No. 21-3787

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JANET YELLEN, ET AL., Defendants-Appellants,	:	On Appeal from the United States District Court for the Southern District of Ohio Western Division
v.	:	
STATE OF OHIO, Plaintiff-Appellee.	:	District Court Case No. 1:21-cv-00181-DRC

BRIEF OF APPELLEE THE STATE OF OHIO

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
ZACHERY P. KELLER
SYLVIA MAY DAVIS
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

Counsel for State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important constitutional issues, the State of Ohio requests oral argument.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331. That court entered final judgment on July 1, 2021, and the appellants timely appealed on August 27. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Congress, exercising its power under the Spending Clause, U.S. Const. art. I, §8, cl.1, can offer States money in exchange for their agreement to abide by conditions. Those conditions must be unambiguous. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987). And Congress's offers must be non-coercive—Congress cannot attach conditions to offers that States have no "legitimate choice" but to "accept." *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012) (op. of Roberts, C.J.).

Congress purported to exercise its Spending Clause authority when it enacted the American Rescue Plan Act of 2021. The Act offers the States *billions* of dollars to use toward repairing the economic damage that COVID-19 caused. To receive that money, States must agree to abide by the Tax Mandate, 42 U.S.C. §802(c)(2)(A), which prohibits States from spending federal money in ways no one can describe, in circumstances no one can define.

All this gives rise to two questions:

1. Is the Tax Mandate unconstitutionally ambiguous?

2. Did Congress improperly coerce the States into accepting the Mandate?

INTRODUCTION

Congress enacted the American Rescue Plan Act of 2021 to spur the country's recovery from the COVID-19 pandemic. The Rescue Plan, among other things, offers the States money—a lot of it. Ohio stands to receive over $5 billion, which is a sizeable chunk of the State's yearly budget. But the money comes with strings attached. One such string, the "Tax Mandate," prohibits the States from using Rescue Plan funds to "directly or indirectly offset" any "reduction in [their] net tax revenue" caused by a tax cut. 42 U.S.C. §802(c)(2)(A).

This case presents the question whether Congress lawfully enacted the Tax Mandate. The answer is "no." The Constitution's Spending Clause puts Congress in control of the federal purse. U.S. Const. art. I, §8, cl.1. Congress can use that power to offer States federal money with conditions attached. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). But there are limits on the conditions Congress may impose. *Id.* at 207–08. The Tax Mandate violates two of those limits.

First, when Congress imposes a condition on the use of funds, the condition must be unambiguous. *Id.* at 207. That way, States can understand "the consequences of" taking the money before deciding whether to do so. *Id.* at 207 (quotation omitted). The Tax Mandate is hopelessly ambiguous. For one thing, it provides no guidance on what it means to "indirectly offset" a tax reduction. Because money is fungible, there is no principled way to tell whether money a State receives through the Act indirectly offsets a tax reduction the State chooses to pursue. For another, the Tax Mandate provides no guidance on how to measure a reduction in "net tax revenue." Does one ask whether the tax cut decreased revenue relative to what it would have been otherwise, what it was the year before, what it was pre-pandemic, or something else? The Mandate never says.

Second, Congress cannot coerce the States into accepting conditions; it cannot attach conditions to offers of funding that the States have no real choice but to accept. *Id*. at 211. The Tax Mandate violates this rule. If Ohio were to turn down the billions of dollars Congress has offered, it would hamper its economic recovery. It would also affirmatively harm its citizens by putting them at a competitive disadvantage relative to citizens of States that accept the money.

These violations have injured Ohio, which is constitutionally entitled to a clear, non-coercive offer. The District Court correctly enjoined the Tax Mandate. This Court should affirm.

STATEMENT OF THE CASE

1. "The COVID-19 pandemic has imposed far-reaching, unprecedented consequences on nearly every aspect of life." PI Op., R.36, PageID#538. Most relevant here, COVID-19 devastated the American economy. As the pandemic raged, many Americans stayed safe by staying home. This vastly reduced the demand for goods and services in nearly every economic sector. Decreased demand led to decreased revenue. Some businesses closed entirely. Others survived by scaling back hours or cutting jobs.

The bad economy slashed the States' tax hauls. Ohio's Office of Budget and Management reported that tax revenues came in $1.1 billion below estimates for the 2020 fiscal year. Murnieks Decl., R.48-1, PageID#778–79. Meanwhile, "the need for, and use of, governmental services and assistance … ballooned." PI Op., R.36, PageID#538. Thus, the States lost tax revenue at a time when they needed it most.

In response to these issues, Congress passed the American Rescue Plan Act of 2021. The Rescue Plan offers $195 *billion* in aid to the States and the District of Columbia. Ohio, for its part, expects to receive $5.4 billion. Murnieks Decl., R.48-1, PageID#778. That is a tremendous amount of money. It equals about 7.2 percent of Ohio's most recent pre-pandemic budget, and it equals about 6.7 percent of the State's budget for the 2020 fiscal year. Murnieks Decl., R.48-1, PageID#779.

To get the money, the States must agree to abide by certain rules. States, for example, must agree to use the money only for specifically enumerated purposes, like responding "to the public health emergency" and its "negative economic impacts." 42 U.S.C. §802(c)(1)(A). More relevant here, States must agree to a condition affecting their taxing authority. That condition, the "Tax Mandate," says:

> A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title 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.

§802(c)(2)(A). In simpler terms, 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. If a State violates this prohibition, Treasury can initiate recoupment proceedings and recover funds equal in size to the amount improperly expended. §802(e).

States must also prove compliance with the Tax Mandate. The Rescue Plan requires States that accept the offer to periodically submit a "detailed accounting" to the federal government regarding their use of Rescue Plan funds. §802(d)(2). That accounting must include "all modifications" to "tax revenue sources." §802(d)(2)(A).

2. President Biden signed the Rescue Plan into law last March. Six days later, Ohio sued the defendants—the Secretary of the Treasury, Treasury's Inspector General, and the Department of the Treasury. Compl., R.1, PageID#1. (This brief refers to the defendants as "the Secretary.") Ohio alleged that Congress lacked any authority to enact the Tax Mandate. First, Ohio argued, the Tax Mandate is impossible to understand, violating the rule that conditions in Spending Clause legislation must be unambiguous. *See Dole*, 483 U.S. at 207. Second, the Tax Mandate was part of an impermissibly coercive offer: States could receive billions of badly needed dollars *only* by giving up their sovereign authority to set tax policy. *See id.* at 211.

The day it filed suit, Ohio moved for a preliminary injunction. The District Court denied that motion. But it did not do so because it thought the Mandate was constitutional. To the contrary, the District Court determined that the Mandate was ambiguous and that Ohio would likely prevail on the merits. PI Op., R.36, PageID#537. The court refused to grant a preliminary injunction only because it determined that Ohio needed a *permanent* injunction to fully redress its injuries. *Id.*, PageID#567–69.

Ohio responded by moving to expedite briefing on its entitlement to permanent relief. The court, after conferring with the parties, set an expedited briefing schedule.

3. Two noteworthy developments occurred while the parties drafted their briefs. First, Ohio accepted the Rescue Plan funds. Murnieks Decl., R.38-1, PageID#603. Second, the Treasury Department published an interim final rule purporting to implement portions of the Rescue Plan. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26786-01, 26807–10 (May 17, 2021).

This second development deserves some discussion. The "Interim Rule" announces Treasury's current approach to enforcing the Tax Mandate. Relevant here, it says that, "because money is fungible," and because the Mandate prohibits using Rescue Plan funds to "indirectly" offset losses of revenue caused by tax cuts, States may violate the Mandate even when they do not "explicitly or directly" use Rescue Plan funds to "cover the costs of [tax-law] changes that reduce net tax revenue." *Id.* at 26807.

