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9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE DISTRICT OF ARIZONA**

11 State of Arizona,

No. 2:21-cv-00514-DJH

12 Plaintiff,

13 v.

**AMICUS CURIAE BRIEF OF
NATIONAL TAXPAYERS UNION
FOUNDATION**

14 Janet Yellen, in her official capacity as
15 Secretary of the Treasury, et al.,

16 Defendants.
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18 **INTRODUCTION**

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21 On March 11, 2021, President Biden signed the American Rescue Plan Act
22 of 2021 (ARPA) into law, and Subtitle M, Section 9901 amends 42 U.S.C. §
23 602(c)(2)(A) to read:
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25 In general.—A State or territory shall not use the funds provided under this
26 section or transferred pursuant to section 603(c)(4) to either directly or
27 indirectly offset a reduction in the net tax revenue of such State or territory
28 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

1 of any tax or tax increase.

2 42 U.S.C. § 602(c)(2)(A). States which violate the provision “shall be required to
3 repay to the Secretary an amount equal to the amount of funds used in violation”
4 calculated as the “lesser of (1) the amount of the applicable reduction to net tax
5 revenue attributable to such violation; and (2) the amount of funds received by such
6 State or territory pursuant to a payment made under this section or a transfer made
7 [to local governments].” 42 U.S.C. § 602(e).
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10 The provision is capable of multiple meanings, such that an honest person
11 (or state government) attempting to abide by its terms is necessarily guessing at its
12 meaning. The result is paralyzing state legislative action for fear of violating the
13 provision, undermining ARPA’s purpose of action to provide pandemic relief. This
14 chilling effect of the ARPA provision, coupled with the lack of legislative history
15 and the limitations of any future Treasury guidance, means one of two things. Either
16 the provision is so capable of multiple meanings that it is void for vagueness, or is
17 an exercise of such great power by Congress as to deprive states of independent
18 action on their tax policies for five years. The broad sweep of the term “indirectly,”
19 coupled with the inherent fungibility of money in state budgets, means that any state
20 that accepts ARPA aid (and the funds are of such size that no state will be to explain
21 why its citizens must take on the debt to pay for ARPA but say no to their share of
22 the allocations) is effectively surrendering the ability to cut taxes. Because the
23 former result violates the Due Process Clause and the latter result violates the Tenth
24 Amendment, this Court should hold the ARPA provision to be unconstitutional.
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1 **I. The Provision is So Ambiguous That Its Enforcement Will Be**
2 **Arbitrary.**

3 The ARPA provision is capable of at least three reasonable readings.

4 Some read it as a complete ban on state tax cuts through 2024. For example,
5 the *New York Times* reported Senator Joe Manchin (D-WV) as pushing for the
6 language because he believes “states should not be cutting taxes at a time when they
7 need more money to combat the virus. He urged states to postpone their plans to cut
8 taxes.” Alan Rappeport, “A Last Minute Add to Stimulus Bill Could Restrict State
9 Tax Cuts,” *New York Times* (Mar. 12, 2021),
10 [https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-](https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html)
11 [cuts.html](https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html).

12 Some read it as allowing states to cut taxes but only on condition of
13 surrendering aid dollar-for-dollar. For example, Nicholas Johnson of the Center on
14 Budget & Policy Priorities (CBPP) writes, “It says they can’t use federal dollars to
15 do that, either directly or indirectly. If a state chooses to enact a net tax cut, it will
16 forgo the equivalent amount of federal aid provided through the Act’s Coronavirus
17 State Fiscal Recovery Fund.” Nicholas Johnson, “Rescue Plan Protects Against
18 Using Federal Dollars to Cut State Taxes,” CBPP (Mar. 11, 2021),
19 [https://www.cbpp.org/blog/rescue-plan-protects-against-using-federal-dollars-to-](https://www.cbpp.org/blog/rescue-plan-protects-against-using-federal-dollars-to-cut-state-taxes)
20 [cut-state-taxes](https://www.cbpp.org/blog/rescue-plan-protects-against-using-federal-dollars-to-cut-state-taxes).

