No. 22-10560

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division

BRIEF FOR PLAINTIFFS-APPELLEES

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Certificate of Interested Persons

No. 22-10560

State of Texas; State of Mississippi; State of Louisiana,
Plaintiffs-Appellees,

v.

Janet Yellen, in her official capacity as Secretary of the Treasury; Richard K. Delmar, in his official capacity as Acting Inspector General of the Department of the Treasury; United States Department of the Treasury; United States of America,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Plaintiffs-Appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Eric J. Hamilton
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Statement Regarding Oral Argument

This case merits oral argument. The challenged statute substantially limits a core aspect of Plaintiffs' sovereignty by restricting their taxation authority. In addition, Plaintiffs' claims implicate important questions under the Spending Clause and anti-commandeering doctrine. Plaintiffs respectfully suggest that oral argument will assist the Court in resolving these issues.

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases:

Consitutional Provisions, Statutes, and Rules:

Other Authorities:

INTRODUCTION

The economic contraction following the pandemic strained budgets for States and local governments as it did for the American people. Congress responded in March 2021 with the American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4 (ARPA). The law aided States by creating a $195 billion grant program to finance States' pandemic-recovery expenses. 42 U.S.C. § 802(b)(3)(A). Local governments benefited from a similar $130 billion grant program. *Id.* § 803(a). And the neediest individual taxpayers received hundreds of billions of dollars in federal tax relief. *See* p. 30, *infra*.

While ARPA cut taxes, it barred States (but not local governments) from doing the same thing. ARPA requires States to repay an amount equal to any State tax cuts adopted after ARPA's enactment. 42 U.S.C. § 802(c)(2)(A), (e). Specifically, the law provides that participating States "shall not use [grant money] . . . to either directly or indirectly offset a reduction in the net tax revenue of such State . . . resulting from a change in law, regulation, or administrative interpretation . . . that reduces any tax." *Id.* § 802(c)(2)(A). Because money is fungible and many States must balance their budgets, grant money expenditures directly or indirectly offset any revenue-negative policy change. Thus, the provision, called the Tax Mandate, effectively prohibits States from cutting taxes.

ARPA's state tax-cut ban violates the Constitution. The Spending Clause prevents Congress from using federal grants to coerce States, which the Tax Mandate does through the size of its offer. Because States have no realistic option to reject the Tax Mandate, it also operates as a federal order on States that violates the anti-

commandeering doctrine. In addition, the Tax Mandate violates the Spending Clause because it is unconstitutionally ambiguous. Its ambiguity prevents States from making a knowing decision to bind themselves to the Tax Mandate's obligations. Finally, the Tax Mandate violates the Spending Clause because it is unrelated to ARPA's purpose. The prohibition on state tax relief has no relation to ARPA's purpose, which is in large part to deliver federal tax relief.

Statement of Jurisdiction

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the U.S. Constitution. ROA.15. The district court entered judgment in Plaintiffs' favor on April 8, 2022. ROA.1106-07. Defendants timely appealed from that judgment on June 6, 2022. ROA.1108-09; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether the district court correctly held that Plaintiffs have standing.
2. Whether the district court correctly held that the Tax Mandate violates the Constitution.

Statement of the Case

I. Background

A. The COVID-19 pandemic hammered state government budgets by imposing new costs and reducing revenue. Like other States, the impact on Texas, Louisiana, and Mississippi was severe. *See generally* ROA.240-55, 257-63, 284-90. ARPA, Congress's March 2021 COVID-19 legislation, responded by creating a $195 billion

grant program for States. 42 U.S.C. § 802(b)(3)(A). The funds available to Texas, Louisiana, and Mississippi are approximately $15.8 billion, $3 billion, and $1.8 billion, respectively. ROA.383; *see also* 42 U.S.C. § 802(b)(3)(A)-(C). In relation to their respective annual budgets, these amounts are substantial. The grant program equals 13 percent of Texas's 2021 budget, seven percent of Louisiana's 2021 budget, and 31 percent of Mississippi's 2021 budget. ROA.1097-98. Across all States, ARPA funds amount to around 22 percent of States' annual general-fund budgets and 9 percent of total-fund budgets. ROA.1097.

ARPA funds may be used for any of four purposes: (1) providing "assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality"; (2) "respond[ing] to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers"; (3) supplementing reduced government revenues resulting from the pandemic; and (4) investing "in water, sewer, or broadband infrastructure." 42 U.S.C. § 802(c)(1)(A)-(D). Separately, Congress prohibited States from depositing ARPA funds into pension funds. *Id.* § 802(c)(2)(B). These four permissible purposes and the pension-fund deposit prohibition are repeated in a parallel grant program created for local governments. *Id.* § 803(c)(1)(A)-(D), (c)(2).

The state grant program includes an additional provision not duplicated in the local government grant program that covers state revenue-negative policy changes. The Tax Mandate provides:

> A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or

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

Id. § 802(c)(2)(A). ARPA does not define "directly or indirectly offset" or explain how to measure "a reduction in the net tax revenue" of a State. *Id.*

B. Shortly after ARPA's enactment, attorneys general for Plaintiffs and 18 other States requested information on the Treasury Department's Tax Mandate enforcement plans. In a letter dated March 16, 2021, the attorneys general called the Tax Mandate "unclear" and sought "confirm[ation] that [ARPA] does not prohibit States from generally providing tax relief." ROA.405, 409. The letter explained that because "money is fungible[] and States must balance their budgets," "*any* tax relief enacted by a state legislature after the State has received relief funds could be viewed as 'using' those funds as an 'offset' that allows the State to provide that tax relief." ROA.405.

The Secretary of the Treasury responded that the Tax Mandate "does not 'deny States the ability to cut taxes in any manner whatsoever.'" ROA.412. But the Secretary did not clarify the Treasury Department's view of the Tax Mandate's operation. She did not define a "direct[] or indirect[] offset." 42 U.S.C. § 802(c)(2)(A); *see* ROA.412-13. Nor did she explain how the Treasury Department would measure "a reduction in the net tax revenue." 42 U.S.C. § 802(c)(2)(A); *see* ROA.412-13. The Secretary said that States that "lower certain taxes" could avoid implicating the Tax Mandate "by replacing the lost revenue through other means," suggesting that the

Treasury Department views the Tax Mandate as a prohibition on tax relief that reduces state revenue. ROA.412.

