*In The*

United States Court of Appeals

*for the*

Sixth Circuit

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Case No. 21-3787

STATE OF OHIO

*Plaintiff-Appellee*

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as Inspector General of the Department of Treasury, and the U.S. DEPARTMENT OF THE TREASURY

*Defendants-Appellees*

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*On Appeal from the*
*United States District Court for the Southern District of Ohio*
*Civil Action No. 1:21-cv-00181-DRC, Hon. Douglas R. Cole*

# BRIEF OF AMICI CURIAE MICHIGAN LEGISLATURE APPROPRIATIONS COMMITTEE CHAIRS SENATOR JIM STAMAS AND REPRESENTATIVE THOMAS ALBERT

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## DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), Amici certify that no parent corporation or publicly-held corporation owns 10% or more of Amici's stock.

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## STATEMENT OF INTEREST

This case is about the grave impact the Tax Mandate will have on Ohio's sovereignty. The State requested as relief that the court "[d]eclare the Tax Mandate . . . unenforceable" because it exceeds Congress's powers under the Tenth Amendment, and "[e]njoin the defendants" from enforcing the Tax Mandate or recouping funds for alleged violations of the Tax Mandate. (Compl. ¶ 50, R. 1, PageID #: 11.) Michigan State Senator Jim Stamas and State Representative Thomas Albert ("Amici") submit this brief to explain both how the Tax Mandate equally affects Michigan's sovereignty and to urge this Court to uphold the District Court's opinion granting Ohio's Motion for a Permanent Injunction and enjoining the Secretary of the Treasury from enforcing the Tax Mandate against Ohio. (Opinion, R. 56, PageID #: 1017.)

Representative Albert was elected to the Michigan House of Representatives in November 2016. He represents Michigan's 86th House District, which includes portions of Kent and Ionia counties. Representative Albert currently serves as Chair of the House Appropriations Committee. Senator Stamas was elected to the Michigan Senate in 2014 and re-elected in 2018. He represents Michigan's 36th Senate District, which includes the counties of Alcona, Alpena, Arenac, Gladwin, Iosco, Midland, Montmorency, Oscoda, Otsego, and Presque Isle. He serves as the chair of the Senate Appropriations Committee.

As chairs of the House and Senate Appropriations Committees, Amici and their Committees are tasked with appropriating funds for most functions of state government. *See* Mich. Const. art. IV, § 31. Under the House of Representatives' Standing Rules, "a bill containing an appropriation or a bill with a recommended amendment may only be favorably reported back to the House by the Appropriations Committee." Michigan House Standing Rule 38(5). Under the Senate's Standing Rules, "[a]ppropriations bills, when reported back to the Senate favorably by a committee other than the Committee on Appropriations, shall, together with amendments proposed by that committee, be referred to the Committee on Appropriations for consideration." Michigan Senate Standing Rule 3.602. Each year, the Senate must pass an appropriations bill containing "an itemized statement of estimated revenue by a major source in each operating fund for the ensuing fiscal year, the total of which shall not be less than the total of all appropriations made from each fund in the general appropriation bills as passed." *Id.* § 3.603.

Amici and their Committees continue to grapple with the Tax Mandate's implications for Michigan's budget and future appropriations. Amici are left to interpret the ambiguous Tax Mandate and the equally ambiguous Interim Final Rule to determine whether certain actions violate the Tax Mandate. And they are left to predict whether their everyday acts of appropriating funds will cause billions of dollars to be recouped by the federal government. Amici have a significant interest

in having the Tax Mandate enjoined so they can continue to exercise their sovereign power without concern that doing so will cost their constituents billions of dollars.

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), Amici certify that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than the Michigan Legislature contributed money that was intended to fund the preparation or submission of this brief. Amici further certify that the parties to this case have consented to the filing of this Brief.

## INTRODUCTION AND SUMMARY OF THE CASE

The Constitution's Spending Clause allows Congress to grant federal funds to the States and to "'condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (op. of Roberts, C.J.) ("*NFIB*"); U.S. Const. art. I, § 8, cl. 1. But, as the District Court recognized, "unfettered use of this power, especially when coupled with Congress's power to tax, could quickly alter the balance of powers between the federal government and the States." (Opinion at 25, R. 56, PageID #: 993.) To avoid this imbalance, the Supreme Court has "articulated . . . several general restrictions" on the spending power. *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987). As relevant here, "if Congress desires to condition the State's receipt of federal funds, it 'must do so unambiguously[.]'" *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). In addition, Congress may not "coerce the States into accepting funds and the regulations that come with them." *Id.* at 211; *see also Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (citing same standards).