The rule announces a complex framework for identifying indirect offsets. That framework consists largely of *ad hoc* dictates. For example, the Interim Rule says States will not be deemed to have sustained a reduction in "net tax revenue," even if their tax revenue drops relative to the prior year, as long as they bring in more tax revenue than they did in 2019, adjusting for inflation. *Id.* at 26807, 26809. Consider also the Interim Rule's attempt to explain the meaning of "indirectly off-set." On the one hand, the Interim Rule says that States *will not* be deemed to have used Rescue Plan funds to indirectly offset the revenue lost from a tax-rate reduc-tion if changes to other laws or spending cuts fully counterbalance the losses. *Id.* at 26807, 26809–10, 26823. But the Interim Rule simultaneously includes a broad catch-all that empowers the Secretary to go searching for indirect offsets. It says that the Secretary can find a Tax Mandate violation, at any point during the Rescue Plan's coverage, if she concludes in hindsight that a State used Rescue Plan funds to "indirectly offset a reduction in net tax revenue." *Id.* at 26810. This catch-all thus defines "indirectly offset" as encompassing any use of Rescue Plan funds that the Secretary, in her sole discretion, deems an "indirect offset."

One final aspect of the Interim Rule bears on this case. The Interim Rule establishes a detailed "step-by-step framework" by which States must self-report to prove their compliance with (among other things) the Tax Mandate. *Id.* at 26809; *see id.* at 26807–10.

4. The District Court held that the Tax Mandate was unconstitutionally ambiguous and permanently enjoined its enforcement. Op., R.56, PageID#998–1003, 1014–15. The court stressed the incoherence of the prohibition on using Rescue Plan funds to "indirectly offset a reduction in … net tax revenue." *Id.*, PageID #998 (quoting §802(c)(2)(A)). As an initial matter, the Mandate provides "no mechanism for determining whether a State's net tax revenue are 'reduced'" because of a tax cut. *Id.* And because every tax cut that reduces revenue relative to what revenue would otherwise have been *could be* described as reducing net tax revenue, the lack of guidelines causes a great deal of ambiguity. *Id.*, PageID#998–99.

The phrase "indirectly offset" made the ambiguity even worse. Given the fungibility of money, *any* Rescue Plan funds received could be described as "indirectly offset[ting]" *any* loss of revenue from tax cuts. *Id.*, PageID#1000–01. Yet the statute does not contain, and the Secretary would not offer in her briefing, any test for identifying which offsets are impermissible. Put all this together, and the Tax Mandate gave the States no guidance regarding which tax policies would risk running afoul of the Mandate's prohibition. *Id.*, PageID#1002–03.

The District Court next held that the Interim Rule did not alter the analysis. The court doubted whether "an administrative regulation" could *ever* "provide the clarity needed for a conditional grant to comply with Spending Clause strictures." *Id.*, PageID#1004; *see also id.*, PageID#1004–08. Rather than reach that issue, however, the court decided the case on other grounds. It held that, even assuming Congress *could* empower agencies to provide the clarity that the Spending Clause demands, Congress did not empower Treasury to provide such clarity here. The District Court recognized that, "if Congress intends for an agency to answer 'major questions' relating to a statute—i.e., a question of deep 'economic and political significance' that is central to the statutory scheme—then Congress must clearly say so." *Id.*, PageID#1010–11 (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000), & *King v. Burwell*, 576 U.S 473, 485–86 (2015)). The question of what the Tax Mandate prohibits, the court concluded, qualified as a major question. *Id.*, PageID#1012. And since nothing in the Rescue Plan clearly delegated to Treasury the power to provide the needed clarity, Treasury lacked the power to provide that clarity. So as a statutory matter, Treasury had no authority to promulgate a rule saving the Mandate from unconstitutional ambiguity.

5. The Secretary timely appealed.

SUMMARY OF ARGUMENT

The Court should affirm the District Court's permanent injunction.

I. The Spending Clause empowers Congress to spend federal money. U.S. Const. art. I, §8, cl.1. "Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take." *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012) (op. of Roberts, C.J.) (quotation omitted). But Congress's conditions must be unambiguous—they must enable the States to fully grasp the "consequences" of taking the funds. *Dole*, 483 U.S. at 206 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Conditions in Spending Clause legislation must also be non-coercive; Congress cannot impose conditions through offers that States have no "legitimate choice" but to "accept." *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.).

The Tax Mandate violates both limits on Congress's spending power. First, the Mandate is ambiguous. It prohibits using Rescue Plan funds to "indirectly offset" any "reduction[s] in … net tax revenue" that were caused by an easing of the tax burden. 42 U.S.C. §802(c)(2)(A). The phrase "indirectly offset" is one source of ambiguity. Because money is fungible, there is a sense in which Rescue Plan funds will *necessarily* offset all reductions in net tax revenue. So what uses of Rescue Plan funds constitute indirect offsets? No one can say. As the Secretary herself told Congress: "given the fungibility of money," the question of how to identify indirect offsets is "thorny." *The Quarterly CARES Act Report to Congress: Hearing Before the Sen. Comm. on Banking, Hous. & Urb. Affairs Comm*. at 1:10:00–1:13:36 (Mar. 24, 2021), https://tinyurl.com/thornyQs. The Tax Mandate also provides no baseline against which to measure for reductions in "net tax revenue." In other words, it is silent on, and thus ambiguous with respect to, the critically important matter of what constitutes a "reduction" in "net tax revenue."

In addition to being ambiguous, the Tax Mandate is part of a coercive offer. The Rescue Plan offers the States almost $200 billion. Ohio alone is eligible for $5.4 billion. The States have no "legitimate choice" but to "accept" the money and the terms that come with it, including the Tax Mandate. *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.). Given the damage that COVID inflicted upon State budgets and upon the economic well-being of citizens and businesses who would benefit from Rescue Plan funds, States cannot responsibly turn down Congress's offer. That is especially true because most States will take the money regardless of what their sister States do. Thus, by declining the offer, States would place their citizens at a competitive disadvantage relative to their peers in other States. Because Congress coerced the States into accepting the Tax Mandate, the Mandate is unenforceable.

II. The Secretary argues that the Tax Mandate has not injured Ohio and that Ohio, therefore, lacks Article III standing to sue. But the Mandate has inflicted at least five injuries in fact upon Ohio, any one of which would suffice to establish standing under Article III. *First*, the Mandate injures Ohio by denying the State of its legal entitlement to an unambiguous, non-coercive offer. *See* Op., R.56, PageID#981–82; PI Op., R.36, PageID#556; *accord West Virginia v. United States Dep't of Treasury*, No. 7:21-cv-00465, 2021 WL 2952863, at *6 (N.D. Ala., July 14, 2021). *Second*, Ohio is injured because the Mandate "arguably proscribe[s]" tax policies that Ohio has adopted and because there is a credible threat of future enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–62, 164 (2014) (quotation and alteration omitted). *Third*, by limiting the tax laws that Ohio can pass without penalty, and by disrupting the "orderly management of" the State's fiscal affairs, *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers), the Mandate interferes with Ohio's sovereign authority. *Fourth*, the Mandate injures Ohio by making it choose between two distinct injuries: giving up benefits to which it would otherwise be entitled and surrendering its sovereign authority. *Finally*, Ohio is injured by having to reallocate resources to account for and report its compliance with the Mandate. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 547–48 (6th Cir. 2021); *see* 42 U.S.C. §802(d)(2); *see also* 86 Fed. Reg. at 26807–10.