C. After the filing of this lawsuit, the Treasury Department published an interim final rule interpreting the Tax Mandate. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (May 17, 2021). A final rule followed and took effect on April 1, 2022. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338 (Jan. 27, 2022) (codified at 31 C.F.R. pt. 35). The Treasury Department's regulations do not define "directly or indirectly offset," but they do attempt to provide a method for determining whether a tax cut results in "a reduction in the net tax revenue" of a State. States accepting ARPA funds must calculate the value of any changes in state law that might reduce the State's tax revenues. 31 C.F.R. §§ 35.3, 35.8(b)(1). If the aggregate amount of revenue loss is greater than one percent of the State's baseline—the State's tax revenue for its fiscal year ending in 2019 adjusted for inflation—and the State reports a reduction in net tax revenue ("measured as the difference between actual tax revenue and the State's . . . baseline"), the State must show that it has increased other tax revenues or reduced spending to offset the revenue loss from the tax cuts. *Id.* §§ 35.3, 35.8(b)(2)-(4).

The methodology is complicated, and it appears designed to identify as many tax cuts as possible as reducing net tax revenues. States must decipher whether spending cuts are in the same "[d]epartments, agencies, or authorities in which the State" is (or is not) using ARPA funds, and they may not "incorporate the effects of macroeconomic growth to reduce . . . the projected impact" of a tax cut. *Id.* §§ 35.3, 35.8(b)(1), 35.8(b)(4). Moreover, by defining the "baseline" as inflation-adjusted tax

revenue for 2019, *id.* § 35.3, revenue growth following the pandemic-induced economic contraction may nevertheless reduce revenue if the growth does not result in revenues surpassing pre-pandemic levels.

II. Procedural History

The States of Texas, Louisiana, and Mississippi filed suit on May 3, 2021, in the U.S. District Court for the Northern District of Texas. ROA.11-28. Around the same time, other States filed similar suits in other district courts in other circuits. *Ohio v. Yellen*, No. 1:21-cv-181 (S.D. Ohio filed Mar. 17, 2021); *Arizona v. Yellen*, No. 2:21-cv-514 (D. Ariz. filed Mar. 25, 2021); *Missouri v. Yellen*, No. 4:21-cv-376 (E.D. Mo. filed Mar. 29, 2021); *West Virginia v. U.S. Dep't of Treasury*, No. 7:21-cv-465 (N.D. Ala. filed Mar. 31, 2021); *Kentucky v. Yellen*, No. 3:21-cv-17 (E.D. Ky. filed Apr. 6, 2021).

Plaintiffs' complaint alleged that the Tax Mandate violated the Constitution's Spending Clause and anti-commandeering doctrine. ROA.21-25. It named as defendants the United States, the Treasury Department, the Secretary of the Treasury, and the Acting Inspector General of the Treasury Department. ROA.14. Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6), ROA.115-49, which the district court denied, ROA.1061-82. The district court first concluded Plaintiffs have standing. It held that Congress's enactment of ARPA injured Plaintiffs by presenting them with an ambiguous offer, ROA.1068, and "put[ting them] in the position of having to choose between being injured by the loss of a substantial amount of federal funds or the invasion of their constitutional authority to tax," ROA.1069. In addition, the district court found Plaintiffs had pre-

enforcement standing under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). ROA.1071-72. The district court held that each of Plaintiffs' claims met the plausibility standard. ROA.1072-82.

Plaintiffs and Defendants filed motions for summary judgment. ROA.182-226, 926-28. The district court granted in part Plaintiffs' motion, denied Defendants' motion, and entered a permanent injunction against Defendants. ROA.1088-1105. The district court held that the Tax Mandate coerced and commandeered Plaintiffs in violation of the Spending Clause and anti-commandeering doctrine. ROA.1099. "The Court f[ound] the threat to Plaintiffs' budgets . . . is 'economic dragooning' that exerts 'undue influence' rather than 'relatively mild encouragement.'" ROA.1098 (quoting *Nat'l Fed. of Indep. Business v. Sebelius*, 567 U.S. 519, 579-80, 582 (2012) (plurality op.)). Because it held that the Tax Mandate is unconstitutional, the district court determined it did not need to address Plaintiffs' other constitutional challenges to the Tax Mandate. ROA.1099-1100. Turning to remedies, the district court found that Plaintiffs satisfied the elements for a permanent injunction. ROA.1100-01. The district court rendered final judgment, ROA.1106-07, and Defendants timely appealed, ROA.1108.

Summary of the Argument

This Court should affirm the district court's injunction against the Tax Mandate's enforcement. Multiple injuries support Plaintiffs' standing. *First*, as the district court held, Plaintiffs were injured even before accepting grant money by the federal government's constitutionally defective offer. ROA.1068. Plaintiffs were entitled to and did not receive an offer that they could "voluntarily and knowingly

accept[].” *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). *Second*, the Tax Mandate injures Plaintiffs by limiting their taxation authority. That limitation intrudes upon Plaintiffs’ sovereignty as States. *Third*, Plaintiffs have pre-enforcement standing because of the threat of Treasury Department enforcement. The Ninth Circuit recently held that a different group of States also had pre-enforcement standing to challenge the Tax Mandate. *Arizona v. Yellen*, 34 F.4th 841, 848-51 (9th Cir. 2022).

On the merits, the district court correctly held that the Tax Mandate coerces and commandeers Plaintiffs in violation of the Spending Clause and anti-commandeering doctrine. ROA.1094-99. The Tax Mandate coerces Plaintiffs by making an offer they cannot refuse. And because Plaintiffs cannot refuse the Tax Mandate, it operates as an impermissible federal command to States. Alternative grounds also support the provision’s unconstitutionality. The Tax Mandate is unconstitutionally ambiguous because States cannot understand their obligations before binding themselves to them. It also is unconstitutionally unrelated to ARPA’s purpose. If anything, the Tax Mandate opposes ARPA’s purpose by forbidding states from following ARPA’s example in providing substantial tax relief.