21 A third reading was provided by U.S. Treasury Department on March 23,
22 2021, in a letter to Arizona Attorney General Mark Brnovich. Treasury stated that
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1 the provision “simply provides that funding received under the Act may not be used
2 to offset a reduction in net tax revenue resulting from certain changes in state law.
3 If States lower certain taxes but do not use funds under the Act to offset those cuts—
4 for example, by replacing the lost revenue through other means—the limitation in
5 the Act is not implicated.” Letter from U.S. Treasury Department to Arizona
6 Attorney General Mark Brnovich (Mar. 23, 2021),
7 <https://home.treasury.gov/news/press-releases/jy0075>,
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10 This lack of clarity has had a chilling effect on state legislative sessions
11 currently in progress. *See, e.g.*, Associated Press, “California delays tax break for
12 businesses because of COVID-19 relief bill,” Mar. 19, 2021,
13 <https://tinyurl.com/7ppy77p3> (“[A] bill that would do that has been delayed because
14 of a provision in the latest federal coronavirus relief bill that says states can’t use
15 relief money to cut taxes.”); Ian Richardson, “Iowa Senate votes to shift mental
16 health funding to state, eliminate ‘backfill’ payments to cities,” *Des Moines*
17 *Register*, Apr. 7, 2021, <https://tinyurl.com/yzdhzzaz> (“Iowa’s legislative leaders
18 have indicated they’re still seeking clarification on what the new federal funding
19 means for their ability to cut taxes this year.”); Holly Michels, “It’s unclear if federal
20 COVID-19 aid money could affect proposed Montana tax cuts,” *Helena*
21 *Independent Record*, Mar. 16, 2021, <https://tinyurl.com/m6252bcw> (“Gianforte said
22 his administration is still trying to get details on the language in the ARPA and what
23 it means for his tax cut plans.”); Bethany Rodgers, “Advocates urge Utah’s governor
24 to veto tax cut to make sure the state doesn’t lose COVID-19 relief funds,” *Salt Lake*
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1 *Tribune*, Mar. 12, 2021, <https://tinyurl.com/3s2ww4yf> (“Utah advocates are
2 warning that new state tax cuts could put at risk millions of dollars in federal
3 coronavirus aid and are urging Gov. Spencer Cox to veto the only tax relief proposal
4 he hasn’t yet signed.”).

6 In early April 2021, NTUF sent a letter to Treasury Secretary Janet Yellen
7 requesting guidance interpreting the ARPA provisions, with eight specific
8 recommendations. *See* Joe Bishop-Henchman, “NTU Requests Clarification on
9 State Tax Provision in American Rescue Plan,” Apr. 7, 2021,
10 [https://www.ntu.org/foundation/detail/ntu-requests-clarification-on-state-tax-
11 provision-in-american-rescue-plan](https://www.ntu.org/foundation/detail/ntu-requests-clarification-on-state-tax-provision-in-american-rescue-plan). We requested (1) Treasury should make clear
12 the baseline from which revenue reductions will be calculated, such as the pandemic
13 revenue low point, excluding tax cuts that do not cut revenue below that; (2)
14 Treasury should make clear who will be making the determination and how, such
15 as by using certifications from state authorities as the mechanism of determination;
16 (3) we urged that previously enacted, announced, or introduced state tax changes be
17 excluded; (4) we asked that changes designed to conform to federal law be excluded;
18 (5) we asked that state tax cuts that further ARPA objectives, such as those that
19 address unemployment or shore up small businesses, be excluded; (6) we asked that
20 court-ordered refunds or reductions, such as if a state tax is declared
21 unconstitutional, be excluded; (7) we asked that Treasury allow states to receive
22 advance OK that their tax cut is permissible, and that Treasury provide a dispute
23 resolution mechanism; and (8) we asked Treasury to state generally that “directly or
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1 indirectly” is to be narrowly construed. On April 7, the Treasury Department issued
2 a statement that state tax changes that conform to federal law would be excluded
3 (essentially the fourth of the above requests). *See* U.S. Department of the Treasury,
4 “Statement on State Fiscal Recovery Funds and Tax Conformity,” Apr. 7, 2021,
5 <https://home.treasury.gov/news/press-releases/jy0113> (“Regardless of the
6 particular method of conformity and the effect on net tax revenue, Treasury views
7 such changes as permissible under the offset provision.”).

