**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**

| | |
|---|---|
| STATE OF OHIO,<br>*Plaintiff*,<br>v.<br>JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as acting inspector general of the Department of Treasury; and U.S. DEPARTMENT OF THE TREASURY,<br>*Defendants*. | Case No. 1:21-cv-181<br><br>Judge Douglas R. Cole |

---

**COMBINED MOTION FOR A PERMANENT INJUNCTION AND A DECLARATORY JUDGMENT, AND MEMORANDUM IN SUPPORT OF THE MOTION**

---

**MOTION FOR A PERMANENT INJUNCTION AND A DECLARATORY JUDGMENT**

The "Tax Mandate" in the American Rescue Plan Act of 2021, *see* Pub. L. No. 117-2, §9901 (adding §602(c)(2)(A) to the Social Security Act (42 U.S.C. §801 et seq.)), exceeds Congress's power under the Spending Clause, *see* U.S. Const. art. I, §8, cl.1, and violates the Tenth Amendment to the United States Constitution. The Mandate is therefore unconstitutional. The State of Ohio moves for a final judgment permanently enjoining the Mandate's enforcement against Ohio and declaring the Tax Mandate unlawful.

DAVE YOST (0056290)
Ohio Attorney General

*/s/ Benjamin M. Flowers*
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Trial Attorney*
ZACHERY P. KELLER (0086930)
MAY DAVIS (*pro hac vice*)
Deputy Solicitors General
30 East Broad Street, 17th Floor
614-466-8980
614-466-5087; fax
benjamin.flowers@ohioattorneygeneral.gov

*Counsel for the State of Ohio*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Other Authorities**

## INTRODUCTION

This Court already determined that it "cannot fathom what" the Tax Mandate means. Op., R.36, PageID#561. Neither can the State. Neither can the Secretary. *Id.*, PageID#562. That is because the Tax Mandate is an unconstitutionally ambiguous Spending Clause condition. On that ground, and others too, the Court should declare the Mandate unconstitutional and permanently enjoin its enforcement.

## STATEMENT OF FACTS

**1.** The American Rescue Plan Act offers the States massive amounts of money. Ohio is eligible for $5.5 billion in funding. That equals 7.4 percent of Ohio's 2020 expenditure and 7.1 percent of its 2020 budget. *See* Ohio Office of Budget and Management, Ohio Checkbook, https://checkbook.ohio.gov/State/Budgets/default.aspx; *see also Amicus* Br. by Chamber of Commerce, *et al.*, R.24, PageID#173–74. But the money comes with conditions. One such condition, the Tax Mandate, bars States from using Rescue Plan funds "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 (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise)." 42 U.S.C. §802(c)(2)(A).

Ohio, believing the Tax Mandate to be unconstitutional, sued for injunctive and declaratory relief. This Court, in resolving the State's preliminary-injunction motion, held that the Tax Mandate is likely unconstitutional and that the question was not "particularly close." Op., R.36, PageID#537. The Court also found that the Mandate was causing irreparable harm to Ohio. *Id.*, PageID#566–67. But it declined

to award a *preliminary* injunction, suggesting that only *permanent* relief would redress Ohio's injuries. *Id.*, PageID#567–69. Ohio responded to the ruling by seeking to expedite final judgment. The Court ordered an expedited briefing schedule. And the parties agreed, with the Court's blessing, to focus their briefs on new issues rather than repeating already-raised arguments.

**2.** After this Court's ruling, the Treasury Department published, in the Federal Register, an interim final rule purporting to implement the Rescue Plan. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786 (May 17, 2021). Relevant here, the Interim Rule announces the Treasury Department's current approach to enforcing the Tax Mandate. It abandons the narrowing interpretation that the Secretary offered to this Court mere weeks ago—an interpretation offered in a brief that chided Ohio for supposedly misunderstanding the Mandate's narrow scope. Sec. Br., R.29, PageID#253–54. The Interim Rule instead announces that, "because money is fungible," and because the Mandate prohibits using Rescue Plan funds to "indirectly" offset losses of revenue caused by tax cuts, States may violate the Mandate even when they do not "explicitly or directly" use Rescue Plan funds to "cover the costs of [tax-law] changes that reduce net tax revenue." 86 Fed. Reg. at 26807. The Interim Rule creates a complex "framework" for detecting indirect offsets that violate the Mandate. The framework is best understood as a four-step process.

*First*, every fiscal year, States "identify and value" anticipated legislative and administrative actions that might reduce tax revenue. *Id.* Some legislative and administrative actions, however, are not considered "changes." These include: changes

to income-tax rates that comply with federal law; rate reductions automatically triggered by laws in effect prior to March 3, 2021; and "[c]hanged administrative interpretations" that correct "prior inaccurate interpretations." *Id.* at 26808.

*Second*, States determine the total loss in tax revenue that they anticipate incurring from covered changes to tax law. If the "total value" of revenue reduction that a State projects from covered changes equals 1 percent or less of the State's 2019 inflation-adjusted revenue, the revenue losses are deemed "*de minimis*." *De minimis* losses do not trigger the Mandate, but others do. *Id.* at 26807, 26809, 26823.

*Third*, once the fiscal year is over, States decide whether they fall within the Interim Rule's safe harbor. Under the safe harbor, States will be deemed not to violate the Mandate if their actual tax revenue exceeds their inflation-adjusted 2019 tax revenue. *Id.* at 26807, 26809. One might ask: Why does the safe harbor measure whether States experienced an actual reduction in net tax revenue *compared to 2019*, instead of asking whether their revenue decreased relative to the previous year? The Interim Rule claims that the 2019 baseline is "consistent with the approach directed by the [Rescue Plan] in sections 602(c)(1)(C) and 603(c)(1)(C), which identify the 'most recent full fiscal year of the [State, territory, or tribal government] prior to the emergency' as the comparator for regulating revenue loss." *Id.* at 26808 (quotation omitted). But those sections invoke the 2019 baseline *strictly* for purposes of specifying one permitted use of Rescue Plan funds. They say the funds can be used to provide "government services to the extent of the reduction in revenue of [the] State … government due to the COVID-19 public health emergency relative to revenues collected

in the most recent full fiscal year … prior to the emergency." 42 U.S.C. §802(c)(1)(C); *accord* §803(c)(1)(C) (similar limit on municipal governments). These sections do not speak to the baseline against which revenue reductions are to be assessed.