The Secretary's merits arguments fare no better. She does not address Ohio's coercion argument. With respect to ambiguity, her primary argument is that the Mandate, even if it is ambiguous on its own, is adequately clarified by the Interim Rule. But that argument fails. The question whether Congress properly exercised its Spending Clause authority turns on whether the *statutory* conditions it enacted are unambiguous. Thus, as every circuit to have addressed the issue has held, agency regulations cannot save an ambiguous statute from being held unconstitutional. *Tex. Educ. Agency v. United States Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560–61, 567 (4th Cir. 1997) (*en banc*).

Even if regulations could be relevant to the ambiguity issue, the Interim Rule is not. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted). Everyone agrees that the Mandate's meaning is a matter of great significance. But nothing in the Rescue Plan clearly vests Treasury with the power to settle that matter by regulation. It follows that Treasury lacks the power to resolve the Mandate's ambiguities.

STANDARD OF REVIEW

"Summary judgment is appropriate when 'no genuine dispute as to any material fact' exists and the moving party 'is entitled to judgment as a matter of law.'" *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). This Court reviews *de novo* the question whether summary judgment was proper. "A district court's decision to grant or deny a permanent injunction is reviewed under several distinct standards." *S. Cent. Power Co. v. IBEW, Local Union 2359*, 186 F.3d 733, 737 (6th Cir. 1999). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed *de novo*, and the scope of injunctive relief is reviewed for an abuse of discretion." *Id.*

ARGUMENT

The Tax Mandate is unconstitutional. The Secretary insists, however, that Ohio lacks standing to challenge it. This argument is remarkable, for it requires denying that Ohio is injured by a federal law that places ambiguous limits on the State's taxing power—a power "indispensable" to its sovereign authority. Op., R.56, PageID#1015 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824)). This brief begins with the merits, because they make it easier to see the flaws in the Secretary's standing theories. It addresses standing later, when responding to the Secretary's arguments for reversal.

I. The Tax Mandate is unconstitutional and the District Court correctly enjoined the Secretary from enforcing it against Ohio.

The Spending Clause empowers Congress "to … provide for the … general Welfare of the United States." U.S. Const. art. I., §8 cl.1. In other words, Congress can spend money. The Supreme Court has long held that Congress "may attach conditions on the receipt of federal funds." *Dole*, 483 U.S. at 206. Congress may even attach conditions requiring that States agree "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).

But the Supreme 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'" in the federal spending program. *Id.* (quoting *Pennhurst*, 451 U.S. at 17) (alterations adopted). *Second*, Congress's offers of funding must be non-coercive. *NFIB*, 567 U.S. at 577–578 (op. of Roberts, C.J.).

Congress violated both limits when it enacted the Tax Mandate: the Mandate is ambiguous and part of a coercive offer.

A. The Tax Mandate is unconstitutionally ambiguous.

"Congress has broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). But when it "attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Id.* (quoting *Dole*, 483 U.S. at 207).

The prohibition on ambiguous conditions follows from the nature of Congress's Article I authority. The "Federal Government" has only the "limited powers" that the Constitution expressly confers upon it. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Those "few and defined" powers, The Federalist No. 45, p.313 (Madison, J.) (Cooke, ed., 1961)), do not include a general power to regulate the States. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). For that reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

Because Congress cannot regulate the States directly, it cannot compel them to accept conditions in Spending Clause legislation. *See NFIB*, 567 U.S. at 577–578 (op. of Roberts, C.J.). If such conditions are valid, it is only because the States agree to them. But the States can consent only if they are able to "exercise their choice" whether to join the federal program "knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. Ambiguous conditions, by definition, *deny* the States an opportunity to understand "the consequences of their participation." *Id*. The rule prohibiting ambiguous conditions in Spending Clause legislation thus ensures the consent on which the constitutionality of these conditions rests.

The prohibition on ambiguous conditions in Spending Clause legislation does not require Congress to speak with "exactitude." Op., R.56, PageID#997. Congress need not "prospectively resolve every possible ambiguity concerning" every specific application of each Spending Clause condition. *Bennett v. Ky. Dep't* *of Educ.*, 470 U.S. 656, 669 (1985). Still, every condition must be clear enough that officials can "ascertain" the obligations it imposes. *Arlington*, 548 U.S. at 296 (quotation omitted). And critically, officials must be able to ascertain each condition's *substance*. *See, e.g.*, *id.* at 296–97, 300–01; *Haight v. Thompson*, 763 F.3d 554, 569 (6th Cir. 2014). Congress cannot offer the States a pig in a poke; it must be clear *what* the States are agreeing to, not merely that they are agreeing to *something*.

The Tax Mandate does not come close to providing the States with the clear notice to which they are entitled. And Treasury's regulations do not save the Mandate from unconstitutionality. This brief addresses both points in turn.

1. The Tax Mandate's text offers States no guidance on what it means to "indirectly offset" a reduction in "net tax revenue."

Return to the Mandate's text:

> A State … shall not use the funds provided under this section … to either directly or indirectly offset a reduction in the net tax revenue of such State … resulting from a change in law, regulation, or administrative interpretation 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).

Two phrases in the Mandate keep the States from ascertaining its meaning. Op., R.56, PageID#998–1003. The first is "indirectly offset." "Money is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010). As a result, every dollar of revenue gained will, *in some sense*, "indirectly offset" a dollar of revenue lost. Thus, every dollar of Rescue Plan funds will, in some sense, indirectly offset lost tax revenue. How are States to tell *which* uses of Rescue Plan funds qualify as indirect offsets of lost tax revenue? The statute does not say. And neither economic theory nor the English language provides any clarity. Perhaps for that reason, the Secretary, in her briefing and argument below, repeatedly "declined to take any position" on the meaning of, or to offer any "workable definition of," the phrase "indirect offset." Op., R.56, PageID#1000.

The second ambiguity-inducing phrase is this: "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 reductions. Does one "measure[]" "revenue … against the previous fiscal year? Or against what would have been collected without the change in taxes?" PI Op., R.36, PageID#561. Perhaps there is some other baseline. Regardless, "how does one 'score' the issue?" *Id.* For example, suppose "a State elects to increase its statewide sales tax, but decrease its income tax." *Id.* Or suppose one law changes numerous rates, raising some while lowering others. Does one consider the effects of these changes together, or in isolation? Perhaps most importantly, how does one know whether the rate change or some outside factor caused revenue to drop? That is a critical question, because the Mandate applies only when the *change in law* reduces tax revenue. The Mandate is silent on all of this, leaving the States to guess what the Mandate permits or forbids.

It is not just the States saying this. Secretary Yellen herself told Congress that, "given the fungibility of money," the Mandate's meaning presented "thorny questions … to work through." *The Quarterly CARES Act Report to Congress* at 1:10:00–1:13:36, https://tinyurl.com/thornyQs. And in district court, her lawyers were "largely unwilling to hazard a guess as to what" the Mandate "meant." PI Op., R.36, PageID#562; *accord* Op., R.56, PageID#1000. At one point, they acknowledged that the substance of the Mandate's prohibitions were not set out in the statute itself. *See* Tr., R.32, PageID#329–30.