10 Absent a narrowing interpretation by the courts or by Treasury guidance, the
11 ARPA provision forces people “of common intelligence [to] necessarily guess at its
12 meaning and differ as to its application,” which thereby “violates the first essential
13 of due process of law.” *Connally v. General Construction Co.*, 269 U.S. 385, 391
14 (1926). The law neither enumerates the practices that are required or prohibited, nor
15 details the procedures to be followed by those responsible for enforcing the
16 provision. *See, e.g., United States v. Williams*, 553 U.S. 285, 304 (2008). As a result,
17 the statute deprives ordinary people of the “fair notice of the conduct a statute
18 prescribes” and fails “to guard[] against arbitrary or discriminatory law
19 enforcement.” *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1212 (2018). *See*
20 *also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (“A vague law
21 impermissibly delegates basic policy matters to policemen, judges, and juries for
22 resolution on an *ad hoc* and subjective basis.”). Invalidating vague laws not only
23 upholds the Due Process Clause, it upholds the separation of powers. *See, e.g.,*
24 *Sessions*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in the judgment), *citing Jordan*

1 *v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting) (“Under the
2 Constitution, the adoption of new laws restricting liberty is supposed to be a hard
3 business, the product of an open and public debate among a large and diverse
4 number of elected representatives. Allowing the legislature to hand off the job of
5 lawmaking risks substituting this design for one where legislation is made easy, with
6 a mere handful of unelected judges and prosecutors free to “condem[n] all that
7 [they] personally disapprove and for no better reason than [they] disapprove it.”).
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9 *See also Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 17 (1981)
10 (“Accordingly, if Congress intends to impose a condition on the grant of federal
11 moneys, it must do so unambiguously.”).
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14 **II. The Term “Indirectly” In The Statute Is An Unconstitutionally**
15 **Intrusive Condition on State Governments.**