*Finally*, if the loss is more than *de minimis* and if the safe harbor does not apply, the question becomes whether the State's loss of tax revenue is offset by something other than Rescue Plan funds. At this step, the State must identify the changes to state law that increased revenue or cut spending. 86 Fed. Reg. at 26807, 26809–10, 26823. If revenue raisers and spending cuts fully counterbalanced any losses to net tax revenue, the State will not be deemed to have violated the Mandate. But identifying revenue raisers and spending cuts is no mean feat. Revenue raisers are calculated using either a budget model "measured relative to a current law baseline" or based on actual values to "isolate the change in year-over-year revenue attributable to the covered change(s)." *Id*. at 26809. States determine whether they have enacted any spending cuts by comparing their spending to their expenditure in 2019 (adjusting for inflation). *Id*. at 26809–10. In valuing these spending cuts, States may not consider spending cuts in "areas" (whatever that means) where they spent Rescue Plan funds. *Id*. at 26810.

To complicate matters a bit more, the Treasury Department is free to decide, years after the fact, that a spending cut once deemed to have offset a loss in tax revenue did not in fact do so. "In order to" guard against impermissible indirect offsets, "Treasury will monitor changes in spending throughout the covered period." *Id*. That period runs from March 3, 2021, through the last date of the fiscal year on which all

Rescue Plan funds are expended—States have until December 31, 2024, to spend the money, 42 U.S.C. §§802(a)(1) & (c)(1)—or recovered. "If, over the course of the covered period, a spending cut is subsequently replaced" (an undefined concept) with Rescue Plan funds "and used to indirectly offset a reduction in net tax revenue" (an undefined concept), the change will be deemed to violate the Mandate. 86 Fed. Reg. at 26810.

**3.** On May 13, the State of Ohio submitted to the Treasury a signed certification accepting funds under the Rescue Plan. *See* Ex. A; *cf.* 42 U.S.C. §802(d)(1).

## ARGUMENT

### I. The Tax Mandate is unconstitutional.

The Tax Mandate violates the Spending Clause and the Tenth Amendment. But before turning to the merits, Ohio pauses to address Article III standing. This Court already determined that Ohio has standing to bring its Spending Clause claim. Op., R.36, PageID#553–54, 566–67. Rightly so.

The Mandate has injured, and will continue to injure, Ohio. Because of the Mandate, Ohio must "determine how to respond to the offer of funding," and how to spend the funding available, "under the cloud of an ambiguous term." *Id.*, PageID#550. So the State has been denied the clear terms to which it is entitled. *Id.* To make matters worse, the Mandate creates uncertainty surrounding "potential funding sources … in the middle of" Ohio's budgeting process, complicating that process. *Id.*, PageID#553. On top of all this, the State had no choice but to take the funds, *see* Compl., R.1, PageID#9, and the Secretary never questioned whether Ohio intended to take the money. That matters because the Mandate applies retroactively

to any changes to state law made during the "covered period," 42 U.S.C. §802(c)(2)(A), which began on March 3, 2021, *id.*, §802(g)(1). Thus, when Ohio filed its complaint, it was effectively bound, and faced the imminent prospect of being *actually* bound, by the Mandate's unconstitutional terms. That actual and imminent interference with the State's management of its finances and its sovereign authority is an injury in fact. *See* Op., R.36, PageID#553–54; *see also Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *Barnes v. E-Systems*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). So is the need to reallocate resources to assessing whether, and to what extent, proposed regulatory and legislative changes will violate the Mandate. *See Online Merchs. Guild v. Cameron*, — F.3d —, 2021 U.S. App. LEXIS 12825, at *13 (6th Cir. Apr. 29, 2021).

And so is the prospect of future enforcement. Plaintiffs always have standing to bring a pre-enforcement challenge if: (1) they intend to "engage in a course of conduct arguably affected with a constitutional interest"; (2) the conduct is "arguably proscribed" by the challenged statute; and (3) there is a substantial threat of future enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161, 162, 164 (2014) (quotation and alteration omitted). Ohio has adopted and will continue to set tax policy (which it has a constitutional interest in doing); the policies are "arguably proscribed" by the Tax Mandate (since no one can say for sure what the Mandate proscribes); and the "threat of future enforcement … is substantial" (since the Secretary will, as the Interim Rule confirms, seek recoupment for violations). *Id.* "Putting [Ohio] to the choice of abandoning [its] legal claim or risking sanctions is a dilemma

that" the Declaratory Judgment Act, and pre-enforcement review generally, exist "to ameliorate." *Sch. Dist. v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 278 (6th Cir. 2009) (*en banc*) (Sutton, J., concurring in the order) (quotation omitted).

Because these injuries are fairly traceable to the Tax Mandate, and because they can be redressed by a court order, Ohio has standing to challenge the Mandate. *Susan B. Antony*, 573 U.S. at 157–58. And it has standing to raise *all* of its claims—the Spending Clause and Tenth Amendment claims alike—because each claim challenges the statute causing Ohio's injuries and relief on any claim would redress those injuries. (Ohio preserves for appeal those standing arguments that the Court previously rejected. *See, e.g.*, Op., R.36, PageID#554 n.7.)

**A. The Tax Mandate violates the Spending Clause.**

The Tax Mandate is unconstitutionally ambiguous and part of an unconstitutionally coercive offer.

**1. The Tax Mandate is unconstitutionally ambiguous.**

The parties have already briefed at length the question whether the Tax Mandate is an unconstitutionally ambiguous Spending Clause condition. *See, e.g.*, Ohio Br., R.3, PageID#45; Ohio Reply, R.30, PageID#271–77. Ohio incorporates those arguments, and will not burden the Court by repeating them. But the gist is this: no one can "fathom what it would mean to 'indirectly offset a reduction in the net tax revenue' of a State, by a 'change in law … that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise).'" Op., R.36, PageID#562 (quoting 42 U.S.C. §802(c)(2)(A)).

The question now is whether the Interim Rule cures the unconstitutional ambiguity. The answer is "no." Interim final rules cannot cure unconstitutional ambiguity in a Spending Clause statute. Even if they could, *this* rule would not.

