDREW M. GROSSMAN
SEAN SANDOLOSKI
BAKERHOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Attorneys for Amicus Curiae

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.

Table of Contents

Interest of Amicus Curiae 1

I. The Tax Mandate Is Fundamentally Vague and Therefore Unenforceable 4

A. Congress May Impose Conditions on States' Receipt of Federal Funds Only If It Does So "Unambiguously" 4

B. The Tax Mandate's Unprecedented Vagueness Renders It Unconstitutional 7

II. Treasury Cannot and Did Not Cure the Tax Mandate's Constitutional Defect 11

A. The Executive Branch Cannot Make Up for Congress's Failure To Speak "Unambiguously" 11

B. Treasury's Interim Final Rule Only Reinforces the Tax Mandate's Fundamental Vagueness 20

Conclusion 25

Table of Authorities

Page(s)

Cases

Am. Transfer & Storage Co. v. Interstate Com. Comm'n,
719 F.2d 1283 (5th Cir. 1983)....................18

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006) 2, 6, 17

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985)....................7, 11

Bennett v. Ky. Dep't of Educ.,
470 U.S. 656 (1985)....................10

BFP v. Resolution Trust Corp.,
511 U.S. 531 (1994)....................7

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984)....................16

City of Chicago v. Barr,
961 F.3d 882 (7th Cir. 2020) 15, 16

Cutter v. Wilkinson,
423 F.3d 579 (6th Cir. 2005) 10

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006)....................23

Davis v. Monroe Cnty. Bd. of Educ.,
526 U.S. 629 (1999)....................6, 18

Dellmuth v. Muth,
491 U.S. 223 (1989)....................6, 7, 11, 23

Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200,
115 F.3d 1273 (7th Cir. 1997)....................13

Douglas v. Indep. Living Ctr. of S. Cal., Inc.,
565 U.S. 606 (2012) 14

Fairfax's Devisee v. Hunter's Lesee,
11 U.S. (7 Cranch) 603 (1812) 5

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 17

Franklin v. Gwinett Cnty.,
503 U.S. 60 (1992) 6

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 3

Gebser v. Lago Indep. Sch. Dist.,
524 U.S. 274 (1998) 6

Gregory v. Ashcroft,
501 U.S. 452 (1991) 7, 8, 13

Haight v. Thompson,
763 F.3d 554 (6th Cir. 2014) 13

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 7

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 12

National League of Cities v. Usery,
426 U.S. 833 (1976) 3

New York v. United States,
505 U.S. 144 (1992) 5

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 4, 5, 11, 14

Printz v. United States,
521 U.S. 898 (1997) 16

Rapanos v. United States,
547 U.S. 715 (2006) 7

Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.,
584 F.3d 253 (6th Cir. 2009) (en banc) 13, 17

Seila Law LLC v. CFPB,
140 S. Ct. 2183 (2020) 15, 18

Sharp v. Johnson,
669 F.3d 144 (3d Cir. 2012) 11–12

South Dakota v. Dole,
483 U.S. 203 (1987) 4, 5

State ex rel. Ohio Acad. of Trial Lawyers v. Sheward,
715 N.E.2d 1062 (Ohio 1999) 24

Tex. Educ. Agency v. U.S. Dep't of Educ.,
992 F.3d 350 (5th Cir. 2021) 14, 16

United States v. Bass,
404 U.S. 336 (1971) 7, 14

Va. Dep't of Educ. v. Riley,
106 F.3d 559 (4th Cir. 1997) (en banc) 3, 12, 13

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 13

Constitutional Provisions

Art. I, § 8 14

Statutes

5 U.S.C. § 553 18

20 U.S.C. § 1681 5–6

42 U.S.C. § 802 .... 2, 9

Other Authorities

86 Fed. Reg. 26786 (May 17, 2021) .... *passim*

Jeffrey M. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch* 289 (1987) 8

The Federalist No. 58, at 303 (James Madison) (Gideon ed., 2001) 15

The Federalist No. 70, at 475 (Alexander Hamilton) (J. Cooke ed., 1961) 18

The Federalist No. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001) 14–15

Felix Frankfurter, *Some Reflections on the Reading of Statute*s, 47 Colum. L. Rev. 527 (1947) 7

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 (2004) 5

Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 Yale L.J. 1187 (2001) 16–17

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 17

Edward Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After* Cuno *and* Winn, 40 Hastings Const. L.Q. 1 (2012) 24

Interest of Amicus Curiae[1]

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. It is also dedicated to creating a pro-growth tax system that rewards work and encourages entrepreneurship. The "Tax Mandate" challenged in this case directly threatens Buckeye's policy priorities, including those related to federalism, clear lines of government accountability, and pro-growth tax policy.

