No. 21-16227

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ARIZONA, ET AL., Plaintiffs-Appellants,	:	On Appeal from the United States District Court for the District of Arizona
v.	:	
JANET YELLEN, ET AL., Defendants-Appellees.	:	District Court Case No. CV-21-00514-PHX-DJH

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND STATEMENT OF *AMICI* INTEREST

The COVID-19 pandemic caused immense economic harm to the States and their citizens. The American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9901, offers the States almost $200 *billion* that they can use to address that harm. The Act's Tax Mandate, 42 U.S.C. §802(c)(2)(A), regulates the tax polices of States that accept the money. It says:

> A State or territory shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) 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. (emphasis added).

This is, at least potentially, an exceptionally broad limitation. Nearly every change in law that reduces taxes causes "a reduction" in "net tax revenue" relative to a world without the change. And because "[m]oney is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010), every reduction in tax revenue is "indirectly offset" by revenue acquired elsewhere. So the Mandate could be read as forbidding States that take Rescue Plan funds from enacting *any* revenue-negative tax cuts, rebates, credits, *et cetera*. How are States to know which changes to state tax law this Mandate prohibits? No one can say. Janet Yellen herself—a world-class economist and Secretary of the Treasury—told Congress that she had no answer to the "thorny question" of what the Mandate prohibits; "given the fungibility of money," she said, "it's a hard question to answer." Hearing on CARES Act Quarterly Report, Sen. Banking, Hous. & Urb. Affairs Comm. at 1:10:00–1:13:36 (Mar. 24, 2021), https://tinyurl.com/thornyQs.

Indeed it is. The Mandate is hopelessly ambiguous. It is therefore unconstitutional. When Congress enacted the Tax Mandate, it purported to exercise its power under the Spending Clause. U.S. Const. art. I, §8, cl.1. Congress, exercising its Spending Clause authority, may offer States federal funding in exchange for their agreeing to "regulate in a particular way" or to make particular "policy choices." *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012) (op. of Roberts, C.J.) (quotation omitted). But Congress can impose such conditions *only if* it does so "unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Because the Mandate is ambiguous, it exceeds the scope of Congress's Spending Clause authority.

The District Court should have enjoined the Tax Mandate. Instead, it dismissed the case for lack of standing. It reasoned that the Mandate *was* constitutional and that Arizona therefore suffered no legally cognizable injury. The court erred. Its reasoning conflates standing, which is a jurisdictional issue, with the merits, which is not. And that conflation violates the well-established rule that the question whether a plaintiff prevails on the merits "goes to the merits" rather than "the justiciability of a dispute." *Bond v. United States*, 564 U.S. 211, 219 (2011) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998)); *Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 619 (9th Cir. 2008); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 n.4 (9th Cir. 2011). True, this rule, like most, has an exception: courts may dismiss a case "for lack of subject matter jurisdiction" when the claims are "so … 'completely devoid of merit as not to involve a federal controversy.'" *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (quoting *Steel Co.*, 523 U.S. at 89). But this is not such a case. The foregoing constitutional arguments are meritorious; at least, they are not totally devoid of merit. The Southern District of Ohio's decision permanently enjoining the Mandate confirms as much. *See Ohio v. Yellen* ("*Ohio II*"), —F. Supp.3d—, 2021 WL 2712220 (S.D. Ohio July 1, 2021).

The Court should reverse, and then reach the merits and remand with instructions to issue the injunction Arizona asked for. The *amici* States—which have an interest in protecting their sovereign authority to set tax policy from federal interference, and which have sued to enjoin the Tax Mandate themselves—file this brief to urge that result. *See* Fed. R. App. P. 29(a)(2).