**a.** An agency cannot cure unconstitutional ambiguity in a statutory Spending Clause condition. Although the Supreme Court has never definitively settled the matter, this conclusion follows from first principles and case law alike. Perhaps for that reason, the Secretary conceded the point at oral argument. *See* Tr., R.32, PageID#328–29.

Begin with first principles. The Constitution binds every branch of government. When Congress enacts a law that exceeds its enumerated powers, the law is "void." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018); *United States v. Lopez*, 514 U.S. 549, 566 (1995). And just as void laws may not be enforced in court by the judicial branch, *see Marbury*, 1 Cranch at 177–78, they may not be enforced out of court by the executive branch, *see Bond v. United States*, 564 U.S. 211, 226–27 (2011); *Lopez*, 514 U.S. at 567–68. All three branches must follow the Constitution when it contradicts a statute. Thus, when a statute violates the Constitution, all three branches must give the statute no effect. *Id.*; *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Marbury*, 1 Cranch at 177–78; *Bank of Hamilton* v. *Lessee of Dudley*, 27 U.S. 492, 526 (1829).

That fundamental insight ought to end any argument that the Interim Rule is relevant here. Allowing the executive branch to resuscitate the Mandate with an administrative interpretation would mean allowing the executive branch (and

ultimately the courts) to enforce an unconstitutional law. States would be bound by the enforcement of a law that Congress lacked the power to enact—a law that, because it was unconstitutional, was not "law" at all. *Montgomery*, 136 S. Ct. at 731.

To be sure, when a statute is susceptible of two readings, and when one reading is constitutional while another is not, courts and the executive branch may avoid the constitutional issue by adopting (and enforcing) the constitutional reading. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). That option, however, is not available to cure an ambiguous Spending Clause condition. The reason is this: the constitutional-doubt canon applies *only* when "a statute is susceptible of two constructions," one of which is free of constitutional doubt. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quotation omitted). But an ambiguous Spending Clause condition is, by definition, not "susceptible of" a construction in which it is *unambiguous*, and so it is not susceptible of a construction that removes the constitutional problem. Regardless, even if the constitutional-doubt canon might conceivably help salvage *some* ambiguous Spending Clause condition, *the Tax Mandate* is not susceptible of a reading that removes the ambiguity and frees it from constitutional doubt.

Now turn from principles to precedent. The *en banc* Fourth Circuit has correctly rejected the argument that agencies can cure unconstitutional ambiguity in statutory Spending Clause conditions. It reasoned that, because it "is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted," agency interpretations have no role to play in the analysis. *Va. Dep't*

*of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (*en banc*) (appending to its *per curiam* decision, a copy of Judge Luttig's panel-stage dissent, with which a majority of judges agreed in relevant part); *id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment); *cf. Doe v. Bd. of Educ.*, 115 F.3d 1273, 1278–79 (7th Cir. 1997).

Supreme Court decisions from other contexts are in accord. For example, the Court has held that, "unless Congress speaks with a clear voice and manifests an unambiguous intent to confer individual rights," private citizens have no ability to enforce non-compliance with conditions in Spending Clause legislation. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quotation omitted). And that clarity must come from Congress itself, not from agency-issued regulations. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). The Supreme Court has reached a similar conclusion in the context of the non-delegation doctrine. Under that doctrine, Congress unlawfully delegates legislative power if it enables an agency to regulate without providing any "intelligible principle" to guide the agency's discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). And critically for present purposes, the Supreme Court has rejected the idea "that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Id.* "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power" is "internally contradictory," as the "very choice of which portion of the power to exercise … would *itself* be an exercise of the forbidden legislative authority." *Id.* at 473. In other words, if a statute is

unconstitutional and thus unenforceable, it cannot be cured via enforcement. The same logic applies here.

One final note: even if *final* rules could provide clarity, it makes no sense at all to say that an *interim* final rule can do so. These rules, by definition, are "subject to revision after publication." Op., R.36, PageID#563. And the notice-and-comment period will not close until July 16, 2021, *see* 86 Fed. Reg. at 26815, after Ohio's budget deadline. It borders on absurd to suggest that States can obtain the *statutory* clarity to which they are entitled through an agency-issued rule that the federal government itself does not deem final.

**b.** Even assuming that agencies could *ever* clarify an unconstitutionally ambiguous Spending Clause condition, the Interim Rule does not.

Consider first what the Interim Rule has to say about identifying "reduction[s] in the net tax revenue … resulting from a change in law, regulation, or administration interpretation … that reduces any tax." 42 U.S.C. §802(c)(2)(A). According to the Interim Rule, this statutory language captures state-law alterations that have all four of the following characteristics. *First*, the "change in law" must be a "covered change." 86 Fed. Reg. at 26809. Some changes, such as administrative interpretations that correct preexisting-but-inaccurate interpretations of state tax law, do not count. (The Interim Rule does not say who decides which interpretations are corrective.) *Second*, the change must be projected to decrease tax revenue relative to existing law. *Third*, the projected decrease must be greater than *de minimis*, which the Interim Rule defines to mean greater than 1 percent of the State's inflation-adjusted

2019 revenue. *Finally*, the change must cause an actual (as opposed to projected) decrease in revenue compared to the State's inflation-adjusted 2019 tax revenue. *Id.* at 26808–10, 26823.

All that provides some clarity—albeit clarity that has little basis in the statutory text. But the Interim Rule's attempts to make sense of "indirectly offsets" are entirely unhelpful. The Interim Rule says that a loss in tax revenue counterbalanced by a "spending cut" is not "indirectly offset" by Revenue Plan funds. What is a spending cut? It includes *most* reductions in expenditure relative to inflation-adjusted 2019 expenditure. But not all of them: "spending cuts" include "only spending reductions in *areas* where the recipient government has not spent Fiscal Recovery Funds." *Id.* at 26810 (emphasis added). What this means is anyone's guess. The Interim Rule does not define "areas." But given the broad scope of the permissible uses to which Rescue Plan funds can be put, many spending cuts will be linked to an "area" supported with Rescue Plan funds. And since money is "fungible," *id.* at 26807, how is the State to know whether Rescue Plan funds are spent in one "area" rather than another? To make matters worse, the Interim Rule says that the Treasury Department will review the State's spending *in future years* to ensure that a spending cut is not later offset with Rescue Plan funds. And it will assess the existence of an indirect offset using the following circular definition: "If, over the course of the covered period"—which, remember, will last for years, 42 U.S.C. §802(g)(1)—"a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury may consider

such change to be an evasion of the restrictions of the offset provision and seek recoupment." 86 Fed. Reg. at 26810. Beyond that, the Interim Rule offers little (if any) explanation about what Treasury will consider an "evasion."