16 What actions *indirectly* “offset a reduction of net tax revenue...or delays the
17 imposition of any tax or tax increase”? “Indirect” is a broad term, with “direct and
18 indirect” together encompassing all. *See, e.g., Babbitt v. Sweet Home Chapter of*
19 *Communities for a Greater Oregon*, 515 U.S. 687, 704 (1995) (“Congress intended
20 ‘take’ to apply broadly to cover indirect as well as purposeful actions...in the
21 broadest possible manner to include every conceivable way in which a person can
22 take or attempt to take....”) (cleaned up); *National Ass’n of Greeting Card*
23 *Publishers v. U.S. Postal Service*, 462 U.S. 810, 827 (1983) (“[A]ll costs of the
24 Postal Service, both ‘direct’ and ‘indirect.’”); BLACK’S LAW DICTIONARY, 10TH ED.
25 2014 at 423 (“Indirect cost: A cost that is not specific to the production of a
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1 particular good or service but that arises from production activity in general, such
2 as overhead allocations for general and administrative activities.”); TheLaw.com
3 Dictionary, Indirect, <https://dictionary.thelaw.com/indirect/> (“A term almost always
4 used in law in opposition to ‘direct’ though not the only antithesis of the latter
5 word....”).
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7 Money is inherently fungible, especially funds in state budgets. States
8 estimate their revenues and expenses and general funds from all sources are used to
9 support all programs, and the allocation of expenses to particular sources is mainly
10 a post-hoc accounting exercise. *See, e.g., New York v. U.S. Department of*
11 *Education*, 903 F.2d 930, 934 (2nd Cir. 1990) (“Considering this budget process
12 and the fungible nature of money in general, it would be unreasonable to require the
13 Secretary to identify a particular source of funds that would have supported
14 Promotional Gates in the absence of the supplemental Chapter 1 appropriation.”).
15 The proliferation of “maintenance of effort” conditions on federal funds recognizes
16 this fact, setting minimum funding obligations to police the instinct to use new funds
17 for current activities and thereby free up existing funds for other purposes. *See, e.g.,*
18 *State of Wash. v. U.S. Dept. of Educ.*, 905 F.2d 274, 277 (9th Cir. 1990) (“If state or
19 local spending is maintained even when some costs decline, federal funds can be
20 used to fund new programs for handicapped children a local agency could not
21 otherwise afford.”). *Cf. Knox v. Service Employees Intern. Union, Local 1000*, 567
22 U.S. 298, 334-35 (2012) (Breyer, J., dissenting), *citing Retail Clerks v.*
23 *Schermerhorn*, 373 U.S. 746, 753 (1963) (“In any event, we have made clear in
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1 other cases that money is fungible. Whether a particular expenditure was funded by
2 regular dues or the special assessment is ‘of bookkeeping significance only rather
3 than a matter of real substance.’”).
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5 Absent a narrowing interpretation by the courts or by Treasury guidance, the
6 ARPA provision attempts to prohibit all state tax cuts, since any state that accepts
7 ARPA funds and cuts taxes can be said to be “directly or indirectly” using those
8 funds to cut taxes. If the statute merely said “directly” that might be a limiting factor,
9 prohibiting direct dollar-for-dollar or simultaneous in time acceptance of ARPA
10 funds and cutting of taxes. “Indirectly” is no limiting factor. With the size of the
11 federal aid so massive¹ that no state will be able to turn it down (given that their
12 citizens are also federal taxpayers who will bear the burden of paying for the future
13 debt, making it politically difficult to not take advantage of the immediate benefits),
14 the condition attached to the federal aid—cede to Congress your power to cut taxes
15 for five years—is unconstitutionally coercive. *See New York v. United States*, 505
16 U.S. 144, 162 (1992) (“While Congress has substantial powers to govern the Nation
17 directly, including in areas of intimate concern to the States, the Constitution has
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22 ¹ ARPA provides \$195 billion in aid to state governments and \$130 billion
23 in aid to local governments. The state portion amounts to 22 percent of all states’
24 annual general fund budgets (\$892.9 billion in Fiscal 2021) and 9 percent of all
25 states’ total fund budgets (\$2.26 trillion); the combined state and local aid amounts
26 to 36 percent of general fund budgets and 14 percent of all funds budgets. *See*
27 National Association of State Budget Officers, *The Fiscal Survey of States Fall 2020*
28 at 13, <https://www.nasbo.org/reports-data/fiscal-survey-of-states>. *Cf. Sebelius*, 567
U.S. at 582 (“The threatened loss of over 10 percent of a State’s overall budget, in
contrast, is economic dragooning that leaves the States with no real option but to
acquiesce in the Medicaid expansion.”).

1 never been understood to confer upon Congress the ability to require the States to
2 govern according to Congress' instructions.”). While Congress may under some
3 circumstances condition the receipt of new federal funds, restricting past and future
4 actions that “indirectly” use federal funds amounts to “Congress directly
5 command[ing] a State to regulate or indirectly coerces a State to adopt a federal
6 regulatory system as its own” in violation of the Tenth Amendment. *National*
7 *Federation of Independent Business v. Sebelius*, 567 U.S. 519, 578 (2012).
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10 **CONCLUSION**

11 For the foregoing reasons, *Amicus* respectfully requests that this Court grant
12 the plaintiff's motion.
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14 Respectfully Submitted,

15 /s/ Joseph D. Henchman

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2021, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the District of Arizona by using the CM/ECF system. I certify that all participants in the case are represented by counsel of record who are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Joseph D. Henschman
Joseph D. Henschman