The American Rescue Plan Act ("ARPA"), Pub. L. No. 117-2, § 9901, fails on both counts. The ARPA was a $1.9 trillion stimulus package that apportioned significant funding to the states. *See* H.R. 1319, 117th Cong. (2021). The legislation

provides a list of purposes ARPA funds can be used for. *See* Pub. L. No. 117-2, § 9901(c)(1)(A)-(D). It also includes express "restriction[s]" on the use of funds. In what has been termed the "Tax Mandate":

> 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.* § 9901(c)(2)(A).

The District Court recognized that even the Department could "provide[] no workable definition of what an 'indirect offset' is." (Opinion at 32, R. 56, PageID #: 1000.) The District Court found that the "Tax Mandate's language, in and of itself, falls short of the clarity required when Congress exercises its powers under the Spending Clause." (*Id.* at 35.) And it explained that this "is a particularly troubling type of ambiguity." (*Id.* at 34.) "Based on the Tax Mandate's language, the Secretary could deem essentially *any* reduction in the rate of any one or more state taxes—even if other tax rates were increased—to be a 'change in [tax] laws' that results in an 'indirect[] offset [of] a reduction in [Ohio's] net tax revenues." (*Id.* (emphasis and alterations in original) (citing 42 U.S.C. § 802(c)(2)(A)).

The Department now raises jurisdictional and substantive challenges to that ruling. As to jurisdiction, it says the State of Ohio lacks standing to sue, as any harm

to the State is speculative, abstract, and remote. (Dep't Appeal Br. at 8-10, App. R. 18.) And as to the merits, the Department challenges the District Court's finding of ambiguity. In its briefing below, the Department could not provide a "workable definition of what an 'indirect offset' is," and it later "declined to take any position on that term." (Opinion at 32, R. 56, PageID #: 1000.) The Department now provides a new interpretation, (Dep't Appeal Br. at 12, App. R. 18), while arguing that subsequent regulations promulgated by the Department can cure any ambiguities. (*Id.* at 18-24).

For all of the reasons explained in the District Court's Opinion (Opinion at 23-45, R. 56, PageID ##: 991-1014) and the State of Ohio's Brief (Appellee Br. at 17-32, App. R. 19), the Amici agree that the Tax Mandate lacks the clarity required by the Supreme Court's Spending Clause jurisprudence. Amici submit this Brief to explain that, contrary to the Department's arguments, the ambiguity has had, and will continue to have, real and practical impacts on states like Michigan. Because the District Court agreed, it declined to reach the issue of whether the Tax Mandate is unduly coercive (and this Court need not do so here if it agrees with the District Court on ambiguity). But to the extent any doubt remains, the Tax Mandate's coercive nature provides an alternate ground for upholding the District Court's grant of a permanent injunction.

The District Court should be affirmed, and application of the Tax Mandate should remain enjoined.

## FACTUAL BACKGROUND

### I. The COVID-19 Pandemic Reaches Michigan, Causing Significant Impacts on the State's Budget and Revenue.

Over the last year, the COVID-19 pandemic has wrought havoc on the lives of people across the world. Michigan was no different. On March 11, 2020, the Michigan Department of Health and Human Services announced that two Michigan residents tested presumptively positive for COVID-19, and a state of emergency was declared within the State.[1] Less than two weeks later, the Governor issued an Executive Order prohibiting all "business or conduct . . . that require[s] workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations." *See* Mich. Exec. Order No. 2020-21. And from there, restrictions on businesses, in-person education and gatherings, travel, and more remained in place in one form or another for more than a year.

[1] State of Michigan, *Michigan announces first presumptive positive cases of COVID-19, Governor Whitmer declares a state of emergency to maximize efforts to slow the spread* (last visited October 11, 2021), *available at* https://www.michigan.gov/coronavirus/0,9753,7-406-98163-521341--,00.html.