Standard of Review

This Court “review[s] the grant of summary judgment *de novo*, the permanent injunction for abuse of discretion, and the legal issues underlying the grant of the injunction *de novo*.” *Med-Cert Home Care, L.L.C. v. Becerra*, 19 F.4th 828, 830 (5th Cir. 2021).

ARGUMENT

I. Plaintiffs Have Standing.

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Three distinct injuries satisfy the first element. Defendants injured Plaintiffs by presenting them with ARPA's unconstitutional offer. They injured Plaintiffs by limiting their tax authority. And Plaintiffs are injured by the threat of Treasury Department enforcement. Each of these injuries independently suffices to establish standing.

Defendants do not challenge traceability or redressability. Nor could they. ROA.1069-71. As the district court explained, causation is present because ARPA is the "*[b]ut for*" cause of Plaintiffs' injuries. ROA.1070. Plaintiffs' injuries are redressable because a favorable ruling will "halt . . . enforcement" and "eliminate the alleged irreparable harm on state sovereignty." ROA.1071; *West Virginia v. U.S. Dep't of Treasury*, No. 7:21-cv-465, 2021 WL 2952863, at *7 (N.D. Ala. July 14, 2021) (mem. op.) ("[T]here is no question that the injuries in fact . . . are fairly traceable to the Federal Tax Mandate, and they can be redressed by a court order invalidating the mandate.").

A. Defendants' unconstitutional offer injured Plaintiffs.

Before Plaintiffs filed the complaint, Defendants made an unconstitutional offer of funding to Plaintiffs. That offer was made through ARPA's enactment and discussed in pre-complaint correspondence between Plaintiffs' attorneys general and the Secretary of the Treasury. 42 U.S.C. § 802(c)(2); ROA.404-10, 412-13. The

offer violated the Constitution because it was impermissibly coercive and ambiguous and contained a condition that was not related to the legislation's purpose. ROA.22-24. Plaintiffs were entitled to an offer free from these infirmities, and it is axiomatic that a party is injured by the denial of something to which it is legally entitled. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013); *F.E.C. v. Akins*, 524 U.S. 11, 21 (1998); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). The "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result." *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

The district court recognized that Defendants' offer alone injured Plaintiffs. ROA.1068-69. "'[I]t is Congress *passing* the Act, not the State *accepting* the money' that creates the alleged injuries at issue." ROA.1068 (quoting *Ohio v. Yellen*, 539 F. Supp. 3d 802, 812 (S.D. Ohio 2021)). "Because the alleged constitutional violation here occurred when Congress passed ARPA, Plaintiffs[] face an injury by being put in the position of having to choose between being injured by the loss of a substantial amount of federal funds or the invasion of their constitutional authority to tax." ROA.1069. Both the "loss of federal funds" that Plaintiffs would suffer by rejecting the offer, *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2565 (2019), and the invasion of sovereign authority that they would suffer by accepting it, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015), are constitutionally cognizable injuries. "[P]utting them to that choice is an injury itself." ROA.1069.

B. Plaintiffs' sovereign authority has and will be injured.

Defendants also injured Plaintiffs by limiting their taxation power. A State has "a judicially cognizable interest in the preservation of its own sovereignty" and standing to sue for "a diminishment of that sovereignty." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 50 n.17 (1986); *see also Brackeen v. Haaland*, 994 F.3d 249, 296 (5th Cir. 2021) (en banc) (Dennis, J., opinion), *cert. granted sub nom. Nation v. Brackeen*, 142 S. Ct. 1204 (2022). "[T]he taxation authority of state government[s]" is "central to state sovereignty." *Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). It "is indispensable" and "[t]here is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76-77 (1868).

The Tax Mandate limits Plaintiffs' sovereignty by preventing them from reducing taxes. At the time Plaintiffs sued, Defendants' intrusion on Plaintiffs' taxation authority had already begun. The Tax Mandate covers tax reductions occurring on or after March 3, 2021, 42 U.S.C. § 802(c)(2)(A), (g)(1), two months before Plaintiffs sued, ROA.11. Though Plaintiffs had not accepted funding and formally bound themselves to the Tax Mandate before filing the complaint, their later acceptance was the inevitable consequence of Defendants' impermissibly coercive offer. Plaintiffs pled that they "ha[ve] no practical choice but to accept the funds provided by the Act and plan[] to do so." ROA.20. They later did so. ROA.1090. At a minimum, this injury was imminent if not actual when they filed the complaint.

C. Plaintiffs have pre-enforcement standing.

The district court also found that Plaintiffs have standing based on the risk of federal enforcement. ROA.1071-72. A plaintiff has pre-enforcement standing if it "(1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) [its] intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'" *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (quoting *Driehaus*, 573 U.S. at 161-64) (ellipsis and second and third alterations in *Speech First*). The Ninth Circuit recently held a different group of States had pre-enforcement standing to challenge the Tax Mandate. *Arizona*, 34 F.4th at 848-51. Plaintiffs also satisfy the test.

First, Plaintiffs have and will continue to set their own tax policies while the Tax Mandate is in effect. *See* ROA.1071-72. Every State does, and such policies are "arguably affected with a constitutional interest." *Speech First*, 979 F.3d at 330; *see also* p. 11, *supra*. As Defendants admit, Plaintiffs "submitted evidence showing that Texas . . . enacted tax cuts after accepting Fiscal Recovery Funds and that Mississippi's governor and legislature were considering tax-cut proposals." Defs. Br. 9-10 (citing ROA.201, 415-18, 420, 423-24, 429-37, 439, 442-47, 449, 452-57, 459, 464, 468, 471-82, 484). For example, April 2021 fiscal notes for two later-enacted tax bills in Texas forecast negative revenue while Texas is subject to the Tax Mandate. ROA.420, 439.