All this establishes that, even assuming interim final rules can cure unconstitutionally ambiguous Spending Clause conditions, the Interim Rule does not cure the ambiguity of "indirectly offsets." If anything, the Interim Rule proves the phrase is vacuous by adopting yet another impossible-to-understand interpretation with no similarity to the interpretation the Secretary offered in this litigation just weeks ago. Months of experience "trying to derive meaning" from the Tax Mandate proves that the task is impossible. *Johnson v. United States*, 576 U.S. 591, 601–02 (2015).

Relatedly, even if regulatory interpretations in this context could be entitled to deference, the Interim Rule would be entitled to none. To receive deference, an agency interpretation must rest on a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). But as shown above, the Interim Rule's plan for implementing the Tax Mandate has little basis in the statutory language. In particular, the test for measuring indirect offsets is invented out of whole cloth. "While agencies may have authority to interpret statutes, they do not have authority to rewrite them." *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 240 (6th Cir. 2019). Because the newly announced framework does not rest on a permissible interpretation of the statutory text, it receives no deference. *See id.*; *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231–32 (1994).

That conclusion is bolstered by the principle that Congress must "speak clearly

if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted). The Interim Rule confirms what was already apparent: the Tax Mandate regulates the intricate details of state tax policy, which is an issue of vast economic and political significance. If Congress intended the courts to defer to the Treasury Department's interpretation on this important topic, it would have said so clearly. It never did. True, the statute that houses the Mandate includes a provision empowering the Secretary of the Treasury "to issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. §802(f). But *King v. Burwell*, 576 U.S. 473 (2015), shows that this general grant of regulatory authority is not specific enough to confer the power to settle a major question. That case involved the meaning of a phrase in the Affordable Care Act. The section in which the phrase appeared included a provision empowering the IRS to "prescribe such regulations as may be necessary to carry out the provisions of [the relevant] section." 26 U.S.C. §36B(g). Nonetheless, the Court invoked the major-questions doctrine and denied the agency any deference. *King*, 576 U.S. at 485. This Court should do the same thing here.

**2. The Tax Mandate is part of an unconstitutionally coercive offer.**

The Tax Mandate is unconstitutional Spending Clause legislation for a second reason: the Rescue Plan coerces the States into accepting the Mandate. The Interim Rule, to the extent it matters at all, *worsens* the coercion problem.

Ohio will receive $5.5 billion under the Rescue Plan Act. That money will do a great deal to help the State and its citizens recover from the devastating economic

effects of the pandemic. But more fundamentally, Ohio's *refusal* to accept or use the money would put Ohioans at an immense competitive disadvantage relative to their peers in other States. Even if Ohio stood on principle and turned down (or refused to use) the money, its sister States would not. Those States, including Ohio's neighbors, will use the money to help restore *their* economies and to benefit *their* small businesses. Because money is fungible, any relief families and businesses receive for Rescue Plan funds will free up money that can be used to (for example) make additional investments, hire additional employees, and so on. Thus, if Pennsylvania and Michigan businesses receive funding, while their competitors across the border in Youngstown or Toledo do not, the out-of-state businesses will get a significant leg up. This means that the Rescue Plan is not an all-upside offer: a State that refuses will not simply maintain the *status quo*; it will affirmatively harm its citizens.

In this economic climate, Ohio had no choice but to accept the offer of $5.5 billion in funds. The offer is not "relatively mild encouragement" of the sort the Spending Clause permits—"it is a gun to the head." *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (op. of Roberts, C.J.). Indeed, the money offered—which equals 7.4 percent of Ohio's 2020 spending and 7.1 percent of its 2020 budget—is comparable to the offer ("10 percent of a State's overall budget") that *NFIB* held was coercive. *Id*. at 582. Especially given the economic climate—which, as the Interim Rule recognizes, finds the States and their citizens in dire circumstances, 86 Fed. Reg. 26786–88—it ignores reality to say that Ohio could simply reject the Act's offer of funding.

Instead of seriously contending that Ohio had a genuine choice to reject the

money, the Secretary has focused on arguing that the coercion test is inapplicable to the Tax Mandate. That test, everyone agrees, applies to Spending Clause legislation that imposes conditions "as a means of pressuring the States to accept policy changes." *NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.). According to the Secretary, the Tax Mandate is not that kind of condition: all that it does is limit the permissible uses of federal funds. Sec. Br., R.29, PageID#253–54. Ohio already addressed the flaw in that argument: the Tax Mandate *does not* merely place limits on the expenditure of federal funds; given the breadth of the phrase "indirectly offsets," the Tax Mandate also places restrictions on what a State that accepts federal funds can do with *its own* funds. Ohio Reply, R.30, PageID#278–80; *cf. Gruver v. La Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020).

While there is no need to belabor that point, it is worth noting that the Interim Rule, in attempting to solve the ambiguity issue, *worsens* the coercion problem. As implemented by the Interim Rule, the Tax Mandate is far more than a restriction on what States can do with federal funds. The Rule requires each "State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.). In particular, States must conduct their budgeting, and calculate the effects of their tax policies, on the Treasury Department's terms. *See above* 2–5. The States, in other words, must use *their own* resources to help the Treasury Department enforce the Tax Mandate against them. The Mandate thus "conscript[s] state agencies into the national bureaucratic army." *NFIB*, 567 U.S. at 585 (op. of Roberts, C.J.) (quotation omitted). Conditions with that effect undoubtedly implicate the coercion test.