ARGUMENT

All appellate lawyers know the feeling of defending a judgment their client won on an indefensible basis. That is the position in which the Secretary's lawyers find themselves. The District Court dismissed Arizona's case for lack of standing. But it did so in an opinion for which there is no good-faith defense; as outlined above, the District Court's no-standing determination rested primarily on its determination that Arizona's claims failed on the merits. *See* 1-ER-6–11. That reasoning is faulty, and obviously so. *Bond*, 564 U.S. at 219; *Steel Co.*, 523 U.S. at 89 (1998); *Fulfillment Servs.*, 528 F.3d at 619; *Jewel*, 673 F.3d at 907 n.4.

Rather than belaboring this point, the *amici* States will explain why the Mandate is unconstitutional on the merits. The States will then conclude by briefly addressing the many reasons Arizona has standing to sue—reasons that are independent of, but especially obvious after discussing, the merits.

I. The Tax Mandate is unconstitutional.

The Constitution creates a federal government of "limited and defined powers." *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 663 (1874). All "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. This case presents the following question: Did Congress transgress its limited and defined powers, and thus unconstitutionally interfere with powers reserved to the States, when it passed the Tax Mandate? The answer is "yes."

The Spending Clause contains the only one of Congress's enumerated powers that could even arguably permit the Tax Mandate's enactment. That Clause provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ....

U.S. Const. art. I., §8 cl.1. This text permits Congress to spend money; that is what it means to "provide for the … general Welfare." And the Supreme Court has long held that "Congress may attach conditions on the receipt of federal funds." *Dole*, 483 U.S. at 206. Relevant here, those conditions may even require States that accept funds to "regulate in a particular way" or to make particular "policy choices." *NFIB*, 567 U.S. at 576 (op. of Roberts, C.J.) (quotation omitted).

It is far from clear whether the Constitution, as opposed to the case law, permits Congress to impose such conditions. For one thing, Congress lacks any power to regulate the States directly, *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018), and such conditions permit Congress to do just that. For another, Congress did not begin using Spending Clause conditions to influence state policymaking until the twentieth century. *See* Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives* 9 U. Tol. L. Rev. 619, 646–47 (1978); Donald J. Toumey, Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 Yale. L.J. 1694, 1696 (1981). Congress's failure to impose such conditions earlier strongly suggests that the Constitution gives it no such power. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020). Add to this the fact that, since States are sovereigns all their own, the power to influence them by awarding or withholding money is a substantial power. And one would expect to see so substantial a power expressly stated if it existed. Constitutional draftsmen tend not to hide significant powers in vague provisions. *See* James Madison, Speech in the House of Representatives (Feb. 2, 1791), reprinted in *Legislative and Documentary History of the Bank of the United States* 39, 40, 43 (M. St. Clair & D.A. Hall eds.; Gales & Seaton 1832); *California Redevelopment Ass'n v. Matosantos*, 53 Cal. 4th 231, 260 (2011).

The Supreme Court's cases recognize that the "unfettered use of" conditions in Spending Clause legislation "could quickly alter the balance of powers between the federal government and the States." *Ohio II*, 2021 WL 2712220 at *11.

Accordingly—and perhaps recognizing that courts are dutybound to avoid extending wrongly decided precedents, *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing *en banc*)—the Court has articulated "several general restrictions" on Congress's power to place conditions on federal grants, *Dole*, 483 U.S. at 207. Two are relevant here. *First*, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously …, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17) (alteration adopted). *Second*, Congress's Spending Clause offers must be non-coercive. In other words, Congress may not attach conditions to funding offers that States have no "legitimate choice" but to "accept." *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.). The Mandate violates both limitations.