Second, Plaintiffs' conduct is arguably proscribed by the Tax Mandate. This element is satisfied if the plaintiff's "interpretation of the [statute] is . . . plausible."

Barilla v. City of Houston, 13 F.4th 427, 433 (5th Cir. 2021). This Court previously found pre-enforcement standing when a regulation "fail[ed] to cabin" broad "terms" that "beg[ged] for clarification." *Speech First*, 979 F.3d at 332, 334. *Cf. Barilla*, 13 F.4th at 433 (noting ordinance's failure to define terms). Here, the Tax Mandate uses limitless language in prohibiting the use of funds to "directly or indirectly offset a reduction in the net tax revenue." 42 U.S.C. § 802(c)(2)(A). Nothing in the statute distinguishes a direct or indirect offset from no offset. Because money is fungible, any revenue-negative policy change at least arguably implicates the provision. This includes the tax cuts enacted in Texas and considered in Mississippi.

Plaintiffs are not required to prove "that Texas will experience a reduction in its net tax revenue as a consequence of the tax cuts it has made" and that it "lack[s] sufficient state funds to offset any (hypothetical) reductions in [its] net tax revenue." Defs. Br. 10. *First*, the argument wrongly assumes Plaintiffs can calculate a "reduction in [their] net tax revenue." *Id.* They cannot because the term is ambiguous. *See* pp. 27-28, *infra*. *Second*, the argument wrongly seeks the confession of a Tax Mandate breach. Responding to the related argument that Arizona lacked standing because it "had not claimed that its tax cut will result in a reduction in its 'net tax revenue,'" the Ninth Circuit held the argument "approximates requiring Arizona to admit to violating a law in order to have standing to challenge it." *Arizona*, 34 F.4th at 849. But as the district court recognized, "[a] violation of Section 802(c)(2)(A) is not a prerequisite to standing." ROA.1072; *see also Driehaus*, 573 U.S. at 163.

Third, there is a substantial threat of future enforcement. The statute *requires* recoupment if a State violates the Tax Mandate. 42 U.S.C. § 802(e) ("Any State . . .

that has failed to comply . . . *shall be required* to repay . . . .") (emphasis added). And the federal government has a history of enforcing federal funding conditions against States. *See, e.g.*, *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 658-59 (1985); *Bennett v. New Jersey*, 470 U.S. 632, 636 (1985); *Bell v. New Jersey*, 461 U.S. 773, 775-77 (1983). Plaintiffs' fear of Treasury Department enforcement "is far from 'imaginary or speculative.'" *Driehaus*, 573 U.S. at 165 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 552 U.S. 289, 298 (1979)).

As the Ninth Circuit explained, "the federal government has not disavowed enforcement" of the Tax Mandate and "there is affirmative conduct by the Treasury Department evincing an intent to enforce." *Arizona*, 34 F.4th at 850. The Secretary's letter to Plaintiffs "show[s] an intent to enforce the [Tax Mandate], albeit in a cooperative fashion." *Id.*; *see also Kentucky v. Yellen*, 563 F. Supp. 3d 647, 653 (E.D. Ky. 2021). Because they followed the complaint, the Treasury Department's regulations are irrelevant to standing. *Pool v. City of Houston*, 978 F.3d 307, 312 (5th Cir. 2020) ("[W]hen the Pools filed their complaint, they had no assurances that the City would refrain from enforcing . . . . That is what matters for standing.").

But even if they had preceded the complaint, the Treasury Department's regulations support standing. "Treasury's [regulations] outline[] the detailed and specific process that will be used to recoup funds from States that violate the [Tax Mandate], giving more evidence of the government's intent to enforce the challenged provision." *Arizona*, 34 F.4th at 850. The Treasury Department recently announced an investigation into one State's use of ARPA funds. Letter of Richard K. Delmar, Deputy Inspector General, to Senator Edward J. Markey (Oct. 7, 2022),

https://tinyurl.com/bdwsp6bd. Earlier, it suggested a different State may have misused ARPA funds and threatened administrative action. Letter of Adewale O. Adeyemo, Deputy Secretary of the Treasury, to Governor Douglas Ducey (Oct. 5, 2021), https://tinyurl.com/33np7tmd. *Driehaus* does not require Plaintiffs to wait for a similar investigation or threat before litigating their claims.[1]

D. Defendants' arguments are wrong.

1. Defendants' argument that if "correctly construed," "there is no concrete controversy" over the Tax Mandate, Defs. Br. 6, 8, ignores one of standing's first principles. "[S]tanding in no way depends on the merits of the plaintiff's contention that the particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). For standing purposes, this Court "accept[s] as valid the merits of [Plaintiffs'] legal claims," *Fed. Elec. Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022), and assumes "their interpretation of the statute is correct," *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988); *see also Kentucky*, 563 F. Supp. 3d at 653 ("Tennessee and Kentucky . . . interpret the Tax Mandate as proscribing use of the funds for their 'preferred tax policies in the coming years.' The second [*Driehaus*] factor is met.") (citation omitted). Defendants' argument that Plaintiffs submitted no evidence that the

[1] Defendants' argument that Plaintiffs "submitted no evidence showing a credible threat that the Treasury Department will take action to enforce" is wrong. Defs. Br. 10. Plaintiffs submitted into evidence the Secretary of the Treasury's letter, ROA.412-13, which *Arizona* found "show[ed] an intent to enforce" the Tax Mandate, 34 F.4th at 850. In addition, the statute's mandatory recoupment and the federal government's history of funding condition enforcement both evidence a credible threat. *See id.*

Tax Mandate "actually hindered their ability to determine policies for raising and spending state funds," Defs. Br. 9, also wrongly assumes the correctness of Defendants' interpretation of the Tax Mandate. As Plaintiffs understand the Tax Mandate, their tax authority is hindered. *See* ROA.13.