These executive orders and the prolonged pandemic significantly impacted Michigan's economy. Restaurants closed permanently.[2] One report indicated that 24% of Michigan's small businesses "had closed during the pandemic, slightly more than the 22 percent U.S. average."[3] And as of April 2021, total unemployment in the State was 24.9% higher than pre-pandemic levels.[4]

## II. The President Signs the American Rescue Plan Act Into Law.

Michigan was not alone. (*See* Chamber of Commerce Amicus Brief at 12-14, R. 24, PageID #: 174-176 (detailing effects of pandemic on budgets and economies throughout the country).) President Biden signed ARPA—a $1.9 trillion stimulus package—in an attempt to counteract the pandemic's economic impact. *See* H.R. 1319, 117th Cong. (2021). Under the ARPA, $195.3 billion of that stimulus package was divvied among the States and the District of Columbia. Pub. L. No. 117-2, § 9901. Of that amount, $25.5 billion was divided equally among the states and the District of Columbia, while the remaining $170 billion was split on a pro-rata basis

[2] *These Southeast Michigan Restaurants Closed Permanently During the Coronavirus Crisis*, Eater Detroit (May 24, 2021), *available at* https://detroit.eater.com/2020/5/27/21239853/detroit-ann-arbor-restaurant-bar-closings-covid-19 (last visited Oct. 11, 2021).

[3] Jay Davis, *Report: Michigan's small and medium-size businesses hit harder by pandemic*, Crain's Detroit (Apr. 8, 2021), *available at* https://www.crainsdetroit.com/small-business/report-michigans-small-and-medium-size-businesses-hit-harder-pandemic (last visited Oct. 11, 2021).

[4] *Michigan unemployment rate declines in April* (May 19, 2021), *available at* https://www.michigan.gov/som/0,4669,7-192-34773-560103--,00.html.

depending on each state's average number of unemployed individuals from October through December 2020. *See id.*

In total, Michigan received $6.54 billion in funds under the ARPA, while its local governments were allocated nearly $5 billion more.[5] The $6.54 billion in funds represent a 10.2% increase in the State's Fiscal Year 2021 budget. *See* Michigan Public Act No. 166 of 2020 (setting budget). It also represents well over half of the State's discretionary money in its general fund budget for Fiscal Year 2022. *See* State of Michigan State Budget Office, Executive Budget for Fiscal Years 2022 and 2023 ("The state's total general fund budget is $11.4 billion.").[6]

The ARPA requires that these funds be used by 2024, and requires those funds to be used only for certain purposes. States may use the funds "to cover costs incurred" to: (A) "respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality"; (B) "respond to workers

[5] *Stabenow, Peters Welcome Nearly $11 Billion in Funding for Michigan State and Local Governments Through the American Rescue Plan Act They Helped Enact Into Law* (May 10, 2021), *available at* https://www.stabenow.senate.gov/news/stabenow-peters-welcome-nearly-11-billion-in-funding-for-michigan-state-and-local-governments-through-the-american-rescue-plan-act-they-helped-enact-into-law/.

[6] Available at https://www.michigan.gov/budget/0,9357,7-379-88613_88626---,00.html.

performing essential work during the COVID-19" pandemic "by providing premium pay to eligible workers . . . that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work"; (C) provide "government services to the extent of the [State's] reduction in revenue" due to the pandemic "relative to revenues collected in the most recent full fiscal year"; or (D) "make necessary investments in water, sewer, or broadband infrastructure." Pub. L. No. 117-2, § 9901(c)(1)(A)-(D).

The ARPA also includes two "further restriction[s]" on the use of funds. First, in what the parties have termed the "Tax Mandate," it provides:

> 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.* § 9901(c)(2)(A).

Second, "[n]o State or territory may use funds made available under this section for deposit into any pension fund." *Id.* § 9901(c)(2)(B). States that use funds for restricted purposes "shall be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection . . . ." *Id.* § 9901(e).