A. The Tax Mandate is unconstitutionally ambiguous.

1. Congress has no power to regulate the States directly. *New York v. United States*, 505 U.S. 144, 162 (1992). But as just discussed, it may regulate them indirectly through conditions in spending legislation. *Dole*, 483 U.S. at 207. This workaround is justified, if at all, by the States' consent. The idea is that Spending Clause legislation operates like a contract. *Pennhurst*, 451 U.S. at 17. And States can reasonably be required to abide by contractual conditions they accepted "knowingly, cognizant of the consequences of their participation." *Id.*

From this, it follows that Spending Clause conditions must be clear enough to give the States notice of what they are agreeing to do. *Dole*, 483 U.S. at 207. After all, States cannot meaningfully assent to ambiguous conditions. This does not mean that Congress must "prospectively resolve every possible ambiguity concerning particular applications" of the conditions it imposes. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Nor must Congress "list every factual instance in which a state will fail to comply with a condition." *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002). "Rather, it is only when a state official is 'unable to ascertain' the obligations that a conditional grant imposes, that constitutional problems arise." *Ohio II*, 2021 WL 2712220, at *12 (quoting *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006)).

Critically, Congress must clearly express *the substance* of the conditions it imposes; clearly expressing the mere existence of ambiguous conditions is not enough. This makes sense. States can knowingly accept conditions, cognizant "of the consequences of" doing so, *Pennhurst*, 451 U.S. at 17, only if they know what the conditions require. Again, Spending Clause legislation is in the nature of a contract. Just as vague contractual provisions are unenforceable, *Sateriale v. R.J. Reynolds Tobacco*

Co., 697 F.3d 777, 789 (9th Cir. 2012), so too are vague conditions in Spending Clause legislation.

This commonsense insight accords with binding precedent. The Supreme Court has held that Congress must clearly state the substance of any conditions it aims to impose using its Spending Clause authority. Consider *Arlington*, 548 U.S. 291. The Spending Clause statute in that case allowed courts to make federal grantees pay the "reasonable attorneys' fees" of plaintiffs who proved a violation of statutory requirements. *Id.* at 293 (quoting 20 U.S.C. §1415(i)(3)(B)). The Court had to decide whether "reasonable attorneys' fees" included "fees for services rendered by experts." *Id.* at 293–94. The Court concluded that the answer was "no." It reasoned that, because Spending Clause conditions must be unambiguous, and because the phrase "reasonable attorneys' fees" does not *unambiguously* encompass fees for experts, the statute did not allow expert-fee awards. *Id.* at 300–01. That logic makes sense only if the clear-notice requirement applies to the substance, as opposed to the mere existence, of Spending Clause conditions. *Arlington* applied the clear-notice requirement in this manner. And at least one of this Court's sister Circuits has followed suit. *See Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014).

2. In light of these principles, the Tax Mandate is unconstitutionally ambiguous.

Two phrases in the Mandate keep the States from ascertaining its meaning. *Ohio II*, 2021 WL 2712220 at *13–15. The first is "indirectly offset." "Money is fungible." *Holder*, 561 U.S. at 37. As a result, every dollar of revenue—whether it comes from taxes, Rescue Plan funds, or something else—*could be* said to "indirectly offset" revenue losses. So how are States to know when a loss of tax revenue is impermissibly offset by Rescue Plan funds? The statute does not say. And neither economic theory nor the English language provides any clarity. Perhaps for that reason, the Secretary has repeatedly "declined to take any position" on the meaning of, or to offer any "workable definition of," the phrase "indirectly offset." *Ohio II*, 2021 WL 2712220 at *14.

The second ambiguity-inducing phrase is "reduction in the net tax revenue of such State … resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax." As an initial matter, the statute provides no baseline against which to measure revenue reductions. Does one tell whether revenue has declined by comparing it to the previous year? Or does one ask whether revenue would have been higher but for the tax reduction? (If the latter, how does one make such a measurement?) Perhaps there is some other baseline. Regardless, what counts as a "decrease" in net tax revenue? The answer is hardly self-evident. Suppose "a State elects to increase its statewide sales tax, but decrease its income tax." *Ohio v. Yellen* ("*Ohio I*"), —F. Supp.3d—, 2021 WL 1903908 at *12 (S.D. Ohio May 12, 2021). Or suppose one law changes numerous rates, raising some and lowering others. Does one consider the effects of these changes together? Or is each individual change to be considered in isolation? Perhaps most importantly, how does one know whether the rate change, as opposed to some other outside factor, caused revenue to plummet? That is a critically important question, because the Mandate applies only when the *change in law* reduces tax revenues. The Mandate is silent on all of this, leaving the Secretary nearly limitless discretion to define the prohibition's meaning.