### B. The Tax Mandate violates the Tenth Amendment.

The Tax Mandate violates the Tenth Amendment, for two reasons. *First*, the Tax Mandate tells the States which tax policies they may pursue. Article I does not mention any "power to issue direct orders to the governments of the States," *Murphy*, 138 S. Ct. at 1476. The Mandate purports to issue such orders, however, thus exceeding Congress's power and violating the Tenth Amendment. *Second*, the State's power to tax is simply too central to state sovereignty to be regulated by Congress *at all*. *Cf. Coyle v. Smith*, 221 U.S. 559, 565 (1911).

Ohio made these arguments in earlier briefs. Ohio Br., R.3, PageID#43–45; Ohio Reply, R.30, PageID#282–84. The State incorporates those arguments by reference and adds the following observation: the Interim Rule drastically worsens the Tenth Amendment problem. Congress unconstitutionally commandeers the States, and thus violates the Tenth Amendment, when it requires them "to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)). As already discussed, the Interim Rule confirms that the Mandate requires the States to administer a federal regulatory program. That is unconstitutional.

* * *

Often, "the most telling indication of a severe constitutional problem" with legislation "is a lack of historical precedent to support it." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (alterations adopted; quotation omitted). So it is here. The Tax Mandate is unprecedented in American history. Never

before has Congress used its Spending Clause power to impose conditions on state tax policy. That is because it lacks the power to do so.

## II. The Court should enjoin the Mandate and declare it unconstitutional.

The only question left is whether Ohio should win injunctive and declaratory relief. The answer is "yes."

### A. The Court should issue a permanent injunction.

A plaintiff is entitled to a permanent injunction if: (1) it "suffered an irreparable injury"; (2) the "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) the "balance of hardships between the plaintiff and the defendant" justify an equitable remedy; and (4) "the public interest would not be disserved be a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Ohio satisfies every factor. The unconstitutional Tax Mandate has and will continue to inflict irreparable injury on Ohio. *See* Op., R.36, PageID#566. That satisfies the first factor. Because Ohio cannot sue the federal government for a monetary remedy, and because its injuries cannot be redressed with money anyway, "the remedies available at law" are "inadequate." *eBay*, 547 U.S. at 391. That satisfies the second factor. The balance of hardships tip decisively in Ohio's favor: Ohio has a strong interest in not being made subject to an unconstitutional law, while the federal government has no legitimate interest in enforcing such a law. That satisfies the third factor. Finally, an injunction will promote the public interest because it ensures "a correct application" of the law and that "the will of the people" will be "effected in

accordance with [the] law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation omitted). That satisfies the fourth and final factor. Ohio is thus entitled to a permanent injunction.

### B. The Court should award declaratory relief.

The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2201(a).

Because Ohio has standing to sue, this case involves an "actual controversy" within the Court's jurisdiction. *Id.* And because the Tax Mandate is unconstitutional, this Court may say so. But the key word is "may." The Declaratory Judgment Act leaves federal courts with "unique and substantial discretion in deciding whether to declare the rights of litigants." *Western World Ins. Co. v. Hoey*, 773 F.3d 755, 758 (6th Cir. 2014) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995)). That discretion, however, "must not be unguided." *Id.* at 759. Rather, courts should account for "efficiency, fairness, and federalism," when deciding whether to exercise jurisdiction under the Declaratory Judgment Act. *United Specialty Ins. Co. v. Cole's Place, Inc.*, 936 F.3d 386, 396 (6th Cir. 2019) (quotation omitted). In this circuit, five factors, often called the "*Grand Truck* factors," guide the decision whether to award declaratory relief:

> (1) Whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race for res judicata; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

*Id.* (alteration adopted; quotation omitted).

All five *Grand Truck* factors support awarding Ohio declaratory relief. The first two factors, which "often overlap substantially," *id.* at 397, are plainly satisfied: a declaration regarding the Mandate's constitutionality will settle the controversy between the parties and clarify the legal relations between Ohio and the federal government. The third factor asks whether a party, by seeking a declaratory judgment, is trying to avoid a different forum. *See id.* at 399. Ohio is not doing that—it sued in federal court because that is the proper place to raise this constitutional challenge. For the same reason, an award of declaratory relief will not interfere with state-court prerogatives, satisfying the fourth factor. Finally, aside from a permanent injunction, there is no other remedy that would be better or more effective.

Once again, every relevant factor supports awarding Ohio the relief it seeks.

## CONCLUSION

The Court should enjoin the enforcement of the Tax Mandate against Ohio and declare the Tax Mandate unconstitutional.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

*/s/ Benjamin M. Flowers*
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Trial Attorney*
ZACHERY P. KELLER (0086930)
MAY DAVIS (*pro hac vice*)
Deputy Solicitors General
30 East Broad Street, 17th Floor
6l4-466-8980
614-466-5087; fax
benjamin.flowers@ohioattorneygeneral.gov

*Counsel for the State of Ohio*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

*/s/ Benjamin Flowers*
BENJAMIN FLOWERS (0095284)
Solicitor General

# Exhibit A

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**

| | |
|---|---|
| STATE OF OHIO,<br>*Plaintiff*,<br>v.<br>JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as acting inspector general of the Department of Treasury; and U.S. DEPARTMENT OF THE TREASURY,<br>*Defendants*. | Case No. 1:21-cv-181<br><br>Judge Douglas R. Cole |

## DECLARATION OF KIMBERLY MURNIEKS

I, Kimberly A. Murnieks, make the following Declaration pursuant to 28 U.S.C. §1746, and state that under the penalty of perjury the following is true and correct to the best of my knowledge and belief.

1. I am the Director of the Ohio Office of Budget and Management.

2. It is my understanding that, under Section 9901 of the American Rescue Plan Act, a State may receive Rescue Plan funds by providing the Secretary of the Treasury "with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of [42 U.S.C. §802(c)] and will use any payment under this section, or transfer of funds under [42 U.S.C. §803(c)(4)], in compliance with subsection (c) of" 42 U.S.C. §802.

3. On May 13, 2021, I signed and submitted the certification for Ohio.

4. A true and correct copy of an email confirming the Treasury Department's receipt is attached as Exhibit 1.

5. A true and correct copy of the confirmation form, which was signed electronically and submitted, is attached as Exhibit 2.

6. I have personal knowledge that, on May 18, 2021, Ohio received funds through the American Rescue Plan Act.

I have read the following, and it is all true and correct.