All of that is fatal to the Mandate's constitutionality. True, the States are not entitled to have Congress "prospectively resolve every possible ambiguity concerning" the applications of conditions in Spending Clause legislation. *Bennett*, 470 U.S. at 669. But they are entitled to conditions with a meaning capable of being "ascertain[ed]." *Arlington*, 548 U.S. at 296. Here, the Tax Mandate's problems go far beyond a lack of exactitude. Without a definition of "reduction in the net tax revenue" and "indirectly offset," the statute leaves States at a complete loss in ascertaining the Tax Mandate's meaning. In sum, the Mandate provides the States with no guidance at all regarding which exercises of state taxing authority will violate the Mandate's prohibition. As the District Court observed, "it is almost as though Congress had written the Tax Mandate" to 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.

Op., R.56, PageID#1002–03. No one could plausibly contend that this alternative formulation would pass constitutional muster, as it does not meaningfully inform 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.

2. Treasury's regulations do not cure the ambiguity.

The Secretary has never seriously disputed that the Mandate, standing alone, is incoherent. Instead, she has argued that the lack of statutory clarity makes no difference. According to her, States can learn the Mandate's meaning by consulting regulations interpreting the Mandate—namely, the Interim Rule. Defs.' Opp'n to Ohio's Mot. for Prelim. Inj., R.29, PageID#258; Defs.' Comb. Mot. Dismiss and Opp'n to Ohio's Mot. for Final J., R.45, PageID#732–34.

In fact, the Interim Rule is irrelevant to the constitutional question. First, agency-promulgated regulations cannot cure unconstitutional ambiguity in Spending Clause legislation. Second, even assuming that Congress *could* empower agencies to provide the constitutionally required clarity, Congress did not empower Treasury to do so here. Finally, the Interim Rule does not rest on a permissible construction of the Tax Mandate and is therefore not entitled to deference regardless.

a. 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). And 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. *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 defeats any argument that the Interim Rule bears 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 conditions in Spending Clause legislation. But two of its sister circuits have, and both held that agency regulations cannot provide the constitutionally required clarity. The *en banc* Fourth Circuit reached the issue first. It held that agency interpretations have no role to play in the constitutional analysis. Instead, "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." *Riley*, 106 F.3d at 567 (plurality) (adopting Judge Luttig's panel-stage dissent—with which a majority of judges agreed in relevant part—and appending it to the *en banc* court's opinion); *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*, 992 F.3d at 361–62.

Supreme Court decisions from other contexts are in accord. Consider its non-delegation caselaw. Under the non-delegation doctrine, Congress unlawfully delegates legislative power if it enables an agency to regulate without providing any "intelligible principle" to guide the agency's discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). An agency, the Supreme Court has explained, cannot "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.

Because agencies cannot regulate away unconstitutional ambiguity, the Interim Rule is irrelevant.

b. Even if agencies *could* enforce unconstitutional laws so as to make them constitutional, Congress has not empowered Treasury to do so here. Op., R.56, PageID#1010–14.

Begin again with first principles. 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 it.

In general, "a statute's ambiguity" suggests "an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159. 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 there are exceptions. One such exception, the "major-questions doctrine," requires that Congress "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). Thus, courts *will not* presume that Congress meant for an agency to "fill in" gaps pertaining to matters of great import. This doctrine rests on the 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. Thus, statutes are not ordinarily understood as silently empowering agencies to take significant steps. 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).

King v. Burwell, 576 U.S. 473, is the lodestar in this area. There, the Supreme Court considered the meaning of an ambiguous 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 determined that it owed the agency's interpretation of that provision no deference. Mere ambiguity, it reasoned, could not be interpreted as empowering the agency to authoritatively interpret so significant a provision. The Supreme Court decided *Utility Air*, 573 U.S. 302, on similar grounds. That case 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. In *Brown & Williamson*, 529 U.S. 120, the Court held that the major-questions doctrine foreclosed any argument that ambiguities in the Food, Drug, and Cosmetic Act implicitly empowered the FDA to ban cigarettes. 529 U.S. at 159–60. And more recently, the Supreme Court cited the major-questions doctrine when interpreting a law empowering the Surgeon General "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" across state lines. 42 U.S.C. §264(a). In light of the major-questions doctrine, this general grant of authority to stop the spread of disease could not plausibly be read as permitting the Surgeon General to do something as economically significant as banning evictions. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2021 WL 3783142, at *3 (2021); *accord Tiger Lily, LLC v. HUD*, 5 F.4th 666, 671 (6th Cir. 2021).

The major-questions doctrine makes the Interim Rule irrelevant. As an initial matter, the doctrine applies. 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." Op., R.56, PageID#1012 (quoting *Ogden*, 9 Wheat. at 199). Intrusion on state prerogatives is always politically important, and so Congress must always be clear if it wishes to allow such an intrusion. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring).

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 grants that power. Op., R.56, PageID#1012 (quoting *King*, 576 U.S. at 486). But nothing in the Act gives Treasury such immense power. To be sure, the statute that houses the Mandate includes a provision empowering 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 the IRS's power to authoritatively interpret a phrase in the Affordable Care Act. The section in which the phrase appeared included a provision empowering the IRS to "prescribe such regulations as may be necessary to carry out the provisions of [the relevant] section." 26 U.S.C. §36B(g) (2012). Without even addressing this general grant of authority, *King* held that Congress had not clearly empowered the agency to resolve the major question before it. 576 U.S. at 485. If §36B(g) lacked the clarity that the major-questions doctrine demands, so does the nearly identical §802(f).

c. *Even if* Congress had empowered Treasury to clarify the Mandate, the Interim Rule brings no clarity. As noted above, statutory ambiguity is sometimes understood as implicitly delegating to an administrative agency the power "to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159. But such delegations empower an agency to fill gaps *only* with "permissible construction[s] of the statute." *Chevron*, 467 U.S. at 843. The Interim Rule does not rest on a permissible construction of the Tax Mandate. As explained above, the Tax Mandate's ambiguity stems from the combination of two ambiguous phrases: "indirectly offset" and "reduction in the net tax revenue." The Interim Rule's attempts to clarify these phrases either lack support in the statutory text, or else fail to provide the needed clarity.

Consider first how it addresses "reduction in the net tax revenue." According to the Interim Rule, the question whether a tax cut causes a "reduction in the net tax revenue" turns on whether it causes the State to collect less tax revenue than it did in 2019, adjusting for inflation. 86 Fed. Reg. at 26807. This constitutes a rewriting, not an interpretation, of the Tax Mandate: nothing in the Mandate's text can even arguably be read to transform the phrase "reduction in the net tax revenue" into "reduction in revenue relative to inflation-adjusted 2019 figures." And the implausibility of this interpretation is bolstered by the fact that a separate provision in §802(c) *expressly* incorporates a 2019 baseline. The relevant provision says that States may spend Rescue Plan funds "for the provision of government services to the extent of the reduction in revenue of such State, … due to the COVID-19 public health emergency relative to revenues *collected in the most recent full fiscal year of the State … prior to the emergency*." §802(c)(1)(C) (emphasis added). The fact that Congress included a 2019 baseline in this part of §802(c), but omitted it from the Tax Mandate only a few subsections later, §802(c)(2)(A), suggests the Mandate *does not* incorporate that baseline. *Dean v. United States*, 556 U.S. 568, 573 (2009); *contra* 86 Fed. Reg. at 26808.

Now consider what the Interim Rule says about "indirectly offset." In particular, remember that the rule contains a catch-all that defines the phrase in the following, entirely circular manner: "If, over the course of the covered period"—which will last for years, 42 U.S.C. §802(g)(1)—"a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury may consider such change to be an evasion of the restrictions of the offset provision and seek recoupment." 86 Fed. Reg. at 26810. That clarifies nothing. It simply restates the phrase "indirectly offset" in a longer, more-convoluted way. And to make matters worse, the Interim Rule gives the Secretary seemingly limitless discretion to apply the catch-all when-ever she thinks it appropriate. *See above* 8–9. A condition that makes the States subject to the standardless whims of one person does not meet the Supreme Court's standards for clarity, because it leaves the States guessing as to what they can and cannot do. *See Arlington*, 548 U.S. at 296.