Put all this together, and the Mandate provides the States with no guidance at all regarding which exercises of state taxing authority will violate the Mandate's prohibition. So the Mandate might as well say:

> Each certifying State agrees that, if a State reduces any tax rate, on any tax, the Secretary may recoup ARPA funding to the extent that the Secretary determines, in her discretion, that the rate reduction resulted in the State losing tax revenues, and the Secretary further determines, in her discretion, that those losses were offset with ARPA funding.

Ohio II, 2021 WL 2712220 at *15. No one could plausibly contend that this alternative formulation would pass constitutional muster, as it does not meaningfully in-form the States about the "consequences of their participation.'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). Since the Tax Mandate is no clearer, it too is unconstitutional.

3. In the months since the Mandate's enactment, Treasury promulgated an interim final rule that purports to clarify the Mandate's requirements. Even assuming the rule provides clarity, however, it is irrelevant to the constitutional analysis. This follows for two reasons.

First, agencies cannot cure unconstitutional ambiguity in statutory conditions. To see why, 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). Just as void laws may not be enforced in court by the judicial branch, *id.* at 177–78, they may not be enforced out of court by the executive branch, *see Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Letter from Thomas Jefferson to Edward Livingston*, National Archives (Nov. 1, 1801), https://perma.cc/3C8B-G6UW. 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. *See Ex parte Young*, 209 U.S. at 159–60; *Letter from Jefferson to Livingston* (Nov. 1, 1801); *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016); *Marbury*, 1 Cranch at 177–78.

That fundamental insight ought to end any argument that the Treasury's regulations bear on the ambiguity issue. 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 subject to a law that Congress lacked the power to enact—a law that, because it was unconstitutional, was "never really part of the body of governing law" at all. *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021).

Now turn from principles to precedent. This Court has never considered whether agencies can, with regulatory guidance, cure unconstitutionally ambiguous Spending Clause conditions. But two of its sister circuits have, and both held that the answer is "no." The *en banc* Fourth Circuit has explained that, because "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 constitutional 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); *see also id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment).

More recently, the Fifth Circuit reached the same conclusion. *Tex. Educ. Agency v. Usde*, 992 F.3d 350, 361–62 (5th Cir. 2021).

Supreme Court decisions from other contexts are in accord. Consider, for example, the high court's nondelegation caselaw. Under the nondelegation 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, Inc.*, 531 U.S. 457, 472 (2001). 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.

Second, even putting all this aside, any attempt to salvage the Mandate's constitutionality using the interim rule founders on the major-questions doctrine. This doctrine is an outgrowth of the principle that an "agency literally has no power to act … unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019). Thus, even if agencies can cure unconstitutional ambiguity with legislation, they may do so only when Congress allows them to. In general, "a statute's ambiguity" suggests "an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000). And in general, these delegations allow agencies to enforce such laws in any manner supported by a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). But as the qualifier "in general" suggests, there is an exception. Under the "major-questions doctrine," 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) (quoting *Brown & Williamson*, 529 U.S. at 159). This doctrine rests on the commonsense insight that Congress is more likely to consider, and so less likely to leave to implication, matters of great significance. *See Brown & Williamson*, 529 U.S. at 159 (quoting Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)). Thus, statutes are not ordinarily understood as silently empowering agencies to take significant steps. And in addition to reflecting ordinary understanding, the major-questions doctrine promotes "the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

