

**No. 21-3787**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

STATE OF OHIO,	:	On Appeal from the
<i>Appellee-Plaintiff,</i>	:	United States District Court
	:	for the Southern District of Ohio
v.	:	
	:	
JANET YELLEN, in her official	:	District Court Case No.
capacity as Secretary of the	:	1:21-cv-181
Treasury, et al.,	:	
<i>Appellants-Defendants.</i>	:	

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**OHIO'S MOTION TO EXPEDITE**

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## INTRODUCTION

The State of Ohio—the appellee in this case—moves under Sixth Circuit Rule 27(f) to expedite this appeal so that it may be briefed, argued, and resolved before **November 1, 2021**. To that end, Ohio proposes the following schedule.

- Appellant’s Brief: Tuesday, September 14
- Appellees’ Brief: Friday, September 24
- Reply Brief: Tuesday, October 5

On August 30, Ohio informed counsel for the appellants of its intent to seek expedited review on this schedule. Counsel for the appellants informed the State that the appellants oppose this motion.

## BACKGROUND

1. COVID-19 devastated the American economy. Congress passed the American Rescue Plan Act to help stimulate economic recovery. Relevant here, the Rescue Plan offers the States a tremendous amount of money: over \$195 *billion*. See 42 U.S.C. §802(b)(3). Ohio, for its part, is eligible to receive \$5.4 billion. Murnieks Decl., R.48-1, PageID#778. That equals 7.2 percent of Ohio’s budget for 2019, the last pre-pandemic fiscal year. See *id.*, PageID#779. Other States stand to receive comparably large stimulus payments. See Br. of *Amici Curiae* Mich. Legis-

lature Appropriations Comm. Chairs, R.52, PageID#845; Br. for *Amici Curiae* Chamber of Com., *et al.*, R.24, PageID#173–74.

To receive this money, the States must accept the conditions that come with it. One condition, the “Tax Mandate,” is relevant here. The Tax Mandate limits the taxing authority of States that accept Rescue Plan funds. More precisely, 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.

42 U.S.C. §802(c)(2)(A). In other words, if a State reduces taxes, and if that reduction causes “net tax revenue” to fall, the State cannot use Rescue Plan funds to “directly *or indirectly* offset” the lost revenue. The Treasury can initiate recoupment proceedings against any State that violates this prohibition, seizing from the State funds equal in size to the amount improperly expended. §802(e).

2. President Biden signed the Rescue Plan into law on March 11, 2021. Six days later, Ohio sued the defendants—Secretary of the Treasury, the Treasury’s Inspector General, and the Department of the Treasury—in the Southern District of Ohio. Comp., R.1, PageID#1. (This motion will refer to the defendants as “the

Secretary.”) Ohio alleged that the Tax Mandate violated two separate constitutional provisions. First, it violated the Tenth Amendment by intruding upon the State’s power to tax—a power that our Constitution reserves to the States. Second, Ohio argued, the Tax Mandate exceeded Congress’s authority under the Spending Clause. *See* U.S. Const., art. I, §8, cl.1. That clause empowers Congress to spend money. And in exercising that power, “Congress may attach conditions on the receipt of federal funds.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). But those conditions must be expressed “unambiguously.” *Id.* at 207 (quotation omitted). Further, Congress cannot coerce the States to accept Spending Clause conditions. It cannot, for example, impose conditions through offers of funding that States have no real choice but to accept. *Id.* at 211. Ohio alleged that the Mandate violated both principles. The Mandate’s prohibition on using funds to “indirectly offset” losses of “net tax revenue” is unconstitutionally ambiguous; and Congress coerced the States into accepting the Mandate by attaching it to an offer of funds that, given the pandemic-caused economic downturn, they had no choice but to accept.

Ohio moved for a preliminary injunction at the same time it filed its complaint. The District Court denied the motion. It determined that the Mandate was hopelessly ambiguous and that Ohio would likely prevail on the merits. Prelim. Inj.

Op., R.36, PageID#537. But the court nonetheless refused to issue a *preliminary* injunction because it determined that only a *permanent* injunction would redress Ohio's injuries. *Id.*, PageID#567-69.

In response, Ohio moved the very same day to expedite the proceedings. *See* Emergency Mot., R.37, PageID#571. After conferring with the court, the parties agreed on an expedited schedule. And on July 1, 2021, the District Court held that the Tax Mandate is unconstitutionally ambiguous. The court permanently enjoined the Mandate's enforcement. Op., R.56, PageID#1017.