*

The District Court correctly held that the Tax Mandate is unconstitutionally ambiguous.

B. Congress coerced the States into accepting the Mandate.

The Tax Mandate is also unconstitutional because Congress coerced the States into accepting it. Although the District Court did not address this issue, this Court "can affirm the district court's decision on any ground supported by the record." *Fears v. Morgan*, 860 F.3d 881, 887 (6th Cir. 2017) (*en banc*).

1. Conditions in Spending Clause legislation "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. at 211 (quoting *Steward Machine 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 Machine*, 301 U.S. at 587. Remember, Article I gives Congress no power to regulate the States directly. But conditions attached to offers that the States cannot in practice refuse are equivalent to laws regulating the States directly. The latter are unconstitutional. So then, are the former. *NFIB*, 567 U.S. at 577–78 (op. of Roberts, C.J.).

NFIB illustrates the coercion principle's force. That case concerned the constitutionality of Medicaid-expansion provisions in the Affordable Care Act. The provisions allowed the Secretary of Health and Human Services to withhold Medicaid funds for States whose Medicaid plans did not "comply with the Act's requirements." 567 U.S. at 581 (op. of Roberts, C.J.). "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." *Id.* 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 lead opinion explained, "is economic dragooning that leaves the States with no real option but to acquiesce" to Congress's demands. *Id.* at 582 (op. of Roberts, C.J.). The law's provisions thus constituted not "mild encouragement," but rather "a gun to the head." *Id*. at 581; *accord id*. at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Threats like that violate the Constitution.

2. Congress unconstitutionally coerced the States into accepting the Tax Mandate. *See Kentucky v. Yellen*, Civil No. 3:21-cv-00017, 2021 WL 4394249, *4–6 (E.D. Ky., Sept. 24, 2021).

Start by recognizing the impossibility of declining the Rescue Plan funds. Ohio stands to receive $5.4 billion—about 7.2 percent of Ohio's most recent pre-pandemic budget, and about 6.7 percent of the State's 2020 budget. Murnieks Decl., R.48-1, PageID#779. The offer is thus comparable to the one that *NFIB* deemed coercive: "10 percent of a State's overall budget." *NFIB*, 567 U.S. at 582 (op. of Roberts, C.J.). And two real-world factors, in addition to the offer's size, left Ohio with no choice but to accept.

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." 86 Fed. Reg. at 26786. "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 some of 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.

Neither Ohio nor Ohioans escaped the economic downturn unscathed. Millions lost their jobs during the pandemic. Many more saw their hours or wages reduced. *See Ohio: Databases, Tables, & Calculators by Subject*, Bureau of Labor Statistics (June 21, 2021), https://perma.cc/5JF5-VNPA. The State's 2020 revenue fell $1.1 *billion* below estimates. Murnieks Decl., R.48-1, PageID#778–79. Ohio lost that revenue while demand for services, like unemployment benefits, surged. *See Unemployment Claims, 1/30/2021, Ohio Department of Jobs and Family Services* (Feb. 3, 2021), https://perma.cc/49Z9-9XQL. The federal government is now offering money to help to address these fiscal woes—money that consists, in part, of

Ohioans' own tax dollars. Ohio cannot rationally turn down that offer, leaving its citizens to shore up the State's budgetary situation on their own.

The second coercion-inducing factor is this: Ohio would have affirmatively harmed itself and its citizens had it turned down the offer. No matter what Ohio did, its sister States were going to take the money. Those States, including Ohio's neighbors, were going to use the money to help restore *their* economies and to benefit *their* citizens and businesses. Again, money is fungible, so 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 western Pennsylvania and southern Michigan receive funding, while their competitors across the border in Youngstown or Toledo do not, the out-of-state businesses will get a significant leg up. This means that the Rescue Plan is not an all-upside offer. A State that refuses will not simply maintain the *status quo*; it will affirmatively harm its citizens.

All told, Ohio had no choice but to accept the funds—the offer was coercive. Some have suggested that the non-coercion requirement is inapplicable to provisions in Spending Clause legislation that simply "govern the use of funds." *Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020) (quoting *NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.)). But everyone agrees that the test applies to conditions that "attempt to 'pressur[e] the States to accept policy changes.'" *Id.* (quoting *NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.)). And while it is unclear precisely what the Tax Mandate prohibits, it is clear that the Mandate is the second type of provision: it is a condition on the policies that a State may permissibly pursue *with its own* funds.

To illustrate, take the following hypothetical. Imagine a State that spends all of its Rescue Plan dollars on projects the Rescue Plan permits—improving broadband infrastructure, providing premium pay to essential workers, and so on. §802(c)(1)(A)–(D). Now imagine that the same State adopts tax credits or tax cuts. Depending on the meaning of "indirectly offset," the permissible Rescue Plan expenditure may be deemed to "indirectly offset" revenue losses associated with otherwise-permissible tax policies. But for the tax cut, the thinking would go, the State could have paid for the same projects with state funds. If all that is right—and the Interim Rule suggests it is—then the Tax Mandate punishes States for adopting otherwise-permissible tax policies that the States pay for *without* using (in any normal sense of the word "using") federal funds. That qualifies as an "attempt to 'pressur[e] the States to accept policy changes.'" *Gruver*, 959 F.3d at 183 (quoting *NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.)). The coercion test applies.

True enough, the Mandate is phrased like a limit on the expenditure of federal funds. But as the foregoing shows, that phrasing disguises what is actually a regulation of what the States may do with their own money and their own taxing authority. Congress cannot evade the limits on its Spending Clause authority with artful drafting. *NFIB*, 567 U.S. at 582 (op. of Roberts, C.J.).

C. The District Court properly awarded a permanent injunction.

Because the Mandate is unconstitutional, the District Court correctly awarded Ohio a permanent injunction. To win a permanent injunction, a "plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Ohio has satisfied each factor. *First*, the Tax Mandate irreparably injures Ohio by wrongfully interfering with "the exercise of its 'indispensable' sovereign power to tax." Op., R.56, PageID#1015 (quoting *Ogden*, 9 Wheat. at 199). *Second*, Ohio cannot cure these injuries through remedies available at law, because "the federal government has sovereign immunity against claims for money damages."

Id. *Third*, the balance of hardships support an injunction, since "no substantial harm to others can be said to inhere in [the] enjoinment" of an unconstitutional law. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (*en banc*). *Finally*, it "is in the public interest not to perpetuate the unconstitutional application of a statute." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982).

II. The Secretary's arguments for reversing the District Court's judgment all fail.

The Secretary insists that Ohio lacks standing to sue. And it claims that the Interim Rule saves the Tax Mandate from being held unconstitutional. It is wrong.

A. The Secretary's standing arguments fail.

1. Ohio has standing to sue.

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, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). States 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. Every alleged injury is 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). The District Court's injunction thus redresses any injury Ohio has sustained from the Mandate.

With traceability and redressability established, the standing analysis turns on whether Ohio sustained an injury in fact. An injury in fact is "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, Ohio has sustained at least five injuries in fact. Each independently suffices to confer Article III standing.