Some examples help illustrate the doctrine's reach. Take, for example, *King v. Burwell*, 576 U.S. 473 (2015). In that case, the Supreme Court considered the meaning of a phrase in the Affordable Care Act. The meaning of that phrase would "control[] billions of dollars in spending" and "affect[] the price of health insurance for millions of people." *Id.* at 485. The Court held that it owed the agency's interpretation of the relevant provision no deference; the ambiguity in the phrase, it reasoned, did not empower the agency to authoritatively interpret so significant a provision. The Supreme Court decided *Utility Air*, 573 U.S. 302, on similar grounds. The Court invoked the major-questions doctrine in rejecting an argument that ambiguities in the Clean Air Act implicitly empowered the EPA to require permits for the construction, modification, and operation of *millions* of greenhouse-gas-emitting facilities. *Id.* at 324. Finally, consider *Brown & Williamson*, 529 U.S. 120. In that case, the Court invoked the major-questions doctrine in rejecting the argument that ambiguities in the Food, Drug, and Cosmetics Act implicitly empowered the FDA to ban cigarettes. 529 U.S. at 159–60; *see also Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021).

The major-questions doctrine similarly forecloses any argument that Treasury can save the Tax Mandate. As an initial matter, the doctrine applies here because the Tax Mandate's meaning presents a question "of vast 'economic and political significance,'" *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). The Tax Mandate, much like the Affordable Care Act provision in *King*, implicates "billions of dollars in spending each year." 576 U.S. at 485. Further, the Mandate's scope bears directly on "a core State function, the power to tax, that has long been recognized as 'indispensable' to the States' very existence." *Ohio II*, 2021 WL 2712220 at *19 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824)). Intrusion on state prerogatives *always* constitutes the sort of politically important issue that requires Congress to speak clearly. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

Because the major-questions doctrine applies, the Rescue Plan can be read as empowering Treasury to clarify the meaning of the Tax Mandate *only if* the Act clearly demands that reading. Nothing in the Act gives the Treasury such immense power. To be sure, the statute that houses the Tax Mandate includes a provision allowing the Secretary "to issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. §802(f). But this general grant of regulatory authority does not clearly empower the agency to clarify the Tax Mandate's meaning. That follows from *King v. Burwell*. That case, again, involved an agency's power to authoritatively interpret a phrase in the Affordable Care Act. The section in which the phrase appeared included a provision empowering the agency to "prescribe such regulations as may be necessary to carry out the provisions of [the relevant] section." 26 U.S.C. §36B(g). Notwithstanding this general grant of authority, *King* held that Congress had not clearly empowered the agency to resolve the major question before it. If the provision in *King* lacked the clarity that the major-questions doctrine demands, so does the nearly identical provision in the Rescue Plan.

4. The District Court rejected Arizona's ambiguity argument. It determined that Congress must make clear only the existence, as opposed to the substance, of Spending Clause conditions. And it concluded that, while the Tax Mandate's substance may be ambiguous, it unambiguously imposes *some* condition.

The District Court's reasoning fails. For one thing, it is contrary to the binding holding in *Arlington*. *See above* 9–10. The District Court dismissed the relevant portion of *Arlington* as *dicta*. 1-ER-7. But as discussed above, *Arlington*'s bottom-line determination—that the statute before it did not allow for recovery of expert fees—rested on the principle that the substantive requirements of conditions in Spending Clause legislation must be unambiguous. The Court's recognition of that principle was thus necessary to the resolution of *Arlington*. And so it qualifies as a holding, not *dicta*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

The District Court further determined that, under this Court's decision in *Mayweathers*, 314 F.3d 1062, Congress must clearly state only the existence, as opposed to the substance, of conditions in Spending Clause legislation. That arguments fares no better. As an initial matter, *Mayweathers* predates *Arlington* and is therefore overruled to the extent the cases conflict. *See Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009). Moreover, *Mayweathers* did not go as far as the District Court suggested. *Mayweathers* rejected an ambiguity challenge to the Religious Land Use and Institutionalized Persons Act. The relevant provision, by its "plain language, … clearly communicate[d] that any institution receiving federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest." *Id*. at 1067. While the precise application of that standard can be "unpredictable," it is sufficiently clear to provide the States with notice regarding what they may and may not do. It is, after all, the same strict-scrutiny standard that limits government power in numerous areas. *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (Free Speech Clause); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (affirmative action). True enough, *Mayweathers* says that "Congress must … make the existence of the condition itself … explicitly obvious." *Id.* at 1067. And it recognized that Congress need not "list every factual instance in which a state will fail to comply with a condition." *Id.* But it did not reject the idea that the condition's substance must be clear enough to put the State on notice of what it is agreeing to. And it had no occasion to reject the idea, since the provision before it provided adequate notice.