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Introduction and Summary of Argument

The American Rescue Plan Act of 2021 ("ARPA") conditions federal funding to States on a vague and open-ended prohibition on using federal funds to "either directly or indirectly offset a reduction in the net tax revenue" through "a change in law, regulation, or administrative interpretation…that reduces any tax…or delays the imposition of any tax or tax increase." 42 U.S.C. § 802(c)(2)(A). What precisely this language proscribes is anyone's guess, as practically any action by a State may, intentionally or not, reduce tax revenues. As the district court held, ARPA's "Tax Mandate" is unenforceable for that reason. If Congress wishes to impose conditions on States' receipt of federal funds, it must do so "unambiguously" so as to avoid unconsented, undue, and chilling intrusion on State's traditional powers. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Because it fails to draw any line at all distinguishing States' permissible exercise of their taxing and police powers from that which is proscribed, the Tax Mandate imposes no condition that can be lawfully enforced.

It is no exaggeration to say that, given force, the Tax Mandate would bulldoze the Constitution's vertical separation of powers. Its fundamental vagueness 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. Congress has never before used its Spending Clause power to affect such a broad intrusion on States' central

policymaking authority. This interferes so substantially with States' integral governmental functions—and so fails to "comport with the federal system of government embodied in the Constitution"—that it would have been held 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). Whatever the extent of Congress's powers in this area in the wake of *Garcia*, giving "state-displacing weight…to mere congressional ambiguity" as here "would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc).

The Secretary of the Treasury cannot cure Congress's failure to impose a clear condition. The Constitution requires Congress—not the Executive Branch—to draw clear lines when encroaching upon the States' sovereignty. It is Congress's exercise of its Spending Clause power that has the effect of disrupting the federal–State balance, and it is therefore Congress's duty to ensure that it does so in a manner that enables States to police that incursion and that avoids miring States in uncertainty and chilling the exercise of their core powers. Punting the hard questions to the discretion of the Executive Branch is inconsistent with the Constitution's vertical and horizontal separation of powers.

The regulations promulgated by the Secretary are also no cure. They appoint the Secretary as a virtual viceroy over the States, with authority to review practically every decision that might affect tax revenue (potentially any exercise of tax and police powers) and discretion to approve or reject those decisions. In

this role, the Secretary exercises greater discretion over what States may do than State governors. Worse still, because the Secretary's regulations are merely regulations, the Secretary retains the power to withdraw or amend them at any time, even without notice upon a claim of "good cause." The Administrative Procedure Act is not equal to the requirement that Congress impose conditions on the States' receipt of funds unambiguously in advance of their acceptance, confirming that the responsibility to legislate clearly in this area rests solely upon Congress's shoulders—not those of an executive official powerless to act with the durability required when State sovereignty is at stake.

If Congress wishes to exert control over States' taxing and police-power decisions, it must at a minimum do so with a clarity that the Tax Mandate lacks. The judgment of the district court should be affirmed.

Argument

I. The Tax Mandate Is Fundamentally Vague and Therefore Unenforceable

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

Congress may "condition the States' receipt of federal funds" only if it does so "'unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (cleaned up)). No mere technicality, this rule serves as an essential 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).

The Supreme Court has required Congress to speak clearly when intruding upon the traditional sphere of State sovereignty since the dawn of our Republic. *See New York v. United States*, 505 U.S. 144, 155 (1992). *Fairfax's Devisee v. Hunter's Lesee*, 11 U.S. (7 Cranch) 603, 623 (1812), for example, required statutory language that was "clear and explicit" to derogate from the common law.

Current law requires essentially the same. *Pennhurst* 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 very 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*. Contrary to the Government's assertion (at 15–16) that Congress need only make clear to States that funding is conditioned upon compliance with some kind of standard, "the crucial inquiry" is "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst*, 451 U.S. at 25. And this already strong requirement "applies with greatest force where…a State's potential obligations under the Act are largely indeterminate." *Id*. The Supreme Court applied the same standard in *Dole*, 483 U.S. at 208, and *New York*, 505 U.S. at 172.