2. Defendants analogize to the Eighth Circuit's holding that a different group of States lacked standing to challenge ARPA, but the plaintiffs alleged a different and speculative injury. *Missouri v. Yellen*, 39 F.4th 1063, 1067 (8th Cir. 2022). The *Missouri* complaint "describe[d] two potential interpretations of the [Tax Mandate]" and sought an injunction against the adoption of one of them. *Id.* The Treasury Department "ha[d] never endorsed or adopted" that interpretation. *Id.* at 1069. By contrast, Texas, Louisiana, and Mississippi sued upon non-hypothetical injuries. They did not challenge the Treasury Department's regulations, as Defendants admit. ROA.950. Plaintiffs alleged that the Tax Mandate was unconstitutional when Congress enacted it. ROA.21-22. They pled that the Tax Mandate in fact "prohibits [them] from eliminating taxes, reducing tax rates, or increasing tax credit" and "prohibits the adoption of enforcement policies regarding taxes which would lead to reduced tax revenues." ROA.13. *Missouri* recognized that as a distinct injury in discussing *Arizona*. "[U]nlike Missouri, Arizona did not challenge a hypothetical 'broad interpretation' of the [Tax Mandate] but instead argued that, *as written*, the [Tax Mandate] is unconstitutionally ambiguous and unduly coercive." *Missouri*, 39 F.4th at 1069 n.5. Plaintiffs sued upon the same injury and accordingly have standing.

3. Defendants argue that the Treasury Department's regulations affected jurisdiction. Defs. Br. 8-9. However, standing is "assessed under the facts existing

when the complaint is filed." *Daves v. Dallas County*, 984 F.3d 381, 392 (5th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (plurality op.)). The Treasury Department's regulations followed the complaint, ROA.1063, and thus are irrelevant to standing. Defendants do not and cannot argue the regulations mooted Plaintiffs' case, which centers on the statute. *Cf.* ROA.950 ("Defendants are not asking the Court to defer to the Rule because Plaintiffs have not challenged it."). But even if the regulations were relevant, Defendants' argument that their regulations should have "put to rest" Plaintiffs' "feared . . . interpretation," Defs. Br. 8, only supports Plaintiffs' case. "Relying on regulations to present the clear condition [required by the Spending Clause] . . . is an acknowledgement that Congress's condition was not unambiguous." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021). Plaintiffs have standing to challenge the Tax Mandate.

II. The Tax Mandate Is Unconstitutional.

The district court correctly held that the Tax Mandate violates the Constitution. ROA.1094-99. The provision violates the Spending Clause's bar on coercion as well as the anti-commandeering doctrine. ROA.1094-99. It also violates the Spending Clause in two additional respects: The Tax Mandate is ambiguous and unrelated to ARPA's purpose.

A. The Tax Mandate is unconstitutionally coercive and commandeers States.

The Spending Clause and anti-commandeering doctrine both prevent Congress from using federal grant conditions to require States to follow federal orders. The Spending Clause bars federal "financial inducement" to States that is "so coercive

as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The related anti-commandeering doctrine recognizes that Congress cannot "issue direct orders to the governments of the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The district court held that the Tax Mandate violated both provisions. ROA.1094-99.

1. The Tax Mandate is unconstitutionally coercive. The Constitution's prohibition on coercive federal grant programs flows from the fact that Spending Clause legislation is akin to a contract between the federal government and States. *Sebelius*, 567 U.S. at 576-77 (plurality op.). Because contracts are executed by choice, "[t]he legitimacy of Congress's exercise of the spending power '. . . rests on whether the State voluntarily . . . accepts the terms of the "contract."'" *Id.* at 577 (quoting *Pennhurst*, 451 U.S. at 17). "When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program." *Id.* at 680 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting). "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Id.* at 577 (plurality op.).

The Supreme Court has not "attempt[ed] to 'fix the outermost line' where pressure gives way to coercion." *Id.* at 585 (quoting *Steward Mach.*, 301 U.S. at 591)). However, in *Sebelius*, "[t]he threatened loss of over 10 percent of a State's overall budget" was "surely beyond it." *Id.* at 582, 585. By contrast, *Dole* held that the threatened loss of five percent of funding from a particular federal grant program did

not rise to compulsion. 483 U.S. at 211. As a measure of the State's overall budget, less than one half of one percent was at stake in *Dole*. *Sebelius*, 567 U.S. at 581 (plurality op.).

Like the *Sebelius* statute, ARPA's offer of billions of dollars on the forfeiture of tax-reduction power is "economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582; *see also* ROA.1098. ARPA offered $15.8 billion to Texas, $3 billion to Louisiana, and $1.8 billion to Mississippi. ROA.383, 1097-98. As a measure of Plaintiffs' 2021 budgets, that amounts to 13 percent of Texas's budget, seven percent of Louisiana's budget, and 31 percent of Mississippi's budget. ROA.1097-98. No State can realistically turn down such an offer in normal economic conditions. An offer of this size is even more coercive when States are recovering from a once-in-a-century pandemic. "[T]he coercion presented in the ARPA is exactly the kind of intrusion on state sovereignty that the Constitution prohibits." *Kentucky*, 563 F. Supp. 3d at 657.

2. Because States cannot realistically reject ARPA funding, the Tax Mandate also unconstitutionally commandeers State governments. "The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

As explained, ARPA's offer of federal funding on acceptance of the Tax Mandate is illusory. *See* p. 11, *supra*. Plaintiffs cannot reject a federal offer of multiple billions of dollars in funds in a time of economic hardship. *See Kentucky*, 563 F. Supp. 3d at 655-56. Thus, the Tax Mandate is in substance a federal command to States to not reduce taxes. States did not give up the power to reduce taxes when the Constitution was ratified. To the contrary, "the taxation authority of state government[s]" remains "central to state sovereignty." *Dep't of Rev. of Or.*, 510 U.S. at 345. Because Congress lacks authority to prohibit States from reducing taxes, the Tax Mandate violates the anti-commandeering doctrine.

3. Defendants do not dispute that if the coercion analysis applies, Congress's offer is large enough to make the Tax Mandate impermissibly coercive and commandeering. Instead, Defendants characterize the Tax Mandate as a condition that "does not implicate the coercion or commandeering doctrines." Defs. Br. 14.