B. The Tax Mandate is unenforceable because it was attached to an unconstitutionally coercive offer.

1. Supreme Court precedent permits Congress to "condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *NFIB*, 567 U.S. at 576 (op. of Roberts, C.J.) (quotation omitted). Those conditions "may influence a State's legislative choices." *New York*, 505 U.S. at 167. There comes a point, however, at which influence or encouragement "turns into compulsion." *Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). That point comes when Congress attaches conditions to offers of funding that the States have no "legitimate choice" but to "accept." *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.). Congress lacks any power to "drive the state Legislatures under the whip of economic pressure into" doing "the bidding of the central government." *Steward Mach.*, 301 U.S. at 587. Because coercive "offers" amount to impermissible direct regulation of the States, conditions attached to those offers are unenforceable. *NFIB*, 567 U.S. at 578.

The Supreme Court's decision in *NFIB* illustrates the coercion principle's force. That case concerned the constitutionality of certain Medicaid-expansion provisions in the Affordable Care Act. The provisions allowed the Secretary of Health and Human Services to withhold Medicaid funds to States whose Medicaid plans did not "comply with the Act's requirements." *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.); *see* 42 U.S.C. §1396c (2012). "Medicaid spending account[ed] for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.). Crunching those numbers, failure to abide by the Act's terms could cost a State 10 percent of its total budget. *Id.* The Court held that the federally imposed conditions violated the Spending Clause. "The threatened loss of over 10 percent of a State's overall budget," the Chief Justice explained, "is economic dragooning that leaves the States with no real option but to acquiesce" in Congress's demands. *Id.* at 582 (op. of Roberts, C.J., joined by Breyer and Kagan, JJ.); *accord id.* at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The law's provisions thus constituted not "mild encouragement," but rather "a gun to the head." *NFIB*, 567

U.S. at 581 (op. of Roberts, C.J.). The Spending Clause does not permit Congress to coerce States in that manner.

2. The offer here runs afoul of these principles: the Rescue Plan unconstitutionally coerces the States into accepting the Mandate.

Start by recognizing the impossibility of declining the Rescue Plan funds. Arizona stands to receive $4.2 *billion*. Opening Br.12. That offer—equal to about "33 % of Arizona's total budget for fiscal year 2022," *id.*—is even larger than the offer ("10 percent of a State's overall budget") that *NFIB* deemed coercive. And two real-world factors, in addition to the sheer size of the offer, bolster the conclusion that Arizona and its sister States have no choice but to accept the funds and the conditions that come with them.

First, COVID-19 caused tremendous economic and financial harm to citizens and to States. "As social distancing became a necessity, businesses closed, schools transitioned to remote education, travel was sharply reduced, and millions of Americans lost their jobs." Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26786 (May 17, 2021). "In April 2020, the national unemployment rate reached its highest level in over seventy years." *Id.* Even as we emerge from the pandemic, it is clear that the pandemic's effects are here to stay: "Since the beginning of the pandemic," "400,000 small businesses have closed, with many more at risk." *Id*. at 26792. "As of April 2021, approximately 70 percent of small businesses reported that the pandemic has had a moderate or large negative effect on their business, and over a third expect that it will take over 6 months for their business to return to their normal level of operations." *Id*. The pandemic hit the States hard, too. "In responding to the public health emergency and its negative economic impacts," the States saw a substantial spike in the demand for and cost of government services, "often amid substantial declines in revenue due to the economic downturn and changing economic patterns during the pandemic." *Id*. at 26786.