## III. The State of Ohio Successfully Challenges the ARPA's Tax Mandate.

On March 17, the State of Ohio filed its Complaint challenging the Tax Mandate's constitutionality. (Compl., R. 1.) The Complaint explained that Ohio was set to receive $5.5 billion in ARPA funds and, given "the economic instability wrought by the COVID-19 pandemic," had "no real choice except to take the funds." (*Id.* ¶ 26, Page ID #: 6.) Yet at the same time, the Tax Mandate is unclear and "effectively prohibits reduction in taxes" in violation of the Spending Clause. (*Id.* ¶¶ 39, 41, PageID #: 9 (explaining that "Congress violates its Spending Clause power when it coerces states into agreeing to limit their sovereign authority by offering financial inducements that States cannot practically refuse"); *id.* ¶ 43, PageID #: 10 (explaining that the Tax Mandate "is ambiguous regarding what precisely constitutes a change in state tax policy that 'indirectly' offsets a loss in tax revenue.").)

That same day, the State of Ohio filed a Motion for Preliminary Injunction, asking the District Court to "enjoin the [Tax Mandate's] enforcement, at least in its application to Ohio." (Mot. for Prelim. Injunction at 2, R. 3, PageID #: 31.) Oral argument was held on March 26. As of that time, the Department "was largely unwilling to hazard a guess" as to what the Tax Mandate did and did not prohibit. (5/12/2021 Op. & Order at 27, R. 36, PageID #: 562.) Instead, the Department first "claimed that the Spending Clause does not require that the *substance* of the conditions be clear, but merely that the statute make clear that conditions *exist*." (*Id.*

(emphasis in original).) Second the Department "offered that, while the Tax Mandate may be ambiguous *now*, the Secretary [of Treasury] has indicated that regulations were likely forthcoming that may provide clarity *later*." (*Id.*)

Those regulations came in the form of an "Interim Final Rule," which was filed with the Court on May 10, 2021. This Interim Final Rule provides that a State will:

> [B]e considered to have used [ARPA funds] to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery Funds to offset the reduction in net tax revenue."

(Interim Final Rule, R. 33-1, PageID ##: 440-441.) It states further that, "because money is fungible," even if the funds "are not explicitly or directly used to cover the costs of changes that reduce net tax revenue," they "may be used in a manner inconsistent with the statute by indirectly being used to substitute for the State's or territory's funds that would otherwise have been needed to cover the costs of the reduction." (*Id.* at PageID ##: 441-442.) The Interim Final Rule stated that "Treasury will provide additional guidance and instructions [as to] the reporting requirements at a later date." (*Id.* at PageID #: 454.)

Two days after the Interim Final Rule issued, the District Court ruled on the State's Motion for Preliminary Injunction. The Court addressed the four factors for injunctive relief, and first found "that Ohio made a substantial showing that it is

likely to succeed on the merits of its Spending Clause claim, at least on the ambiguity issue." (5/12/2021 Order at 25, R. 36, PageID #: 560.) Even with the Interim Final Rule in place, the Court explained that "it is far from clear" whether interim regulations can provide the needed clarity. (*Id.* at 28, PageID #: 563.) "[A]nd more fundamentally, it is not at all clear that the Secretary"—as opposed to Congress—"can *ever* cure a Spending Clause ambiguity pro[blem], even through final regulations." (*Id.* (emphasis in original).) The Court next explained that "the (likely) unconstitutional ambiguity in the statute's language, with its resulting impact on Ohio's exercise of its sovereign powers, constitutes not only an injury in fact, but also irreparable harm." (*Id.* at 32, PageID #: 567.) Still, because the Court found the Secretary "unlikely to be in a position to recoup funds while this suit is pending," the motion was denied. (*Id.* at 33-34, PageID ##: 568-569.)

The State of Ohio then filed its Motion for a Permanent Injunction and Declaratory Judgment. (Mot. for Permanent Injunction, R. 38.) The State argued that the Tax Mandate is both coercive and ambiguous. After finding that the State had Article III standing (Opinion at 11-23, R. 56, PageID ##: 979-991), the District Court held the Tax Mandate fails to "satisf[y] the clarity requirement the Spending Clause imposes," (*id.* at 23, PageID #: 991[7]). And it found that the executive

[7] "Although Ohio raise[d] both coercion and ambiguity in support of its Spending Clause challenge," the District "Court's resolution of this case rest[ed] on ambiguity concerns," so it did not address the coercion argument. (*Id.* at 27, PageID #: 995.)

branch—through the Department's Interim Final Rule—did not cure the ambiguities created by Congress. "[W]hile Congress may be able to delegate authority to an agency to supply the requisite clarity, Congress must provide for such delegation in clear and unambiguous terms. And Congress did not do so here." (*Id.* at 36, PageID #: 1004.)