This clear statement requirement has also been implicated in a series of cases arising under Title IX of the Education Amendments of 1972, 20 U.S.C.

§ 1681 *et seq. See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Indep. Sch. Dist.*, 524 U.S. 274 (1998), *Franklin v. Gwinett Cnty*., 503 U.S. 60 (1992). 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).

On similar reasoning, *Arlington Central School District* concluded that the Individuals with Disabilities Education Act (IDEA) did not permit a court to shift expert witness fees paid by a prevailing party. 548 U.S. at 296. 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*. It emphasized that the text of the statute is the touchstone of this inquiry, rejecting reliance on legislative history: "the key 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) ("[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate" state sovereignty).

The Supreme Court's explication of functionally identical clear statement requirements in other contexts is also instructive. For Congress to abrogate State

sovereign immunity, it "must mak[e] its intention unmistakably clear in the language of a statute." *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"). Likewise, a "'clear and manifest' statement from Congress" is required "to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op.); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991).

"[U]nless 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) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statute*s, 47 Colum. L. Rev. 527, 539–40 (1947)).

B. The Tax Mandate's Unprecedented Vagueness Renders It Unconstitutional

What the Tax Mandate requires of States is anything but clear. 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. And limiting indoor dining at restaurants may slow the spread of SARS-COV-2, at the expense to the State of a reduction in sales-tax revenues.

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 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.

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 may bar 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

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

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 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.

The Government's brief provides no clarity as to how the law would apply in this, or myriad other, situations. Instead, it argues broadly (at 7–9 and 12) that the Tax Mandate is not implicated if a State offsets tax cuts with increases in other taxes, revenue derived from macroeconomic growth, or spending cuts in areas not implicated by ARPA. But this position, advanced for the first time in this Court, raises at least three substantial problems: First, it is contrary to the text of the Act, which prohibits the use of ARPA funds to "directly or *indirectly* offset a reduction in the next tax revenue" of a State "resulting from a change in law, regulation, or administrative interpretation…that reduces any tax." 42 U.S.C. § 802(c)(2)(A) (emphasis added). The statutory bar on indirect offset does

not allow for the Treasury to decide that some offsets are actually permissible. Second, even if the Government's litigating position was the statutory standard, it remains clear as mud: how is a State to know whether the Treasury considers corresponding spending cuts to be in an area not affected by ARPA? And third, that the Government needs to clarify the application of the Tax Mandate through its shifting litigation positions demonstrates that the text of the statute itself fails to meet the clarity requirements for Spending Clause legislation.

The Government's defense of the Tax Mandate finds no support in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), nor *Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir. 2005). *Bennett* found the "requisite clarity" in the statutory language itself, which expressly required that federal funds be used only to "'supplement'" and not "'supplant'" preexisting spending. 470 U.S. at 666, 671 (quoting statute). That the court additionally addressed the parties' arguments on the implementing regulations—which closely tracked the statutory language, *id*. at 671—does not support any position of the Government here. Nor does *Cutter*, which upheld the Religious Land Use and Institutionalized Persons Act's "least restrictive means" standard for burdens on prisoners' religious exercise. 423 F.3d at 586. The distinction between that familiar standard—clearly formulated, applied in decades of court decisions, and extended in the statute to only a narrow field of State activity—and the Tax Mandate's open-ended and novel prohibition on any action that might "directly or indirectly" reduce tax revenue only highlights the Tax Mandate's status as an extreme outlier in terms of vagueness.

"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*, 491 U.S. at 230. Because Congress failed to do so here, the Tax Mandate is facially invalid. *Pennhurst*, 451 U.S. at 17.

II. Treasury Cannot and Did Not Cure the Tax Mandate's Constitutional Defect

A. The Executive Branch Cannot Make Up for Congress's Failure To Speak "Unambiguously"

The Tax Mandate's constitutional infirmity cannot be cured by the Secretary through rulemaking or otherwise.