5-19-2021
Dated

Kimberly A. Murnieks
Director
Ohio Office of Budget and Management

# Exhibit 1

**From:** slfrp@treasury.gov
**To:** Stacie.Massey@obm.ohio.gov; Kim.Murnieks@obm.ohio.gov
**Cc:** caresitforms@treasury.gov
**Subject:** Submission Received - American Rescue Plan Act of 2021 – Treasury's Coronavirus State and Local Fiscal Recovery Funds
**Date:** Thursday, May 13, 2021 10:43:29 AM

---

Your submission to the Treasury Submission Portal for Coronavirus State and Local Fiscal Recovery Funds on behalf of EXECUTIVE OFFICE OF STATE OF OHIO has been received.

The submission review process generally takes approximately four business days. During that time, you may be contacted at this email address if there is an issue regarding your submission that needs correction or clarification.

You can monitor the status of your submission at any time by logging into the Treasury Submission Portal.

If the information and documentation you submitted is determined to be complete and accurate, you will receive confirmation at this email address with instructions on how to access information about your payment including the projected timing for payment.

If you have questions about the Treasury Submission Portal or for technical support, please email covidreliefitsupport@treasury.gov. If you have general questions about the Coronavirus State and Local Fiscal Recovery Funds please email SLFRP@treasury.gov or call 844-529-9527.

U.S. Department of the Treasury
Coronavirus State and Local Fiscal Recovery Funds
SLFRP@Treasury.gov

OMB Approved No.:1505-0271
Expiration Date: 11/30/2021

Exhibit 2

U.S. DEPARTMENT OF THE TREASURY
CORONAVIRUS STATE FISCAL RECOVERY FUND

| | |
|---|---|
| Recipient name and address:<br>EXECUTIVE OFFICE OF STATE OF OHIO<br>30 E BROAD ST<br>COLUMBUS, Ohio 43215-3414 | DUNS Number: 809031776<br>Taxpayer Identification Number: 311334820<br>Assistance Listing Number and Title: 21.019 |

Section 602(b) of the Social Security Act (the Act), as added by section 9901 of the American Rescue Plan Act (ARPA), Pub. L. No. 117-2 (March 11, 2021), authorizes the Department of the Treasury (Treasury) to make payments to certain recipients from the Coronavirus State Fiscal Recovery Fund.

As a condition to receiving such payment from Treasury, the authorized representative below hereby (i) certifies that the recipient named above requires the payment to be made pursuant to section 602(b) of the Act in order to carry out the activities listed in section 602(c) of the Act and (ii) agrees to the terms attached hereto.

Section 603(b)(2) of the Act authorizes Treasury to make payments to States for the State to distribute to nonentitlement units of local government within the State in accordance with section 603(b)(2). The authorized representative below hereby agrees to use such payment from Treasury to make payments to such nonentitlement units of local government in accordance with Section 603(b) of the Act and Treasury's implementing regulations and guidance.

Section 603(b)(3)(B)(ii) of the Act authorizes Treasury to make payments to States, in the case of an amount to be paid to a county that is not a unit of general local government, for the State to distribute to units of general local government within such county in accordance with Section 603(b)(3)(B)(ii) of the Act. To the extent applicable, the authorized representative below hereby agrees to use any such payment from Treasury to make payments to such units of general local government in accordance with Section 603(b) of the Act and Treasury's implementing regulations and guidance.

Recipient:

_____
Authorized Representative:
Title:
Date signed:

U.S. Department of the Treasury:

_____
Authorized Representative:
Title:
Date signed:

PAPERWORK REDUCTION ACT NOTICE
The information collected will be used for the U.S. Government to process requests for support. The estimated burden associated with this collection of information is 15 minutes per response. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Privacy, Transparency and Records, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, D.C. 20220. DO NOT send the form to this address. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

U.S. DEPARTMENT OF THE TREASURY
CORONAVIRUS STATE FISCAL RECOVERY FUND
AWARD TERMS AND CONDITIONS

1. Use of Funds.

    a. Recipient understands and agrees that the funds disbursed under this award may only be used in compliance with section 602(c) of the Social Security Act (the Act) and Treasury's regulations implementing that section and guidance.

    b. Recipient will determine prior to engaging in any project using this assistance that it has the institutional, managerial, and financial capability to ensure proper planning, management, and completion of such project.

2. Period of Performance. The period of performance for this award begins on the date hereof and ends on December 31, 2026. As set forth in Treasury's implementing regulations, Recipient may use award funds to cover eligible costs incurred during the period that begins on March 3, 2021, and ends on December 31, 2024.

3. Reporting. Recipient agrees to comply with any reporting obligations established by Treasury as they relate to this award.

4. Maintenance of and Access to Records

    a. Recipient shall maintain records and financial documents sufficient to evidence compliance with section 602(c), Treasury's regulations implementing that section, and guidance issued by Treasury regarding the foregoing.

    b. The Treasury Office of Inspector General and the Government Accountability Office, or their authorized representatives, shall have the right of access to records (electronic and otherwise) of Recipient in order to conduct audits or other investigations.

    c. Records shall be maintained by Recipient for a period of five (5) years after all funds have been expended or returned to Treasury, whichever is later.

5. Pre-award Costs. Pre-award costs, as defined in 2 C.F.R. § 200.458, may not be paid with funding from this award.

6. Administrative Costs. Recipient may use funds provided under this award to cover both direct and indirect costs.

7. Cost Sharing. Cost sharing or matching funds are not required to be provided by Recipient.

8. Conflicts of Interest. Recipient understands and agrees it must maintain a conflict of interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict of interest policy is applicable to each activity funded under this award. Recipient and subrecipients must disclose in writing to Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting the awarded funds in accordance with 2 C.F.R. § 200.112.