The Department appealed. (Notice of Appeal, R. 59.) Amici now submit this Brief, and urge this Court to affirm the District Court's well-reasoned Opinion.

## ARGUMENT

### I. The States Will Suffer Concrete Harm if the Tax Mandate Is Not Enjoined.

As a starting point, the Department offers several arguments as to why it believes the State of Ohio lacks Article III standing. None is persuasive.

#### A. Harm To The States Is Neither Speculative, Abstract, Nor Remote.

The Department first contends that, although Ohio "claimed that there is a risk that the Treasury Department will take future action to enforce" the Tax Mandate, this prospective threat is too speculative to provide federal jurisdiction. (Dep't Appeal Br. at 8, App. R. 18.) Although the Department frames potential violations of the Tax Mandate as "hypothetical," "abstract," and "remote," (*id.* at 10), for states like Michigan, it is real and imminent. Two examples show why.

The first example is Michigan's Unemployment Trust Fund (the "Fund"), which is the pool of money Michigan uses to pay unemployment insurance benefits

to unemployed workers. As Michigan's Legislature has explained, "the funding of unemployment compensation benefits, and the financing and funding of this state's account in the unemployment trust fund including, without limitation, the funding of sufficient fund balances in the unemployment trust fund, are an essential governmental function and public purpose of this state." Mich. Comp. Laws § 421.2(2).

If the amounts available in the Fund fall below $2.5 billion, and Michigan's Unemployment Insurance Agency ("UIA") projects that the fund will remain below that amount for the succeeding calendar quarter, the State's taxable wage base for the next calendar year will increase to make up the difference. *See* Mich. Comp. Laws § 421.44(4). Conversely, if the Fund balance equals or exceeds $2.5 billion, and the UIA projects that the fund will remain at or above that amount for the succeeding calendar quarter, "the taxable wage limit for the calendar year is reduced . . . for an employer that is not delinquent in the payment of unemployment contributions, penalties, or interest." *Id.*

Due to the COVID-19 pandemic, in 2020, the Fund reached its lowest level since 2011.[8] In the past, to avoid a taxable wage increase, or to correct a deficit,

[8] *Briefing: Unemployment Insurance Trust Fund*, House Fiscal Agency, Appropriations Committee, p 7 (January 27, 2021), https://www.house.mi.gov/hfa/PDF/Alpha/Unemployment_Insurance_Trust_Fund_Briefing_Jan2021.pdf.

Michigan has taken several courses of action, including borrowing from the federal unemployment insurance trust fund, and refinancing $3.2 billion in federal unemployment debt by issuing bonds.[9] Although billions of ARPA funds could today be appropriated to replenish the Fund to its pre-pandemic levels, doing so would move the Fund over the $2.5 billion threshold. That would, in turn, cause a reduction in employers' taxable wage limit, leading to a potential violation of the Tax Mandate and the recoupment of billions of dollars. Thus, despite the ARPA's goal of placing states in the same financial position as before the pandemic, if Michigan uses ARPA funds to do just that and replenish the Fund, it risks running afoul of the ARPA's restrictions.

Michigan's state income tax framework is similar. Beginning in January 2023, "if the percentage increase" in the State's "general fund/general purpose revenue"[10] exceeds the "the inflation rate for the same period and the inflation rate is positive," then the "current rate shall be reduced by an amount" set by a statutory formula. Mich. Comp. Laws § 206.51(1)(c).



[9] *Id.*

[10] Michigan's general fund "covers all State appropriation, expenditure and receipt transactions, except those for which special constitutional or statutory requirements demand separate fund accounting," and which "reflect[s] the major share of the State's fiscal transactions." State Budget Office, *Glossary of Terms*, available at https://www.michigan.gov/budget/0,9357,7-379-88613_88626-479312--,00.html.