1. Whether the Spending Clause authorizes particular legislation depends on that legislation alone. 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 (emphasis added), in a manner both "unequivocal and textual," *Dellmuth*, 491 U.S. at 230. 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 legitimately legislating under the Spending Clause and the offending provisions are facially invalid. *Pennhurst*, 451 U.S. at 17 (assessing "[t]he legitimacy of Congress' power to legislate under the spending power"). Put simply, "when Congress desires to impose a condition

under the Spending Clause, it is Congress's burden to affirmatively impose the condition in clear and unmistakable statutory terms." *Sharp v. Johnson*, 669 F.3d 144, 154 (3d Cir. 2012).

The Constitution does not permit Congress to issue vague statements of principle affecting States' exercise of their sovereign powers, leaving it to the Executive Branch to fill in the details. Reliance on an agency's general gap-filling authority, *see Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007), is not enough to satisfy the demands of the Spending Clause.

The *en banc* Fourth Circuit addressed that precise issue in *Riley*, 106 F.3d at 559, holding that to "commandeer from the States their core function[s]" and sovereignty, Congress itself must "sp[eak] in affirmative and unambiguous terms, so that there could be no question whatsoever of its intent." *Id.* at 562.[3] The court rejected the argument that courts may defer to an agency's interpretation of an ambiguous provision affecting State sovereignty. "In 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. An adjustment to the critical balance of power between the Federal Government and the States cannot be authorized implicitly." *Id.* at 563.

It is therefore "axiomatic" that any statutory ambiguity "defeats altogether a claim by the Federal Government that Congress has unambiguously

[3] In reversing the panel opinion, the Fourth Circuit adopted the dissenting panel opinion of Judge Luttig. 106 F.3d at 561. Quotes from the opinion include those from Judge Luttig's original panel dissent, reproduced by the *en banc* court.

conditioned the States' receipt of federal monies in the manner asserted." *Id*. at 567. And it is not enough that Congress indicate, generally, its intent to use its spending power to direct State activity: "a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed." *Id.* at 568 (citing *Gregory*, 501 U.S. at 460–70);[4] *accord Doe v. Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200*, 115 F.3d 1273, 1278 (7th Cir. 1997).

"Clarity is demanded *whenever* Congress legislates through the spending power." *Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014). The Constitution requires that the legislature speak unambiguously when conditioning the grant of federal funds to the States. It is Congress, not the Executive Branch, that must make "its intention clear and manifest…if it intends to impose a condition on the grant of federal moneys." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotations omitted). As this Court recognized, it is "'[b]y insisting that Congress speak with a clear voice,' the [courts] enable[] the States 'to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 268 (6th Cir. 2009) (en banc) (opinion of Cole, J.) (quoting *Pennhurst*, 415 U.S. at 17). Lacking legislative power, the Executive can enable no such thing.

[4] The Government contends (at 19 n.5) that this is *obiter dictum* and contrary to controlling precedent. Not so. The Fourth Circuit made explicit that it was holding that "[i]n order for *Congress* to condition a state's receipt of federal funds, *Congress* must do so clearly and unambiguously." *Riley*, 106 F.3d at 561. And, as described above, this rule flows directly from Supreme Court precedent.

2. Congress alone must shoulder the burden of imposing conditions unambiguously because the power being exercised is Congress's, not the Executive's. It is Congress's exercise of its Spending Clause power that has the potential to disrupt the careful balance between the federal and State governments. And it is therefore Congress's responsibility to ensure that this power be exercised in a manner that observes the Constitution's limits on what it can and cannot do. That's why the "legitimacy of Congress' power to legislate" under the Clause depends on the clarity with which it acts. *Pennhurst*, 451 U.S. at 17. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.

Requiring Congress to speak clearly is consistent with and reflective of the Constitution's interbranch separation of powers and respect for States' traditional sovereign authorities. The Constitution gives Congress, not the Executive Branch, the power to spend for the "general Welfare of the United States." Art. I, § 8, cl. 1. *Cf. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting) ("[T]he States under the Spending Clause agree only to conditions clearly specified by Congress, not any implied on an ad hoc basis by the courts."). It "carefully separates the 'purse' from the 'sword' by assigning to Congress and Congress alone the power of the purse." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021); *see* The Federalist No. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001) ("The Executive…holds

the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."). And because the Founders viewed the "power over the purse" as "the most complete and effectual weapon" in representing the interests of the people, The Federalist No. 58, at 303 (James Madison) (Gideon ed., 2001)—wielded by a body that posed a "a special threat to individual liberty"—they divided [the legislative] power to ensure that 'differences of opinion' and the 'jarrings of parties' would 'promote deliberation and circumspection' and 'check excesses in the majority.'" *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020).