First injury. A party is always injured when it is denied something to which it is legally entitled. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *accord, e.g.*, *Ohio v. Raimondo*, 848 F. App'x 187, 188 (6th Cir. 2021). And the deprivation of a constitutional entitlement constitutes *irreparable* harm as a matter of law. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The District Court correctly held that Ohio sustained this form of injury. Congress denied Ohio the clear, non-coercive offer to which it was constitutionally entitled in making its decision whether to accept the funds. The deprivation of this right had a concrete effect. Ohio received, considered, and ultimately accepted the Rescue Plan's offer. *See* Murnieks Decl., R.38-1, PageID#603–11. Ohio was thus forced to "determine how to respond to the offer of funding under the cloud of an ambiguous term." PI Op., R.36, PageID#550. Now that Ohio accepted Rescue Plan funds, it must determine whether and how to spend those funds, and whether and how to set its taxing policy, under the same cloud of ambiguity. Op., R.56, Page ID#985. By depriving Ohio of the clear, non-coercive offer to which it was entitled, the Tax Mandate caused the State to sustain an Article III injury. *See* Op., R.56, PageID#981–82; PI Op., R.36, PageID#556; *accord West Virginia*, 2021 WL 2952863, at *6.

Second injury. 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. *Driehaus*, 573 U.S. at 161, 162, 164 (quotation and alteration omitted).

Ohio has suffered this form of injury, too. *See* Op., R.56, PageID#988–89; *Kentucky*, 2021 WL 4394249, at *2–3; *West Virginia*, 2021 WL 2952863, at *6–7. Begin with the first two prongs. The Mandate, at the very least, "arguably proscribes" most reductions in state taxes: any revenue-negative reduction in tax rates *could be* read to contravene the Mandate, and the Act punishes States that contravene the Mandate by making them pay back Rescue Plan funds. *See* 42 U.S.C. §802(e). By enacting and enforcing such tax cuts, States "engage in conduct affected with a constitutional interest": they exercise their sovereign taxing power. And there is no doubt that Ohio has and will exercise this sovereign power. In March, the General Assembly passed a law that, among other things: lowers the tax rate applicable to certain investors in qualifying pass-through entities; creates a tax credit; exempts certain workers' compensation dividends from the commercial-activity tax; and allows for tax refunds. *See* Sub. S.B. 18, 134th Gen. Assemb. §§1, 5, 6 (Ohio, enrolled Mar. 29, 2021), https://perma.cc/4Q5F-ZWYT. And Ohio's biennial budget enacts numerous other tax cuts and credits. For example, it: reduces income- and estate-tax rates; creates tax credits for private-school tuition and other education-related expenses; exempts employment-placement services from sales and use taxes; and expands tax credits available through Ohio's rural-business-growth program. *See* Am. Sub. H.B. 110, 134th Gen. Assemb. (Ohio, enrolled June 30, 2021) (amending O.R.C. §§122.15, 122.151, 122.153, 122.154, 122.156, 5739.01, 5739.02, 5739.03, 5747.02, 5747.08, 5747.09, 5747.72, 5747.73, 5747.75, 5747.98).

Because the Mandate at least arguably proscribes these tax cuts and their enforcement, the first two *Driehaus* prongs are satisfied.

That leaves the third prong. Ohio satisfies that prong because the "threat of future enforcement" is "substantial." *Driehaus*, 573 U.S. at 164; *see* Op., R.56, Page ID#988–90. The Secretary concedes, and the Interim Rule confirms, that Treasury will seek to recoup money it believes was 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 threat any less credible or substantial. In *Driehaus*, 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 Ohio in the coming years is equally present.

Putting plaintiffs "to the choice of abandoning their legal claim or risking sanctions is a dilemma that" pre-enforcement review exists "to ameliorate." *Sch. Dist. 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). The standing doctrine does not force Ohio to face that dilemma.

Third injury. The federal government causes injury to the States when it interferes with their sovereign authority. *Texas v. United States*, 809 F.3d 134, 153 (5th

Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016); *cf. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). Thus, States have standing to challenge the legality of federal laws that preempt state laws. *See Celebrezze*, 766 F.2d at 232–33. Similarly, States "always" suffer an injury when the federal government "inferer[es] with" the "orderly management of [their] fiscal affairs." *Barnes*, 501 U.S. at 1304 (Scalia, J., in chambers).

The Mandate injures Ohio by interfering with its sovereign authority. The Mandate forbids otherwise-permissible state-tax policies: States that lower tax rates and that experience a "reduction" in "net tax revenue" (whatever that means) as a result, will be punished by being made to repay Rescue Plan funds. (This is something of a double penalty, as States will lose *both* the revenue lost from the tax cut and an equal amount of Rescue Plan funds.) In other words, the Mandate preempts these laws. That is an injury. *Celebrezze*, 766 F.2d at 232–33. So is the Mandate's interference "with the State's orderly management of its fiscal affairs." *Barnes*, 501 U.S. at 1304 (Scalia, J., in chambers). The Mandate interferes with the States' fiscal affairs by imposing uncertain limits on the States' taxing power—limits that States must track and prove their compliance with in a "detailed accounting." 42 U.S.C. §802(d)(2); *accord* 86 Fed. Reg. at 26807–10.

Fourth injury. When plaintiffs must either forgo a benefit or accept an otherwise-unconstitutional condition, they suffer an injury in fact. *See Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 279 (6th Cir. 2021); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir. 1999). That injury creates standing in every unconstitutional-conditions case. Such conditions force a party to choose between forgoing a benefit or accepting unconstitutional terms, which is an injury in and of itself. *See, e.g.*, *Daunt v. Benson*, 956 F.3d 396, 417–18 (6th Cir. 2020). The "loss of federal funds" to which a State is otherwise entitled is an injury in fact. *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2565 (2019). So is the wrongful invasion of a State's constitutional authority. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015). Thus, making a State choose between these injuries is an injury in fact all its own.

Ohio has suffered this form of injury, too. The Mandate made it choose between receiving federal benefits and surrendering some of its sovereign authority over tax policy.

Fifth injury. Finally, plaintiffs have standing to sue when they must reallocate resources in response to the defendant's illegal conduct. *Online Merchs. Guild*, 995 F.3d at 547–48. Such is the case here. Because the Mandate retroactively applies to all changes to state tax policies made after March 3, 42 U.S.C.

§802(c)(2)(A), (g)(1), Ohio was already forced to reallocate resources to ensuring compliance with the Mandate when it sued on March 17. The problem is worse today because States that accept Rescue Plan funds are statutorily bound to provide a "detailed accounting" proving their compliance with, among other things, the Mandate. *Id.* §802(d)(2); *accord* 86 Fed. Reg. at 26807–10; Exhibit 2 to Perm. Inj. Br., Doc. 38-1, PageID#607 (noting reporting requirements). Thus, Ohio must reallocate scarce resources to monitoring its compliance with a provision—the Tax Mandate—that Congress has no authority to impose.

2. The Secretary's counterarguments all fail.

The Secretary challenges Ohio's standing, but her "heart is plainly not in it." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021). Her four-page standing discussion does not even address Ohio's third, fourth, and fifth theories of standing—each of which is independently sufficient to satisfy Article III, and each of which Ohio pressed in the District Court. Moreover, the Secretary never grapples with the principle that States get "special solicitude" in the standing analysis. *Massachusetts*, 549 U.S. at 520. And while the Secretary does respond to Ohio's first and second standing theories, her counterarguments fail.