The second coercion-inducing factor is that States would affirmatively harm themselves and their citizens by rejecting the offer. Even if some State rejects the money on principle, the other forty-nine States—including the rejecting State's neighbors—will take the money. Those States will use the money to help restore *their* economies and to benefit *their* citizens and small businesses. Because money is fungible, any relief families and businesses receive from Rescue Plan funds will free up money that can be used to make additional investments, hire additional employees, and so on. Thus, if businesses in one State receive funding, while their competitors across the border do not, businesses in the first State 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.

Put all this together, and the States have no choice but to accept the offer. So the offer is coercive, and the terms the States were coerced into accepting may not be enforced.

3. The District Court's contrary analysis fails. It gave two reasons for deeming the offer non-coercive. First, it said, the only "downside to declining the ARPA funds" is the unavailability of such funds. 1-ER-11. And no State is coerced, the District Court concluded, by an all-upside offer for money to which it is otherwise not entitled. This logic, however, ignores the competitive nature of federalism. The Rescue Plan's offer is *not* all upside. Instead, as just explained, any State that refuses to accept it will affirmatively harm itself and its citizens by allowing other States (and the citizens of those States) to gain a competitive advantage.

The court also suggested that Arizona must not have been coerced because it waited over two months after the Rescue Plan's enactment to accept the funds. "Such delay," the court concluded, "does not evidence coercive pressure." 1-ER-11. That is wrong. Arizona's short delay, during which it tried to obtain an injunction, hardly shows that it could have refused the money forever.

II. States have standing to challenge the Tax Mandate.

Plaintiffs have Article III standing if they suffer an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable ruling. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). And States, when they bring suit, are "entitled to special solicitude" throughout this analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). In this case, traceability and redressability are undisputed and indisputable. First, the injuries Arizona claims are the result of (and so fairly traceable to) the Tax Mandate, as opposed to some other provision in the Rescue Plan. *See California v. Texas*, 141 S. Ct. 2104, 2117–18 (2021). Second, and as a result, any court order enjoining the Mandate would redress Arizona's injuries.

The only remaining question is whether Arizona has suffered an injury in fact. It has. A plaintiff suffers an injury in fact when it suffers "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quotation omitted). In this case, Arizona has suffered at least five injuries in fact, all of which independently suffice to confer Article III standing.

First, the Tax Mandate's ambiguity constitutes an injury in fact. Parties always suffer an injury in fact when they are denied or deprived of a substantive right. *See, e.g.*, *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983); *FEC v. Akins*, 524

U.S. 11, 21 (1998); *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Here, Arizona alleges it was denied its right to clear terms. And it alleges it was unconstitutionally coerced into accepting the Mandate's terms. By alleging that the Mandate fails to give Arizona the clear, non-coercive deal to which every State is entitled, Arizona alleged an injury in fact. *Ohio II*, 2021 WL 2712220 at *6; *Ohio I*, 2021 2021 WL 1903908 at *8–10.

Second, the Tax Mandate injures Arizona by forcing it to choose between accepting an unconstitutional condition (the Mandate) or foregoing a benefit (Rescue Plan funds) to which it is otherwise entitled. That is an injury in fact. *See City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018). Indeed, it is the same injury in fact that creates standing in every unconstitutional-conditions case. *See Clinton v. City of N.Y.*, 524 U.S. 417, 433 & n.22 (1998); *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 228 (2d Cir. 2011); *Carson ex rel. O.C. v. Makin*, 979 F.3d 21, 30 (1st Cir. 2020). To hold otherwise would put every party to "the choice of abandoning its legal claim or risking sanctions" for violating an unconstitutional law—precisely the "dilemma" that pre-enforcement review exists "to ameliorate." *Sch. Dist. of City of Pontiac 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).