4. Almost two months later, on August 27, the Secretary filed her notice of appeal.

## ARGUMENT

Ohio respectfully moves to expedite the resolution of this appeal. It has good cause to do so. The question whether the Tax Mandate is constitutional, and in turn whether it binds Ohio, is critically important. And Ohio needs the final answer—which will, in all likelihood, ultimately require word from the Supreme Court—as soon as possible. This follows from two overlapping considerations.

First, the Mandate calls into question the legality of quite-common exercises of state sovereign authority. To see why, return to the Mandate's text:

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 indi-

rectly 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.

42 U.S.C. §802(c)(2)(A).

As the text shows, the Mandate broadly prohibits using Rescue Plan funds to indirectly offset lost revenue resulting from tax reductions. Thus, *any* reduction in tax rates—whether implemented through statute, regulation, or administrative rule—potentially implicates the Mandate. *See* Op, R.56, PageID#998–1003. And any State that runs afoul of the Mandate will in effect pay a double penalty: it will lose the revenue associated with any tax cut, along with Rescue Plan funds equal in size to the revenue lost.

Put all this together, and the Mandate requires the States to make their tax policies under tremendous uncertainty. To be sure, the defendants are *currently* enjoined from enforcing the Mandate against Ohio. *Id.*, PageID#1017. But if this Court or the Supreme Court reverses that award of injunctive relief, the Treasury will likely seek to recoup any funds spent in violation of the Mandate—including funds that “indirectly” offset revenue losses from tax policies adopted or implemented during the pendency of this action. (Ohio does not believe Treasury would be permitted to recoup money based on Tax Mandate violations that occurred

while the injunction remained in place. But that will not stop Treasury from trying.) Thus, Ohio will have no certainty regarding which tax policies it can lawfully implement until this case is finally resolved. In other words, without a speedy resolution, Ohio will be forced to exercise one of its most important sovereign prerogatives—the power to set taxing policy—under a cloud of uncertainty. For that reason, Ohio hopes to secure a final adjudication of that matter by the end of the Supreme Court’s upcoming term. And to have any realistic chance at accomplishing that, the parties’ *certiorari*-stage briefing will need to be finished by January of 2022.

The second consideration is this: Ohio needs to spend the Rescue Plan funds quickly. The reason Congress appropriated these funds is so that States could spend them to promote economic revitalization. Funds that go unspent will not accomplish that goal. Thus, the lack of a final judgment in this case puts Ohio in a predicament: it can either decline to spend the funds until it receives a final resolution, thus thwarting Congress’s purpose in making these funds available in the first place, or risk spending the funds in a manner that will later be deemed to violate the Tax Mandate.

Because the legal issues in this case bear on issues of ongoing and immediate importance, there is good cause to expedite the appeal. And the need to expedite is

not attributable to any failing on Ohio's part. *Nader v. Land*, 115 F. App'x 804, 805 (6th Cir. 2004). To the contrary: Ohio sued soon after the Tax Mandate became law; it moved for a preliminary injunction the day it filed its complaint; it moved to expedite final judgment the day the District Court denied a preliminary injunction; and it moved to expedite this appeal on the same day the Court docketed the case.

It bears noting that expedited review will not prejudice the parties. "The appeal focuses" on "issues that have already been briefed below." *Autocam Corp. v. Sebelius*, No. 12-2673, 2012 U.S. App. LEXIS 26736 at \*5 (6th Cir. Dec. 28, 2012). And indeed, the Secretary is briefing the same issues in courts around the country, including in the Eighth and Ninth Circuits. *See Missouri v. Yellen*, No. 21-2118 (8th Cir.); *Arizona v. Yellen*, No. 21-16227 (9th Cir.); *West Virginia, et al. v. Dep't of Treasury, et al.*, No. 7:21-cv-00465 (N.D. Ala.); *Texas, et al. v. Yellen, et al.*, 2:21-cv-79 (N.D. Tex.). The Secretary will thus have little trouble converting her district-court filings to appellate briefs—or converting her Eighth and Ninth Circuit briefs into Sixth Circuit briefs. Given that the Secretary took almost sixty days to file a notice of appeal, she has had ample time to begin drafting already.

## CONCLUSION

The Court should grant the motion to expedite the appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, this brief complies with the type-volume requirements for a motion and contains 1,575 words. Fed. R. App. P. 27(d)(2)(A).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers  
BENJAMIN M. FLOWERS

## CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, this motion 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.

*/s/ Benjamin M. Flowers*  
BENJAMIN M. FLOWERS