As these two examples show, the Tax Mandate has far-reaching effects. The ARPA funds make up approximately more than half of the discretionary budget in Michigan's general fund. Yet if those funds are used to replenish the Unemployment Trust Fund—which the Legislature has deemed "an essential governmental function and public purpose of this state," Mich. Comp. Laws § 421.2(2)—then employers' taxable wage limits could fall. Along similar lines, if the ARPA funds are used for expenditures that would generally be funded out of Michigan's general fund, then Michigan's income tax rate could fall. In either of these situations, ARPA funds could "directly or indirectly offset a reduction in the net tax revenue" of Michigan, requiring the State to "repay to the Secretary an amount equal to the amount of funds used in violation of such subsection . . . ." Pub. L. No. 117-2, § 9901(c)(2)(A).

**B. The Deprivation of Constitutional Rights Is A Concrete Harm.**

*Second*, the Department argues that "nothing in the record showed that Ohio's actions will not comply with the [Tax Mandate's] restriction on the use of federal funds," and so there is no "realistic danger of sustaining a direct injury." (Dep't Appeal Br. at 9, App. R. 18) citing *Arizona v. Yellen*, No. CV-21-00514, 2021 U.S. Dist. LEXIS 136971 (D. Ariz. July 22, 2021)). But that misses the point. As the District Court recognized, given the Tax Mandate's ambiguities, states like Ohio and Michigan will often have no way of knowing whether their "actions [will or] will

not comply with the [Tax Mandate's] restriction on the use of federal funds." (*See id.*)

That recognition was well-founded. Given how complex and interconnected Michigan's financial operations are, it is near impossible to identify each downstream effect that will stem from the use of ARPA funds, and whether the use of those funds will unintentionally violate the Tax Mandate's ambiguous prohibitions. That ambiguity alone inflicts a concrete injury on the states. "[I]njuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts" are "concrete." *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). And "those traditional harms may . . . include harms specified by the Constitution itself." *Id.*

Here, the Spending Clause requires Congress to clearly state the conditions that are tied to federal funding. *Pennhurst*, 451 U.S. at 17. As one court recently recognized, "[t]hat clarity is critical to a State's ability to exercise its sovereign power in deciding whether to accept or decline an offer of funds." *W. Virginia v. United States Dep't of Treasury*, No. 7:21-cv-00465, 2021 U.S. Dist. LEXIS 131153, at *22 (N.D. Ala. July 14, 2021). In short, the Supreme Court requires clarity because states' constitutional rights are impinged without it.

The clarity required by the Supreme Court's Spending Clause jurisprudence also is critical to a State's determination of how to use ARPA funds and, more

broadly, how to exercise its taxing authority. Indeed, states have explained that they do "not want to be in a situation where the Legislature makes commitments and then we find out four months from now we are accused of misusing the money when we thought we could use it a certain way."[11] Michigan is no different. Yet because Michigan must spend ARPA funds by 2024, Pub. L. No. 117-2, § 9901, whether or not the State waits for further clarity or acts now to spend the funds on what the Department later interprets to be an impermissible purpose, it risks having to "repay to the Secretary an amount equal to the amount of funds used in violation of such subsection . . . ." *Id.* § 9901(e).

"The uncertainty itself . . . will continue to exert pressure on state legislators not to consider any tax change, or set of tax changes, as to which the Tax Mandate implications cannot be assessed." (Opinion at 20, R. 56, PageID #: 988.) "That type of thumb on the legislative scale is a current and ongoing injury," and is a harm to states' "ability to exercise [their] sovereign powers." (*Id.*) This infringement on a state's constitutional taxing authority is the type of traditional harm "specified by the Constitution itself" that rises to the level of an injury-in-fact. *TransUnion*, 141 S. Ct. at 2204; *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) ("[I]t is

[11] Stephen Gruber-Mills, DES MOINES REGISTER, *Iowa holds off on spending $1.4 billion in federal COVID-19 stimulus money* (Apr. 27, 2021), available at https://www.desmoinesregister.com/story/news/politics/2021/04/27/iowa-legislators-not-rushing-to-spend-1-4-billion-dollars-in-federal-covid-19-stimulus-money/4855450001/ (quoting Iowa's Speaker of the House).

of the utmost importance to [the States] that the modes adopted to enforce the taxes levied should be interfered with as little as possible.").