Third, the Tax Mandate injures Arizona by interfering with its sovereign authority. Such interference constitutes an injury in fact. *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016); *cf. also Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). That is why States have standing to challenge federal laws that preempt state laws. *See Celebrezze*, 766 F.2d at 232–33. It is also why States "always" suffer an injury when the federal government "inferer[es] with" the "orderly management of [their] fiscal affairs." *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). In both circumstances, the federal government interferes with the State's implementation of its own laws. And as the power to make and enforce a legal code is a quintessentially sovereign power, *see Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 601 (1982), the federal government's wrongful interference with that power is a quintessentially sovereign injury. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The Mandate causes this sort of injury, too. As the merits discussion above illustrates, the Mandate forbids otherwise-permissible state tax policies. The preemption of state policies (even in circumstances no one can quite explicate) is an injury. So is the fact that the Mandate, by imposing uncertain limits on state power, interferes "with the State's orderly management of its fiscal affairs." *Barnes*, 501

U.S. at 1304 (Scalia, J., in chambers). These injuries were already actual or imminent once Congress enacted the law. After all, no one disputes that the States, including Arizona, always intended to accept the Rescue Plan funds—they debate only whether the States formed this intention of their own free will or as a result of unconstitutional coercion. And once a State accepts Rescue Plan funds, the Mandate's prohibition on indirect offsets applies retroactively to all changes in tax policy dating back to March 3, 2021. *See* 42 U.S.C. §802(c)(2)(A); §802(g)(1). Thus, at the instant Congress passed the law, the States were effectively bound, and faced the imminent prospect of being *actually* bound, by the Mandate's unconstitutional terms. Imminent and actual injuries are enough to confer standing.

Fourth, and relatedly, the Tax Mandate injures States like Arizona by forcing them to reallocate resources they would otherwise spend elsewhere. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). States necessarily must expend resources addressing whether tax policies will conform to the Mandate's requirements. Indeed, the Rescue Plan requires that States provide Treasury with a "detailed accounting" proving their compliance with, among other things, the Tax Mandate. 42 U.S.C. §802(d)(2); *accord* 86 Fed. Reg. at 26807–810. This forced reallocation of resources is an injury in fact that gives rise to standing.

Fifth, and finally, a party suffers an injury in fact, and may bring a pre-enforcement challenge to prevent that injury, when there is a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). An injury is sufficiently imminent to confer standing if: (1) a party intends 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).

Arizona alleged (correctly) that it has suffered this form of injury, too. *See Ohio II*, 2021 WL 2712220 at *9. No one can explain with any clarity what the Mandate prohibits. Even the interim final rule, which is supposed to provide clarity, includes a catch-all that leaves the Secretary with absolute discretion to determine that a tax cut was "indirectly offset" with Rescue Plan funds. *See* 86 Fed. Reg. at 26810. Thus, the Mandate at least "arguably proscribes" most reductions in state taxes. *Susan B. Anthony*, 573 U.S. at 162. And there is no doubt that Arizona intends to "engage in" a course of conduct implicating this arguable proscription; as the District Court noted, the State has already enacted tax cuts potentially implicated by the Mandate. 1-ER-9. That leaves only the question whether there is a "substantial threat of future enforcement." *Id.* There is. The interim final rule confirms that Treasury will seek to recoup money it perceives to have been spent in violation of the Tax Mandate. *See* 86 Fed. Reg. at 26807–11. The fact that the enforcement action may happen next year or the year after does not make the injury insufficiently imminent. In *Susan B. Anthony*, for example, the Court found that an organization had standing to sue because it faced a credible threat of being punished for political speech made in unspecified future elections. *Id.* at 164–66. The risk that the Secretary will enforce the Mandate against Arizona in the coming years is equally imminent.

CONCLUSION

Arizona has standing to sue and its claims succeed as a matter of law.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) 21-16227

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STATEMENT OF RELATED CASES

The *amici* are not aware of any related cases pending in this Court.

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I hereby certify that on August 27, 2021, 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. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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