As this Court has explained, *Sebelius* "delineates between two types of spending conditions," the second of which triggers a coercion analysis. *Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020) (citing *Sebelius*, 567 U.S. at 580 (plurality op.)). "The easier situation is when Congress places a direct restriction on how a state uses federal funds. . . . A restriction of that sort is constitutional because it 'ensures that the funds are spent according to [Congress's] view of the 'general Welfare.'" *Id.* (quoting *Sebelius*, 567 U.S. at 580 (plurality op.)). But "Congress can also impose conditions that do not directly 'govern the use of the funds' and instead attempt to 'pressur[e] the States to accept policy changes.'" *Id.* (quoting *Sebelius*, 567 U.S. at 580 (plurality op.)). "[B]ecause

those conditions 'cannot be justified' on the same basis as the first type of condition, a different test is appropriate to assess their constitutionality: the coercion inquiry." *Id.* (quoting *Sebelius*, 567 U.S. at 580 (plurality op.)). "In other words, determining that a condition does not 'govern the use of the funds' triggers the coercion question." *Id.*

The coercion analysis applies because the Tax Mandate does not govern States' use of federal grant money. The statute provides that "[a] State or territory shall not use the funds . . . to either directly or indirectly offset a reduction in the net tax revenue of such State or territory . . . ." 42 U.S.C. § 802(c)(2)(A). Though styled as a "restriction on use of funds," the provision goes beyond the use of funds and prohibits all tax reductions by barring "direct[] or indirect[] offset[s]." *Id.* "[D]irectly or indirectly" has an "expansive definition," *United States v. Gharbi*, 510 F.3d 550, 556 (5th Cir. 2007), and is "extremely broad," *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 444 (D.C. Cir. 2012) (quoting *Roma v. United States*, 344 F.3d 352, 360 (3d Cir. 2003)).

"Money is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010). And Plaintiffs must balance their budgets. Defs. Br. 13; La. Const. art. VII, § 10; Miss. Code § 27-103-125; Tex. Const. art. III, § 49a. Thus, the expenditure of ARPA funds directly or indirectly offsets any reduction in tax revenue. *See West Virginia v. U.S. Dep't of Treasury*, 571 F. Supp. 3d 1229, 1250 (N.D. Ala. 2021) (mem. op.). One of the Tax Mandate's neighboring subsections reinforces that conclusion by requiring States to report to the Treasury Department "*all* modifications to the State's . . . tax revenue sources during the covered period." 42 U.S.C. § 802(d)(2)(A)

(emphasis added). That subsection's unlimited breadth only makes sense if the Tax Mandate is similarly limitless.

a. Defendants cite the constitutional avoidance canon to narrow the Tax Mandate, Defs. Br. 8-9, but that canon only applies to "ambiguous statutory language," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). "Congress's inclusion of the phrase 'directly or indirectly' . . . indicates that the unambiguous and plain meaning of the statute reaches broadly." *United States v. Prasad*, 18 F.4th 313, 325 (9th Cir. 2021). And even if the canon applied, "a court relying on [the avoidance] canon still must *interpret* the statute, not rewrite it." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Defendants' interpretation is a rewrite. Their contention that the statute only applies where the State has "fail[ed] to account for [a tax] reduction" through non-ARPA funds only describes a direct offset. Defs. Br. 8 (quoting *Missouri*, 39 F.4th at 1070). That reading wrongly "renders the word 'indirectly' a nullity." *Gharbi*, 510 F.3d at 556. In addition, nothing in the statute's text supports Defendants' argument that the Tax Mandate permits de minimis tax reductions. Defs. Br. 8 (citing *Missouri*, 39 F.4th at 1070).

b. After "not asking the [district c]ourt to defer to the [Treasury Department's regulations]," ROA.950, Defendants now claim those regulations are of the type to which "th[is] Court 'generally defer[s].'" Defs. Br. 8 (quoting *Moore v. Brown*, 868 F.3d 398, 407 n.3 (5th Cir. 2017) (per curiam)). Deference does not apply. Congress coerced and commandeered Plaintiffs through ARPA—not the Treasury Department regulations issued later. Treasury Department regulations do not undo congressional coercion and commandeering; nor could they. *Cf. Whitman v.*

Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). When Congress exceeds constitutional limits on its authority, the offending law is "void." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). Federal agencies cannot breathe life into void laws. "[T]he Spending Clause . . . empowers Congress, not the Executive, to spend for the general welfare." *Tex. Educ. Agency*, 992 F.3d at 362.

Even if the Treasury Department's regulations did bear on ARPA's interpretation, they do not narrow the Tax Mandate to an ARPA spending restriction. The Treasury Department's "Final Rule still fails to define how a State 'indirectly offsets' spending cuts with ARPA funds." *West Virginia*, 571 F. Supp. 3d at 1255. It "still leaves States guessing as to how they may exercise their sovereign power to tax." *Id.* As one district court explained:

> A State, for example, can cut taxes so long as decreases in revenue are counterbalanced by "[s]pending cuts in areas not being replaced by [ARPA] Funds." 86 Fed. Reg. at 26808. But the Rule does not define "areas." And because the Final Rule "provides benefits across several areas" due to the breadth with which ARPA funds can be used, *id.* at 26816, few "areas" of State spending will be suitable candidates for spending cuts that could offset a decrease in revenue. Further, the Treasury has multiple years during which it can assess whether "a spending cut is subsequently replaced with [ARPA] Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change." *Id.* at 26810. Thus, a spending cut in 2021 followed by a use of ARPA funds in 2023 could later be deemed "an evasion of the restrictions of the offset provision" that would entitle Treasury to recoupment. *Id.*

Id. The Treasury Department's regulations do not cure the Tax Mandate's unconstitutionality.

c. Defendants wrongly compare the Tax Mandate to the conditions that *Sebelius* allowed Congress to attach to state Medicaid funding, Defs. Br. 11-12, and maintenance-of-effort provisions, Defs. Br. 14. *Sebelius* allowed Medicaid conditions within *Gruver*'s first category, i.e., "direct restriction[s] on how a state uses federal funds" that "'ensure[] that the funds are spent according to [Congress's] view of the 'general Welfare.'" *Gruver*, 959 F.3d at 183 (quoting *Sebelius*, 567 U.S. at 580 (plurality op.)). But as explained, the Tax Mandate goes farther because an expenditure of grant money will "directly or indirectly offset" any revenue-negative policy change. The Tax Mandate "attempt[s] to 'pressur[e] the States to accept policy changes,'" triggering the coercion analysis. *Id.* (quoting *Sebelius*, 567 U.S. at 580 (plurality op.)).