9. Compliance with Applicable Law and Regulations.

    a. Recipient agrees to comply with the requirements of section 602 of the Act, regulations adopted by Treasury pursuant to section 602(f) of the Act, and guidance issued by Treasury regarding the foregoing. Recipient also agrees to comply with all other applicable federal statutes, regulations, and executive orders, and Recipient shall provide for such compliance by other parties in any agreements it enters into with other parties relating to this award.

    b. Federal regulations applicable to this award include, without limitation, the following:

        i. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, other than such provisions as Treasury may determine are inapplicable to this Award and subject to such exceptions as may be otherwise provided by Treasury. Subpart F – Audit Requirements of the Uniform Guidance, implementing the Single Audit Act, shall apply to this award.

        ii. Universal Identifier and System for Award Management (SAM), 2 C.F.R. Part 25, pursuant to which the award term set forth in Appendix A to 2 C.F.R. Part 25 is hereby incorporated by reference.

        iii. Reporting Subaward and Executive Compensation Information, 2 C.F.R. Part 170, pursuant to which the award term set forth in Appendix A to 2 C.F.R. Part 170 is hereby incorporated by reference.

        iv. OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), 2 C.F.R. Part 180, including the requirement to include a term or condition in all lower tier covered transactions (contracts and subcontracts described in 2 C.F.R. Part 180, subpart B) that the award is subject to 2 C.F.R. Part 180 and Treasury's implementing regulation at 31 C.F.R. Part 19.

v. Recipient Integrity and Performance Matters, pursuant to which the award term set forth in 2 C.F.R. Part 200, Appendix XII to Part 200 is hereby incorporated by reference.

vi. Governmentwide Requirements for Drug-Free Workplace, 31 C.F.R. Part 20.

vii. New Restrictions on Lobbying, 31 C.F.R. Part 21.

viii. Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (42 U.S.C. §§ 4601-4655) and implementing regulations.

ix. Generally applicable federal environmental laws and regulations.

c. Statutes and regulations prohibiting discrimination applicable to this award include, without limitation, the following:

i. Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.) and Treasury's implementing regulations at 31 C.F.R. Part 22, which prohibit discrimination on the basis of race, color, or national origin under programs or activities receiving federal financial assistance;

ii. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 et seq.), which prohibits discrimination in housing on the basis of race, color, religion, national origin, sex, familial status, or disability;

iii. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of disability under any program or activity receiving federal financial assistance;

iv. The Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101 et seq.), and Treasury's implementing regulations at 31 C.F.R. Part 23, which prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance; and

v. Title II of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. §§ 12101 et seq.), which prohibits discrimination on the basis of disability under programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto.

10. Remedial Actions. In the event of Recipient's noncompliance with section 602 of the Act, other applicable laws, Treasury's implementing regulations, guidance, or any reporting or other program requirements, Treasury may impose additional conditions on the receipt of a subsequent tranche of future award funds, if any, or take other available remedies as set forth in 2 C.F.R. § 200.339. In the case of a violation of section 602(c) of the Act regarding the use of funds, previous payments shall be subject to recoupment as provided in section 602(e) of the Act and any additional payments may be subject to withholding as provided in sections 602(b)(6)(A)(ii)(III) of the Act, as applicable.

11. Hatch Act. Recipient agrees to comply, as applicable, with requirements of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328), which limit certain political activities of State or local government employees whose principal employment is in connection with an activity financed in whole or in part by this federal assistance.

12. False Statements. Recipient understands that making false statements or claims in connection with this award is a violation of federal law and may result in criminal, civil, or administrative sanctions, including fines, imprisonment, civil damages and penalties, debarment from participating in federal awards or contracts, and/or any other remedy available by law.

13. Publications. Any publications produced with funds from this award must display the following language: "This project [is being] [was] supported, in whole or in part, by federal award number [enter project FAIN] awarded to [name of Recipient] by the U.S. Department of the Treasury."

14. Debts Owed the Federal Government.

a. Any funds paid to Recipient (1) in excess of the amount to which Recipient is finally determined to be authorized to retain under the terms of this award; (2) that are determined by the Treasury Office of Inspector General to have been misused; or (3) that are determined by Treasury to be subject to a repayment obligation pursuant to sections 602(e) and 603(b)(2)(D) of the Act and have not been repaid by Recipient shall constitute a debt to the federal government.

b. Any debts determined to be owed the federal government must be paid promptly by Recipient. A debt is delinquent if it has not been paid by the date specified in Treasury's initial written demand for payment, unless other satisfactory arrangements have been made or if the Recipient knowingly or improperly retains funds that are a debt as defined in paragraph 14(a). Treasury will take any actions available to it to collect such a debt.

15. Disclaimer.

a. The United States expressly disclaims any and all responsibility or liability to Recipient or third persons for the actions of Recipient or third persons resulting in death, bodily injury, property damages, or any other losses resulting in any way from the performance of this award or any other losses resulting in any way from the performance of this award or any contract, or subcontract under this award.

b. The acceptance of this award by Recipient does not in any way establish an agency relationship between the United States and Recipient.

16. Protections for Whistleblowers.

a. In accordance with 41 U.S.C. § 4712, Recipient may not discharge, demote, or otherwise discriminate against an employee in reprisal for disclosing to any of the list of persons or entities provided below, information that the employee reasonably believes is evidence of gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant.

b. The list of persons and entities referenced in the paragraph above includes the following:

i. A member of Congress or a representative of a committee of Congress;

ii. An Inspector General;

iii. The Government Accountability Office;

iv. A Treasury employee responsible for contract or grant oversight or management;

v. An authorized official of the Department of Justice or other law enforcement agency;

vi. A court or grand jury; or

vii. A management official or other employee of Recipient, contractor, or subcontractor who has the responsibility to investigate, discover, or address misconduct.

c. Recipient shall inform its employees in writing of the rights and remedies provided under this section, in the predominant native language of the workforce.

17. Increasing Seat Belt Use in the United States. Pursuant to Executive Order 13043, 62 FR 19217 (Apr. 18, 1997), Recipient should encourage its contractors to adopt and enforce on-the-job seat belt policies and programs for their employees when operating company-owned, rented or personally owned vehicles.

18. Reducing Text Messaging While Driving. Pursuant to Executive Order 13513, 74 FR 51225 (Oct. 6, 2009), Recipient should encourage its employees, subrecipients, and contractors to adopt and enforce policies that ban text messaging while driving, and Recipient should establish workplace safety policies to decrease accidents caused by distracted drivers.