First injury. Begin with Ohio's first theory of standing. Under that theory, the Tax Mandate injured Ohio by denying the State its right to have "the terms of a proposed Spending Clause 'deal'" presented "in an unambiguous fashion." PI Op., R.36, Page ID#552; *see also* Op., R.56, PageID#985. The Secretary never responds to the key point, which is that the government *always* inflicts an injury when it withholds a constitutional entitlement or interferes with a constitutional right. *See Abbott*, 138 S. Ct. at 2324; *Obama for Am.*, 697 F.3d at 436. Instead, she says that Ohio failed to introduce evidence showing that the Mandate's ambiguity "played any role in state legislators' enactment of" the recent budget bill or state law generally. Resp.10. Ohio did not need to make that showing. It submitted evidence showing that it accepted the funds and their attendant conditions. *See* Ex. 2 to Murnieks Decl., R.38-1, PageID#607. That proves, as a factual matter, that the Tax Mandate's terms were put to Ohio in the course of an actual transaction. By denying the State the clear, non-coercive offer to which it was entitled during that transaction, the Tax Mandate injured Ohio as a matter of law. Op., R.56, PageID# 982–83. Today, but for the District Court's injunction, Ohio would be forced to make tax policy beneath the "pall" cast by the Mandate's ambiguity. *Id.*, PageID#985.

The Secretary also suggests that the Tax Mandate must not affect legislators' conduct, as "Ohio enacted a budget including $2 billion in tax cuts." Resp.9. As an initial matter, this does not respond to the key point, which is that Ohio, at the time it sued, was denied the clear, non-coercive offer to which it was entitled in deciding whether to take the funds. Additionally, the fact that legislators' enacted the tax cuts notwithstanding the Tax Mandate hardly shows that the Mandate did not affect their deliberations. Most importantly of all, however, this reasoning fails to appreciate that the General Assembly passed the budget bill *after* the District Court held that the Tax Mandate was likely unconstitutional. *See* PI Op., R.36, PageID# 560–65. Since the General Assembly had good reason to think it would not be bound by the Tax Mandate's ambiguous terms, its passing tax cuts hardly implies that the Mandate would cause no confusion *if it were enforceable*.

Second injury. The Secretary's arguments opposing the State's second theory of standing fare no better. She correctly recognizes that plaintiffs can prove an injury in fact by showing that: (1) they intend to exercise some power or right arguably permitted by the Constitution; (2) the statute arguably forbids the intended action; and (3) there is a credible threat of enforcement. Resp.8 (*Driehaus*, 573 U.S. at 158–59). The Secretary says that Ohio failed to make the second showing. According to her, Ohio failed to prove that any tax cut would "result in a reduction' of its net revenue, much less that [the State] will use Fiscal Recovery Funds to pay for any such reduction." Resp.8 (quoting *Arizona v. Yellen*, —F. Supp.3d.—, 2021 WL 3089103 (D. Ariz., July 22, 2021)).

This argument overlooks the Mandate's ambiguous nature. Because no one can say what the Tax Mandate means, the Mandate arguably proscribes most reductions in tax rates. *Driehaus*, 573 U.S. at 162–63. The Interim Rule, assuming it is even legally relevant, makes the arguable proscription even clearer: because the rule includes a catch-all giving the Secretary boundless discretion to call any use of Rescue Plan funds an "indirect offset," *see above* 8–9, any participating State that cuts *any* taxes risks being found by the Secretary to have made an indirect offset.

The Secretary seems to fault the State for being unable to say with certainty that its budget or its tax laws *will* violate the Mandate. But Ohio cannot make that showing "precisely because" the Mandate is "so vague." *Kenny v. Wilson*, 885 F.3d 280, 291 (4th Cir. 2018). Every court agrees that individual plaintiffs have standing to challenge vague criminal laws that may, depending on how they are interpreted, prohibit their intended conduct. *Id.*; *Aid for Women v. Foulston*, 441 F.3d 1101, 1110 (10th Cir. 2006). There is no reason to treat State plaintiffs any differently. If anything, the "special solicitude" principle entitles Ohio to more relaxed scrutiny. *Massachusetts*, 549 U.S. at 520.

The Secretary claims support from two district-court decisions dismissing challenges to the Tax Mandate on standing grounds. *See Arizona*, 2021 WL 3089103; *Missouri v. Yellen*, —F. Supp.3d—, 2021 WL 1889867 (E.D. Mo., May 11, 2021). Those decisions are both wrong. They make the same mistake as the Secretary's brief: they overlook the fact that the Mandate, precisely because it is so vague, arguably proscribes nearly every tax reduction. *Arizona*, 2021 WL 3089103, at *5; *Missouri*, 2021 WL 1889867, at *4. And on that basis, they overlook the fact that the Mandate *arguably* proscribed tax changes that the States had passed or were considering. *Arizona*, 2021 WL 3089103, at *5; *Missouri*, 2021 WL 1889867, at *4.

If the Court is inclined to look at district-court decisions, it should consult the more-thoroughly-reasoned opinion below and the similarly well-reasoned opinions in *West Virginia v. Treasury*, 2021 WL 2952863, at *6–7, and *Kentucky v. Yellen*, 2021 WL 4394249, at *2–3, all of which held that States *have* standing to challenge the Mandate.

B. The Court should reject the Secretary's merits arguments.

On the merits, the Secretary addresses only the State's ambiguity argument. To no avail.

1. She begins with a series of unchallenged principles. The Secretary repeatedly stresses that Congress may "condition the receipt of funds on the States' complying with restrictions on the use of those funds." Resp.12 (quoting *NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.)). That is true, and neither the District Court nor the State has ever suggested otherwise. The question here is not whether Congress could have attached conditions to the Rescue Plan funds. The question is whether one particular condition, the Tax Mandate, is unambiguous.

The Secretary notes that Congress, to meet the clear-notice requirement, "need not 'delineate every instance in which'" a State might violate a condition in Spending Clause legislation. Resp.15 (quoting *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005)). Again, no one disputes the point. The question here is not whether the Tax Mandate lists every conceivable way that a State might violate the Mandate's terms; the question is whether the Mandate is clear enough to put the States on notice regarding "the consequences of their participation" in the federal program. *Dole*, 483 U.S. at 206 (quotation omitted).

2. When she moves from principles to application, the Secretary's argument disintegrates. She makes no serious attempt to interpret the statute in a way that would provide the States with meaningful guidance regarding what actions might violate the Mandate's terms. The District Court, recall, held that two provisions in the Mandate are unconstitutionally ambiguous: "indirectly offset" and "reduction in the net tax revenue of [a] State." Op., R.56, PageID#998 (quoting §802(c)(2)(A)). The Secretary does not challenge this conclusion with respect to the second phrase at all, forfeiting her right to do so. The Court could, based on the Secretary's failure to challenge this independently dispositive portion of the District Court's opinion, affirm the judgment below and go no further. *United States v. Kettles*, 970 F.3d 637, 646 (6th Cir. 2020).

But proceeding further requires little work. The Secretary tries to clarify the Tax Mandate by arguing that the prohibition on "indirectly offset[ing]" tax cuts with Rescue Plan funds simply prohibits "us[ing] federal funds to pay for a tax cut." Resp.12. That definition clarifies nothing. Again, the ambiguity in the phrase "indirectly offset" arises from the fact that, given the fungibility of money, all federal funds in some sense indirectly offset all revenue losses. The Secretary offers no way to identify *impermissible* offsets.