Defendants' comparison to maintenance-of-effort provisions also fails. As the district court explained, the Tax Mandate "substantially differs from a maintenance-of-effort provision." ROA.1098. The statute at issue in *Bennett*, 470 U.S. at 658, required recipients to use funds "to supplement, and not to supplant, state and local expenditures for education." The statute in *Mayhew v. Burwell*, 772 F.3d 80, 84 (1st Cir. 2014), required recipients to "'freeze' their eligibility standards" for Medicaid recipients. ARPA does not freeze recipients' COVID recovery expenditures. ROA.1098-99. It exists because of a judgment that States cannot meet their COVID recovery needs without federal support. 42 U.S.C. § 802(a)(1). "ARPA represents a life preserver thrown to drowning governmental bodies." *Kentucky*, 563 F. Supp.

3d at 656. Life-preserver-like laws do not require a maintenance of effort, and maintenance-of-effort provisions do not ban tax reductions.

B. The Tax Mandate is ambiguous.

In addition to coercing and commandeering States, the Tax Mandate violates the Spending Clause because it is ambiguous.[2] Since Spending Clause legislation is "in the nature of a contract," a State must be able to "knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a State is . . . unable to ascertain what is expected of it." *Id.* "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* The analysis "view[s] the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The Court "must ask whether such a state official would clearly understand . . . the obligations of the Act," i.e., whether the statute "furnishes clear notice." *Id.*

The Tax Mandate leaves State officials guessing about their obligations in two respects. *First*, the Tax Mandate's "directly or indirectly offset" language is

[2] Plaintiffs argued in the district court that the Tax Mandate was unconstitutionally ambiguous and unrelated to ARPA's purpose. ROA.212-21, 1099. The district court did not address those arguments because it found the Tax Mandate unconstitutional for other reasons. ROA.1099-1100. "This Court may affirm on grounds other than those relied upon by the district court when the record contains an adequate and independent basis for that result." *Lauren C. ex rel. Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 374 (5th Cir. 2018).

ambiguous, 42 U.S.C. § 802(c)(2)(A), if Defendants are correct in claiming that the Tax Mandate excludes some tax reductions, ROA.412. Some line must separate an direct or indirect offset from an offset that is neither direct nor indirect, but the Tax Mandate does not draw that line. That flaw "makes it impossible for States . . . to know how to exercise taxing authority without putting ARPA funds at risk." *West Virginia*, 571 F. Supp. 3d at 1250; *Ohio*, 539 F. Supp. 3d at 818 ("Despite poring over this statutory language, the Court cannot fathom what it would mean to 'indirectly offset a reduction in the net tax revenue' of a State . . . ."). Plaintiffs are unable to make a "knowing[]" decision to accept ARPA's contract. *Pennhurst*, 451 U.S. at 17.

Defendants' citations to Treasury Department regulations and the constitutional avoidance canon imply that the Tax Mandate is ambiguous. This Court previously held that the federal government's "[r]el[iance] on regulations to present the clear condition [required by the Spending Clause] . . . is an acknowledgement that Congress's condition was not unambiguous." *Tex. Educ. Agency*, 992 F.3d at 361. That was because "[r]egulations that interpret statutes are valid only if they either match Congress's unambiguous command or are clarifying a statutory ambiguity." *Id.* Here, Defendants implicitly acknowledge the Tax Mandate's ambiguity twice. As in *Texas Education Agency*, Defendants cite regulations, claiming they merit "defer[ence]" and should have "put to rest" Plaintiffs' "fear." Defs. Br. 8. Defendants also invoke the avoidance canon, Defs. Br. 8-9, which "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 494 (2001). If Defendants are correct, the Tax Mandate is necessarily ambiguous.

State officials and the Treasury Department have both acknowledged the Tax Mandate's vagueness. Twenty-one State attorneys general, including Plaintiffs' attorneys general, called the provision "unclear" in a letter seeking information on the Treasury Department's enforcement plans. ROA.405. In Congress, the Secretary of the Treasury testified that the Tax Mandate raises a "host of thorny questions." U.S. Senate Comm. on Banking, Housing, & Urban Affairs, *The Quarterly CARES Act Report to Congress: Committee Hearing*, 1:10:00–1:13:36 (Mar. 24, 2021), https://tinyurl.com/45mf9ayh. When asked "what is directly or indirectly offsetting a tax cut," the Secretary could not answer. *Id.* "Given the fungibility of money, it's a hard question to answer," she testified. *Id.* Reading the Tax Mandate is no less challenging for States, which are entitled to know "the consequences of their participation" before they "exercise their choice" to accept federal money. *Pennhurst*, 451 U.S. at 17.