OMB Approved No. 1505-0271
Expiration Date: November 30, 2021

**ASSURANCES OF COMPLIANCE WITH CIVIL RIGHTS REQUIREMENTS**
ASSURANCES OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

As a condition of receipt of federal financial assistance from the Department of the Treasury, the recipient named below (hereinafter referred to as the "Recipient") provides the assurances stated herein. The federal financial assistance may include federal grants, loans and contracts to provide assistance to the Recipient's beneficiaries, the use or rent of Federal land or property at below market value, Federal training, a loan of Federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not encompass contracts of guarantee or insurance, regulated programs, licenses, procurement contracts by the Federal government at market value, or programs that provide direct benefits.

The assurances apply to all federal financial assistance from or funds made available through the Department of the Treasury, including any assistance that the Recipient may request in the future.

The Civil Rights Restoration Act of 1987 provides that the provisions of the assurances apply to all of the operations of the Recipient's program(s) and activity(ies), so long as any portion of the Recipient's program(s) or activity(ies) is federally assisted in the manner prescribed above.

1. Recipient ensures its current and future compliance with Title VI of the Civil Rights Act of 1964, as amended, which prohibits exclusion from participation, denial of the benefits of, or subjection to discrimination under programs and activities receiving federal financial assistance, of any person in the United States on the ground of race, color, or national origin (42 U.S.C. § 2000d et seq.), as implemented by the Department of the Treasury Title VI regulations at 31 CFR Part 22 and other pertinent executive orders such as Executive Order 13166, directives, circulars, policies, memoranda, and/or guidance documents.
2. Recipient acknowledges that Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," seeks to improve access to federally assisted programs and activities for individuals who, because of national origin, have Limited English proficiency (LEP). Recipient understands that denying a person access to its programs, services, and activities because of LEP is a form of national origin discrimination prohibited under Title VI of the Civil Rights Act of 1964 and the Department of the Treasury's implementing regulations. Accordingly, Recipient shall initiate reasonable steps, or comply with the Department of the Treasury's directives, to ensure that LEP persons have meaningful access to its programs, services, and activities. Recipient understands and agrees that meaningful access may entail providing language assistance services, including oral interpretation and written translation where necessary, to ensure effective communication in the Recipient's programs, services, and activities.
3. Recipient agrees to consider the need for language services for LEP persons when Recipient develops applicable budgets and conducts programs, services, and activities. As a resource, the Department of the Treasury has published its LEP guidance at 70 FR 6067. For more information on taking reasonable steps to provide meaningful access for LEP persons, please visit http://www.lep.gov.
4. Recipient acknowledges and agrees that compliance with the assurances constitutes a condition of continued receipt of federal financial assistance and is binding upon Recipient and Recipient's successors, transferees, and assignees for the period in which such assistance is provided.
5. Recipient acknowledges and agrees that it must require any sub-grantees, contractors, subcontractors, successors, transferees, and assignees to comply with assurances 1-4 above, and agrees to incorporate the following language in every contract or agreement subject to Title VI and its regulations between the Recipient and the Recipient's sub-grantees, contractors, subcontractors, successors, transferees, and assignees:

   *The sub-grantee, contractor, subcontractor, successor, transferee, and assignee shall comply with Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from excluding from a program or activity, denying benefits of, or otherwise discriminating against a person on the basis of race, color, or national origin (42 U.S.C. § 2000d et seq.), as implemented by the Department of the Treasury's Title VI regulations, 31 CFR Part 22, which are herein incorporated by reference and made a part of this contract (or agreement). Title VI also includes protection to persons with "Limited English Proficiency" in any program or activity receiving federal financial assistance, 42 U.S.C. § 2000d et seq., as implemented by the Department of the Treasury's Title VI regulations, 31 CFR Part 22, and herein incorporated by reference and made a part of this contract or agreement.*

6. Recipient understands and agrees that if any real property or structure is provided or improved with the aid of federal financial assistance by the Department of the Treasury, this assurance obligates the Recipient, or in the case of a subsequent transfer, the transferee, for the period during which the real property or structure is used for a purpose for which the federal

financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is provided, this assurance obligates the Recipient for the period during which it retains ownership or possession of the property.

7. Recipient shall cooperate in any enforcement or compliance review activities by the Department of the Treasury of the aforementioned obligations. Enforcement may include investigation, arbitration, mediation, litigation, and monitoring of any settlement agreements that may result from these actions. The Recipient shall comply with information requests, on-site compliance reviews and reporting requirements.
8. Recipient shall maintain a complaint log and inform the Department of the Treasury of any complaints of discrimination on the grounds of race, color, or national origin, and limited English proficiency covered by Title VI of the Civil Rights Act of 1964 and implementing regulations and provide, upon request, a list of all such reviews or proceedings based on the complaint, pending or completed, including outcome. Recipient also must inform the Department of the Treasury if Recipient has received no complaints under Title VI.
9. Recipient must provide documentation of an administrative agency's or court's findings of non-compliance of Title VI and efforts to address the non-compliance, including any voluntary compliance or other agreements between the Recipient and the administrative agency that made the finding. If the Recipient settles a case or matter alleging such discrimination, the Recipient must provide documentation of the settlement. If Recipient has not been the subject of any court or administrative agency finding of discrimination, please so state.
10. If the Recipient makes sub-awards to other agencies or other entities, the Recipient is responsible for ensuring that sub-recipients also comply with Title VI and other applicable authorities covered in this document State agencies that make sub-awards must have in place standard grant assurances and review procedures to demonstrate that that they are effectively monitoring the civil rights compliance of subrecipients.

The United States of America has the right to seek judicial enforcement of the terms of this assurances document and nothing in this document alters or limits the federal enforcement measures that the United States may take in order to address violations of this document or applicable federal law.

Under penalty of perjury, the undersigned official(s) certifies that official(s) has read and understood the Recipient's obligations as herein described, that any information submitted in conjunction with this assurances document is accurate and complete, and that the Recipient is in compliance with the aforementioned nondiscrimination requirements.

EXECUTIVE OFFICE OF STATE OF OHIO
Recipient

_____
Date

_____
Signature of Authorized Official

PAPERWORK REDUCTION ACT NOTICE
The information collected will be used for the U.S. Government to process requests for support. The estimated burden associated with this collection of information is 30 minutes per response. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Privacy, Transparency and Records, Department of the Treasury, 1500 Pennsylvania Ave., N.W., Washington, D.C. 20220. DO NOT send the form to this address. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.