Thus, the District Court correctly recognized that "[t]he Spending Clause *prohibits* Congress from offering an ambiguous deal, because the States, as sovereigns, are entitled to clarity." (5/12/2021 Op. at 14, R. 18, PageID #: 550 (emphasis in original).) And it recognized that this lack of clarity, by itself, amounts to a concrete harm.

### C. States Need Not Wait Until The Tax Mandate Is Enforced to Challenge It.

Finally, the Department argues that "[d]ismissing this suit for lack of jurisdiction will not deprive Ohio of an opportunity to seek relief" in the future if a "dispute over allegedly misused Fiscal Recovery Funds were to arise," because Ohio "could assert its challenge at that time." (Dep't Appeal Br. at 10-11, App. R. 18.)

The Supreme Court does not require the states to wait, however. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."); *Fieger v. Mich. Supreme Ct.*, 553 F.3d 955, 971 (6th Cir. 2009) ("[W]here threatened action by *government* is concerned," a "plaintiff need not 'bet the farm, so to speak, by taking the violative action.") (emphasis in original).

This case highlights the wisdom in that rule. If states like Michigan and Ohio were required to wait until an enforcement action is brought, they would risk having to return *billions* of dollars that have already been spent. By allowing pre-enforcement challenges like this, states can attempt to exercise their sovereign rights, while gaining clarity as to what federal conditions apply when doing so.

## II. The Tax Mandate Is Coercive.

Moving to the merits, although the District Court's Opinion declined to reach the issue of coercion, to the extent any doubt remains, the Tax Mandate's coercive nature provides an alternate ground for enjoining the Tax Mandate. *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (affirming on "alternative basis" "[d]espite the district court's failure to reach the issue" can "further[] the interests of judicial economy and does not unfairly prejudice the parties" when the issue was "raised and fully briefed"); *Lindsay v. Yates*, 498 F.3d 434, 440-41 (6th Cir. 2007) (reaching an issue not decided below, where the issue was fully briefed and its resolution would serve the interest of judicial economy).

The Spending Clause grants Congress the "Power To lay and collect Taxes, Duties, Imposes 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. Through this authority, Congress can provide the states with federal funds. And it can even "'condition such a grant upon the States' 'taking certain actions that Congress could

not require them to take.'" *Sebelius*, 567 U.S. at 576 (quoting *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)).

But there comes a point when a condition on funding itself turns into a "requirement" for states to take certain action. Put differently, while Congress can encourage states to "voluntarily and knowingly accept[]" funds by complying with certain conditions, it cannot force the States to do so. *See id.* at 577-78. "When 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Id.* at 578 (cleaned up). "The Constitution simply does not give Congress the authority to require the States to regulate. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."

True, the line between pressure and compulsion is not always clear. But the Tax Mandate does not fall on the margins. As the Chamber of Commerce explained to the District Court, the funds available under the ARPA amount to "nearly 20% of state government revenues nationwide." (Chamber of Commerce Amicus Br. at 3, R. 24, PageID #: 165.) And, as explained above, the $6.54 billion in funds made available to the State of Michigan under the ARPA (not to mention the nearly $5 billion in funds made available to Michigan's local governments) would represent a 10.2% increase in the State's Fiscal Year 2021 budget. This amount represents more than half of the State's discretionary budget for Fiscal Year 2022.

This Court need go no further than *Sebelius*, which has already recognized that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce" to the loss of sovereignty. 567 U.S. at 582; *id.* at 585 (finding that the statutory provision at issue, which would lead to over a 10% loss in the budget, was "surely beyond" the "outermost line" of compulsion).

That is particularly true at a time when states like Michigan face an unprecedented challenge to mitigate the effects of a global pandemic that has gravely impacted Michigan residents and the State's budget. This Court should, therefore, enjoin the Tax Mandate and grant the relief requested in the State of Ohio's Complaint.

## CONCLUSION

For the reasons stated above, Amici respectfully request that this Court affirm the District Court's grant of a permanent injunction, and enjoin the Department from enforcing the Tax Mandate.

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Respectfully submitted,

Dated: October 19, 2021

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,381 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b) .

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## CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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