Second, the Tax Mandate's calculation for impermissible offsets is ambiguous. A forbidden tax policy "reduc[es] . . . the net tax revenue of such State or territory," but the statute does not define "net tax revenue." 42 U.S.C. § 802(c)(2)(A). "[T]he notion of 'reducing net tax revenue' necessarily assumes some baseline," and "the statutory language itself provides no mechanism for determining whether a State's net tax revenues are 'reduced' or not." *Ohio v. Yellen*, 547 F. Supp. 3d 713, 731-32 (S.D. Ohio 2021). The Treasury Department's regulations treat inflation-adjusted 2019 figures as the baseline. 31 C.F.R. §§ 35.3, 35.8(b)(3), (c)(1). That interpretation is implausible since Congress used different language to expressly incorporate a 2019 baseline into a neighboring subsection. *See* 42 U.S.C. § 802(c)(1)(C) ("reduction in

revenue . . . relative to revenues collected in the most recent full fiscal year of the State . . . prior to the emergency"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In addition to leaving the baseline undefined, the statute "does not explain whether the prohibition applies to *expected* tax revenues, or *actual* tax revenues." *Ohio*, 547 F. Supp. 3d at 732. If Plaintiffs make tax policy changes that they reasonably expect will not reduce revenue, have they violated the Tax Mandate if such policies in fact do? That outcome is a realistic possibility given current economic uncertainty. Even Congress's tax policy forecasters "expect[] that the economic disruptions associated with the 2020 coronavirus pandemic will result in large projection errors." *An Evaluation of CBO's Past Revenue Projections*, Cong. Budget Off. (Aug. 2020), https://tinyurl.com/3rdutrz4.

The methodology for scoring tax policies is "an essential aspect" of a State's decision to accept ARPA funds "and one on which the Tax Mandate itself says nothing." *Ohio*, 547 F. Supp. 3d at 732. Treasury Department regulations provide a methodology, but "regulations cannot provide the clarity" required for a State's acceptance of a Spending Clause condition to be "knowing." *Tex. Educ. Agency*, 992 F.3d at 362. Courts "do not," "in the event of ambiguity in" Spending Clause legislation, "defer to a reasonable interpretation by the agency, as if we were interpreting a statute which has no implications for the balance of power between the Federal

Government and the States." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (Luttig, J., dissenting) (per curiam) (en banc); *see also id.* at 560-61 (adopting Part I of Luttig, J., dissent).

C. The Tax Mandate is unrelated to ARPA's purpose.

The Tax Mandate also violates the Spending Clause because its tax-cut ban is unrelated to ARPA's purpose. Conditions on federal funding "must be reasonably related to the purpose of the federal grant." *Gruver*, 959 F.3d at 182 (citing *Dole*, 483 U.S. at 207-08). "[O]therwise . . . the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. According to the Treasury Department, Congress created the States' grant program "to provide . . . governments . . . with the resources needed to respond to the pandemic and its economic effects and to build a stronger, more equitable economy during the recovery." 87 Fed. Reg. at 4,338. To conform States' federally funded expenditures to that purpose, Congress specified four categories for permissible uses: assistance to households and businesses, essential worker compensation, replacement of lost government revenues, and infrastructure investment. 42 U.S.C. § 802(c)(1).

The Tax Mandate is unrelated to ARPA's purpose. Governments can reduce revenue without detracting from ARPA's pandemic and economic recovery purpose. Indeed, ARPA proves that. The law contains a multitude of tax rebates, tax credits, and tax suspensions that would violate the Tax Mandate if that provision applied to the federal government. ARPA suspended taxes on some unemployment compensation. Pub. L. 117-2, § 9042. It expanded the child tax credit. *Id.* § 9611. It

expanded the earned income tax credit. *Id.* §§ 9621-26. It expanded the child and dependent care tax credit. *Id.* § 9631. It expanded tax credits for COVID-19 related paid sick leave and family and medical leave. *Id.* § 9641. It increased the premium tax credit. *Id.* § 9661. And it made $1,400 refundable tax credits available to many individual taxpayers. *Id.* § 9601.

These revenue reductions do not tinker on the margins. "The American Rescue Plan delivered major tax relief . . . ." *Fact Sheet: Biden-Harris Administration Announces Child Tax Credit Awareness Day and Releases Guidance for Unprecedented American Rescue Plan Investments to Support Parents and Healthy Child Development*, The White House (June 11, 2021), https://tinyurl.com/57yrub86. For 17 million Americans, ARPA tripled the earned income tax credit from $540 to $1500. *Fact Sheet: State-by-State Analysis of American Rescue Plan Tax Credits for Families and Workers*, The White House (Mar. 8, 2022), https://tinyurl.com/38w26td8. The maximum child and dependent care tax credit increased six-fold to up to $8,000. *Id.* And ARPA delivered "the largest ever Child Tax Credit," which the White House cited as "the main driver" in "bringing child poverty to record lows." *Id.* In total, ARPA spends more on tax relief than the state grant program. For fiscal year 2021, ARPA appropriated $195.3 billion to the grant program, 42 U.S.C. § 802(a)(1), (b)(3)(A), while spending $469.1 billion on tax cuts, credits, and suspensions according to forecasts from the nonpartisan Congressional Budget Office.[3]

[3] The Congressional Budget Office forecasted that ARPA will reduce revenue by $75.4 billion in Fiscal Year 2021. *Table 9: Estimated Budgetary Effects of Title 9 (Committee on Finance) of H.R. 1319, the American Rescue Plan Act of 2021, as Passed*

While ARPA uses "major tax relief" to respond to the pandemic, it prevents States from using the same policies to respond to the same problem. And its absurdity is compounded by its inapplicability to local government recipients of ARPA funds. 42 U.S.C. § 803(c). There is no reason that the federal and local governments can use revenue-negative policies to respond to the pandemic and States cannot. If anything, the Tax Mandate opposes ARPA's pandemic and economy recovery purpose by forbidding States from following ARPA's example. Congress's inexplicable choice to cut federal taxes while banning States from doing the same thing violates the Spending Clause's relatedness requirement.

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by the Senate on March 6, 2021, Cong. Budget Off. (Mar. 10, 2021), https://tinyurl.com/45ncr5pm. It also forecasted that Congress will spend $393.7 billion on Section 9601's $1,400 refundable tax credits. *Id.* Though a "tax credit[]," "[s]uch refunds are classified as outlays in the federal budget." *Reconciliation Recommendations of the House Committee on Ways and Means*, Cong. Budget Off., at 7 n.1 (Feb. 17, 2021), https://tinyurl.com/yckrf6a3.

Conclusion

The Court should affirm the district court's judgment.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,456 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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