The Secretary also says the Mandate "is not implicated if a State that accepts the funds offsets tax cuts with increases in other taxes, revenue derived from macroeconomic growth, or spending cuts in areas where the State is not spending Fiscal Recovery Funds." Resp.12. But for several reasons, that statement does not cure the ambiguity problem. *First*, this supposed narrowing construction suffers from the same defect as the statute itself: given money's fungibility, there is no principled way to tell whether a revenue loss is "indirectly offset" using revenue acquired from one source (spending cuts, perhaps) as opposed to another (the Rescue Plan, perhaps). *Second*, the Secretary's assurance has no basis in the Mandate itself. The

Mandate is not, and cannot be interpreted to be, limited in this manner. Instead, the Secretary is repeating a test set forth in her Interim Rule. But as explained above, clarifying regulations have no role to play when the question is whether a Spending Clause condition is ambiguous. The Court cannot hold otherwise without creating a circuit split with the Fourth and Fifth Circuits. *See Riley*, 106 F.3d at 567; *Tex. Educ. Agency*, 992 F.3d at 361–62. *Third*, even if the regulation matters, its catch-all provision gives the Secretary standardless discretion to decide whether a State is using Rescue Plan funds to "indirectly" offset revenue lost through tax cuts. *See above* 8–9. So the Interim Rule provides no meaningful clarity.

The Secretary suggests that the Court *can* defer to the interpretation in the Interim Rule. She cites decisions from this Court giving *Chevron* deference to regulations interpreting ambiguities in Spending Clause legislation. Resp.18–19 & n.5. But none of those cases address whether an agency's interpretation can save a condition from being held unconstitutionally ambiguous. They show only that, "if a statute meets the Spending Clause's clarity threshold, then an agency can resolve any remaining ambiguity." PI Op., R.36, PageID#558. That is "different from saying that an Executive Branch agency can wholesale fix a constitutionally defective statute." *Id.* And again, the Court cannot permit such wholesale fixes without creating a circuit split. The Secretary does not address the Fifth Circuit's decision in

Tex. Educ. Agency. She does call the *en banc* Fourth Circuit's analysis "dicta." Resp.19 n.5. That is incorrect. In *Riley*, a plurality of the *en banc* court rejected an invitation to defer to an agency's interpretation of an unconstitutionally ambiguous condition in Spending Clause legislation *on the ground* that agencies have no power to cure unconstitutional ambiguity. *Riley*, 106 F.3d at 567 (incorporating Judge Luttig's panel-stage dissent); *id.* at 561 (*per curiam*). Two additional judges—enough to make a majority—concurred with that portion of the plurality's analysis. *Id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment).

Even if the court *could* defer to an agency regulation in these circumstances, the Interim Rule is entitled to no deference. Under *Chevron*, only agency interpretations resting on a "permissible construction of the statute" are entitled to deference. *Chevron*, 467 U.S. at 843. The Interim Rule does not rest on any such construction—rather than interpreting the Tax Mandate, the rule announces enforcement principles made up out of whole cloth. *See above* 8–9. The Secretary says Ohio has never contended the Rule is inconsistent with the Mandate's text. Resp.19. That is not true. *See* Mot. Perm. Inj., R.38, PageID#592.

Perhaps realizing that the Interim Rule is no help, the Secretary insists the statute is no vaguer than other conditions that this Court and others have upheld. For example, she points to maintenance-of-effort requirements, which require that

States receiving federal grants for a particular purpose not decrease their own expenditure in furtherance of the same purpose. Resp.13 (collecting cases). But those laws are hardly comparable. Maintenance-of-effort laws are easy to understand and easy to follow: a State must simply keep budgeting to one particular purpose the same amount of money it budgeted before receiving the grant. Such laws present no comparable ambiguity.

The Secretary also points to RLUIPA, which prohibits federal grantees from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution" unless there is no less "restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000cc-1(a) (cited at Resp.15). While this is a flexible standard, it nonetheless provides the States with meaningful 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). So RLUIPA is not analogous to the Mandate.

3. Finally, the Secretary devotes an entire section of her brief to rebutting Ohio's reliance on the major-questions doctrine. Resp.18–23. The Court need not even reach this issue. Unless it holds that agencies may cure unconstitutional ambiguity in conditions in Spending Clause legislation, *contra Riley*, 106 F.3d at 567; *Tex. Educ. Agency*, 992 F.3d at 361–62, and unless it holds that the Interim Rule rests on a "permissible construction" of the Mandate, *Chevron*, 467 U.S. at 843, the question whether the major-questions doctrine forbids deferring to Treasury never arises.

In any event, the Secretary's arguments are unavailing. She silently acknowledges that Congress must "speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors*, 2021 WL 3783142, at *3 (quotation omitted). And the Secretary never disputes that the Mandate addresses immensely important issues. Instead, she argues that Congress clearly empowered the Secretary to regulate these issues. In particular, she points to 42 U.S.C. §802(f), which says that the Secretary may "issue such regulations as may be necessary or appropriate to carry out this section." *Id.* Since the Tax Mandate is part of that section, the Secretary reasons, §802(f) gives Treasury all the authority it needs. Resp.20.

Not so. Section 802 is large and contains many provisions. The fact that §802(f) gave the Secretary authority to issue regulations pertaining to §802 *generally* does not imply that it empowered her to issue regulations that give meaning to the Tax Mandate. This follows from *King v. Burwell*. As discussed above, the ambiguous phrase in that case appeared in a statute that contained a subsection materially identical to §802(f). *King*, 576 U.S. at 486; 26 U.S.C. §36B(g) (2012). The Secretary says *King* stands only for the proposition that courts will not defer to an agency if doing so would empower the agency to promulgate regulations thwarting the purpose of the overall statutory scheme. Resp.22. She claims *King* refused to defer to the IRS's interpretation because, had it done so, the agency "could (counterfactually) have interpreted" the ambiguous provision "in a way that would have destabilized insurance markets," undermining the Affordable Care Act. *Id.* That characterization of *King* finds no support in the Supreme Court's opinion. 576 U.S. at 485–86. *King* says simply that Congress, if it wants agencies to resolve statutory ambiguities affecting matters of great significance, must say so clearly. And it found that the statute before it contained no such clear statement, even though the statute contained a provision generally empowering the IRS to issue regulations implementing the law's commands, *see* 26 U.S.C. §36B(g) (2012). That case is on all fours with this one.

CONCLUSION

The Court should affirm the District Court's judgment.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
ZACHERY P. KELLER
SYLVIA MAY DAVIS
Deputy Solicitors General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioago.gov

Counsel for State of Ohio

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 principal brief and contains 12,801 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

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 October 12, 2021, this brief 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

DESIGNATION OF DISTRICT COURT RECORD

Plaintiff-Appellee, pursuant to Sixth Circuit Rule 30(g), designates the following filings from the district court's electronic records:

***State of Ohio v. Yellen*, 1:21-cv-181**

Date Filed	R. No.; PageID#	Document Description
3/17/2021	R.1; 1	Complaint
4/16/2021	R.29; 258	Defendants' Opposition to Ohio's Motion for Preliminary Injunction
5/4/2021	R.32; 329–30	April 30, 2021 Hearing Transcript
5/12/2021	R.36; 537–38, 550–69	Order Denying Preliminary Injunction
5/19/2021	R.38; 592	Motion for a Permanent Injunction and a Declaratory Judgment
5/19/2021	R.38-1; 603–11	Declaration of Kimberly Murnieks
6/2/2021	R.45; 732–34	Motion to Dismiss and Opposition to Ohio's Motion for Final Judgment
6/7/2021	R.48-1; 778–79	Declaration of Kimberly Murnieks
7/1/2021	R.56; 981–90, 997–1015	Opinion and Order
7/1/2021	R.57	Judgment
8/27/2021	R.59	Notice of Appeal