In contrast, "no such institutional protection from abuse exists" when this power is exercised by the "executive branch, where one individual…determined to impose his or her policy preferences regardless of the will of Congress"—here the Secretary of the Treasury—"could proceed unimpeded by the types of institutional checks present in the legislative body." *City of Chicago v. Barr*, 961 F.3d 882, 887 (7th Cir. 2020). And while "[t]he executive branch has significant powers…the power of the purse is not one of them." *Id.* It is one thing for Congress, made up of the elected representatives of the People and bestowed with limited, enumerated powers (including the spending power) to encumber the State's actions. It can, but it must do so carefully and unambiguously. It is quite another, more offensive thing, for the Secretary to take the power for herself, on the basis of ambiguous statutory text. So while there is a "tendency to overlook the formalities of separation of powers to address the issue-of-the-day [that] has been seen many times by the courts,…it is no more persuasive now than it was in

those cases." *Id.* As the Supreme Court observed in *Printz v. United States*, 521 U.S. 898, 933 (1997), "[m]uch of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form." (citations omitted). While a given result "may appear 'formalistic'…because such measures are typically the product of the era's perceived necessity….the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.*

3. This structural argument is bolstered by basic tenets of administrative law: regulations interpreting statutes are only valid inasmuch as they either "match Congress's unambiguous command or are clarifying a statutory ambiguity." *Tex. Educ. Agency*, 992 F.3d at 361 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)). Relying on the relevant regulations to indicate what Congress intended, when it did not say so clearly itself, is a tacit admission that the statute itself is impermissibly ambiguous.

Indeed, the clear-statement rule at issue here is a sort of "nondelegation canon," a rule that "forbid[s] administrative agencies from making decisions on their own." Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 Yale L.J. 1187, 1204 (2001). These sorts of canons "are an effort to link 'important interests' with 'appropriate institutional design.' The interests served by *Pennhurst*'s rule, of course is state autonomy, which (on this account) finds its protection principally in the institutional structure of Congress." *Id*. (quoting

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000)). Allowing an agency to fill in the gaps via regulation "not only creates the potential that the agency has attempted to impose a condition that was not within Congress's contemplation, but also risks doing so at the expense of important values of federalism." *Id.*

Accordingly, the only question for this Court is whether "*Congress* satisf[ied] the *Pennhurst* clear-statement rule by 'clearly' describing 'the conditions that go along with the acceptance…of funds under the Act.'" *City of Pontiac*, 584 F.3d at 281 (Sutton, J., concurring) (quoting *Murphy*, 548 U.S. at 304) (emphasis added). And the answer is "No."

4. Even if the Constitution permitted the Executive Branch to cure Congress's failure to unambiguously condition federal funding, the Administrative Procedure Act ("APA") is unequal to the task. Whether or not Congress could enact some statutory scheme that might allow durable clarification of vague statutory intrusions on State sovereignty, the APA's features render it entirely unsuited to that task.

Where the APA falls short is its authorization for federal agencies to withdraw or amend rules at their discretion. The APA "makes no distinction…between initial agency action and subsequent agency action undoing or revising that action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It is generally enough that an agency "display awareness that it *is* changing position" and that the agency has some reason to believe its new position "to be better."

Id. Moreover, an agency may change position on a dime, without even providing advance notice and an opportunity for comment, by promulgating an interim final rule (as the Secretary did here) based on some exigency. 5 U.S.C. § 553(b)(3)(B), (d)(3); *see, e.g., Am. Transfer & Storage Co. v. Interstate Com. Comm'n*, 719 F.2d 1283, 1303 (5th Cir. 1983). The result is that an agency is powerless to commit itself to follow any set course and so cannot speak with the durability of a duly enacted statute. Exacerbating the problem is the office exercising rulemaking authority here: the Secretary of the Treasury, an individual executive official who enjoys the "'[d]ecision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man.'" *Seila Law*, 140 S. Ct. at 2203 (quoting Federalist No. 70, at 475 (Alexander Hamilton) (J. Cooke ed., 1961)).

A 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).

But a rule promulgated under the APA can provide no safeguard. It provides States with no understanding of where they may exercise their power and where they may not, and no durable line demarcating the limits of the federal government's incursion into its authority. And a rule, even a "final" rule, provides no finality sufficient for a State to order its affairs around its content. It is

only an announcement of the Executive's views of its authorities and enforcement priorities in a given moment, which can be wiped away with rule. States will, therefore, be boxed in by the possibility that the Secretary will change her mind and amend the rules—potentially on an expedited basis—leaving them in breach at the snap of a finger

Even if one were to assume that the Secretary will stick by her as-promulgated regulations, that still would not solve the problem. A new Secretary, should one take office, could promulgate a new rule. Likewise, a new administration could issue a new rule, and could likely do so on an interim final basis—with no notice or no opportunity for the States to issue their views—changing the terms of the "contract" with the States, unilaterally obligating the States to pay the Treasury recoupment for taxing and revenue decisions it had thought were permissible under the current Administration's rules. This Administration's exercise of discretion could suddenly become an unanticipated cost for the States, contrary to the very purposes underlying the clear-statement requirement.

The APA and rules promulgated thereunder simply cannot cure the fundamental vagueness problem that exists here. Even rules drawn with perfect clarity are still subject to unilateral amendment and revision. If a State cannot rely on the lines drawn via regulation, it will almost certainly be chilled in the exercise of its retained sovereignty. And, in that way, it cannot be said to be able to make a knowing decision as to whether or not the offered funds are worth the strings attached.

B. Treasury's Interim Final Rule Only Reinforces the Tax Mandate's Fundamental Vagueness

Even assuming, *arguendo*, that the Department of the Treasury could cure the ambiguity of the American Rescue Plan Act through rulemaking, the Interim Final Rule promulgated by the Department of the Treasury falls far short. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26786, 26807 (May 17, 2021). Despite answering some questions at the margins and providing more information about the procedures that the Treasury will require the States to follow, the Interim Final Rule still leaves crucial questions unanswered about the broad scope of this unprecedented arrogation of State power, while introducing further complications.

1. The rule leaves many central questions unanswered, to the point that what is required of States is anything but clear. As one example, the rule does not define what sorts of "changes in law, regulation or interpretation" are covered by the Tax Mandate. It defines "covered change" to include "any final legislative or regulatory action, a new or changed administrative interpretation, and the phase-in or taking effect of any statute or rule where the phase-in or taking effect was not prescribed prior to the covered period." Fed. Reg. 26808/1–2. Does this include changes in property tax assessments? Or a decision to delay sending property tax assessors out to do rounds, due to the pandemic, which might have the effect of lowering revenues? Would it cover the decision to end "to go" sales of alcohol, which have provided restaurants—and

state tax collectors—with revenue, over the course of the next year? Does it matter that ending "to go" alcohol sales by restaurants would be a return to the pre-COVID *status quo ante* in most places? Even if such changes are not forbidden under the rule because of the exceptions it recognizes, States are still required to assess their "measured or predicted reductions in tax revenue." *Id.* at 26823/2.

One category that the Treasury specifically exempts from the Tax Mandate are "income tax changes—even those made during the covered period—that simply conform with recent changes in Federal law (including those to conform to recent changes in Federal taxation of unemployment insurance benefits and taxation of loan forgiveness under the Paycheck Protection Program)." *Id.* at 26808/2. While a sensible policy choice, it is difficult to see how that choice follows from the text of the Tax Mandate and impossible to predict whether that limitation will survive legal challenge. And this limitation, though an attempt to clarify, itself raises numerous questions that are unanswerable without further exercise of the Secretary's discretion. Will future changes to federal income taxes, including those presently proposed by the Administration, qualify for this exemption? And if these conforming changes raise revenue, can they be considered a changes that "pay for," *id.* at 26807/3, other tax decreases?

One potential answer to these and other questions is: "Don't worry about it." The Interim Final Rule contemplates a system wherein a State adds up all their revenues and tries to identify pay-fors to make up any difference. *See id.* But it remains unclear what inputs are supposed to be considered as part of this

calculation. Nor is it apparent that this formula-based approach is even consistent with the Tax Mandate. And how does the rule handle the possibility that tax revenues are reduced because of changes in the economy due to unforeseen circumstances? Are these to be considered when evaluating covered changes?

All of this is further exacerbated by the Interim Final Rule's charge to the States to "determine the cost of changes in law, regulation, or interpretation that reduce tax revenues and to identify and value the sources of funds that will offset—i.e., cover the cost of—any reduction in net tax revenue resulting from such changes" at the beginning of the year. *Id.* at 26807/1–2. The rule requires states to "identify and value covered changes that [the State] predicts will have the effect of reducing tax revenue in a given reporting year…based on estimated values produced by a budget model, incorporating reasonable assumptions" and that "aligns with the [State's] existing approach for measuring the effects of fiscal policies." *Id.* at 26809/1. But this requirement only highlights the ambiguity and confusion created by the Tax Mandate. How is a State supposed to know at the beginning of a year the extent to which a "change in interpretation [will] result in a reduction in net tax revenue"? To take one obvious example, States' projections at the beginning of 2020 were off by miles. And what if the Treasury believes that the assumptions that States make or their "existing approach for measuring the effects of fiscal policies" is unreasonable? Ultimately, this does not serve to make things any clearer for States. They do not have a crystal ball, nor can they read the Secretary's mind.

Perhaps to blunt these criticisms, the Interim Final Rule establishes a "de minimis level" of acceptable reduced revenue, one percent of the reporting year's baseline, to accommodate the "small changes [that] alter the composition of their tax revenues" and "other policies with marginal effects on tax revenues." *Id.* at 26809/2. The "de minimis level" also attempts to account for "projected revenue effects that turn out to differ from actual effects." *Id.* The creation of this zone of discretion to account for potential ambiguity, though, simply proves the constitutional infirmity in the first place: neither the Tax Mandate, nor the complicated regulatory scheme meant to enforce it, provides sufficient clarity for States to understand their obligations and the potential costs. That the Secretary indicates that she is planning to use her discretion not to recoup certain monies—a decision she has the discretion to change in an instant, *see supra*—does not make the actual text of the statute or regulations any clearer. Ultimately, the obligations imposed on the States must be "unequivocal and textual," *Dellmuth*, 491 U.S. at 230. This is neither.

2. It is also doubtful that the Interim Final Rule can provide any certainty to the States in the areas where it arguably departs from the Tax Mandate's text, such as its exclusion of conforming changes to taxation and the *de minimis* exemption. States' reliance on these provisions of the rule may be subject to challenge in litigation seeking the invalidation of State law as conflicting with the Tax Mandate. Although such issues probably could not arise in federal-court litigation, *see generally DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006),

many State courts do recognize taxpayer standing. *See generally* Edward Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After* Cuno *and* Winn, 40 Hastings Const. L.Q. 1, 36–46 (2012) (surveying States' approaches). That includes Ohio. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1082 (Ohio 1999) ("[W]hen the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."). Thus, in addition to grappling with the uncertain obligation of the Tax Mandate itself, States must additionally assess whether and to what extent they may rely on the Secretary's "fix." The Secretary's attempt to clarify the Tax Mandate by departing from its text through such regulatory provisions as the *de minimis* exemption actually increases the uncertainty to States as to the exercise of their sovereign powers.

3. In many ways, the Interim Final Rule simply confirms the overwhelming sweep of the Tax Mandate. It establishes a proto-receivership under which State governments and their budget offices are mere functionaries reporting to their federal superintendent. It requires the State to quantify every policy decision that it makes, and then identify an offset for any that reduces revenue to the satisfaction of the Treasury Department. *See* 86 Fed. Reg. at 26810.[5] And, despite all that, it indicates that the Treasury will be monitoring the States and

---

[5] The rule indicates that "Treasury will provide additional guidance and instructions [*sic*] the reporting requirements at a later date." 86 Fed. Reg. at 26810/3. To that end, then, the States *still* do not know the true depth of their obligations under the Tax Mandate for the acceptance of ARPA funds.

indicates that the Treasury—at its discretion—may determine that a State is evading the restrictions and seek recoupment of funds, notwithstanding compliance with the onerous procedures it has put in place. *Id.*

Conclusion

For the foregoing reasons, the decision of the district court should be affirmed.

October 19, 2021

Respectfully submitted,

/s/ Robert Alt

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422
robert@buckeyeinstitute.org

ANDREW M. GROSSMAN
SEAN SANDOLOSKI
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 861-1697
agrossman@bakerlaw.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is 6,468 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs.

/s/ Robert Alt
ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

/s/ Robert Alt
ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

Attorney for Amicus Curiae