No. 21-16227

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
JANET YELLEN, in her official capacity as
Secretary of the Treasury, *et al.*,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-00514-DJH

ARIZONA'S REPLY BRIEF

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INTRODUCTION

The Secretary's brief is admirably short. But that brevity is achieved largely by evading the State's arguments and core issues here. The Secretary's evasiveness regarding the ambiguity of the Tax Mandate is particularly astonishing. The Secretary's own admission that the Tax Mandate "raises a host of thorny issues"? Totally ignored. DOJ's *own* prior arguments below that "indirectly" cannot modify "offset" and that "offset" required "volitional use," only for the Treasury Department to take *diametrically opposed* positions in its Interim-Final Rule ("IFR")? Completely unmentioned. The fundamental issues presented by money being fungible? Crickets. And that silence is despite the Secretary's own admission (itself also ignored) that "given the fungibility of money it's hard a question to answer" what the effect of the Tax Mandate will be. Indeed, no form of the word "fungible" can be found *anywhere* in the Secretary's brief, despite fungibility of money giving rise to most of the "thorny questions" previously admitted by Defendants themselves.

The brevity of the Secretary's brief is thus achieved by ignoring virtually every hard question presented to her.

Indeed, Defendants' evasiveness is so extensive that it reaches even central arguments that *they made and prevailed upon* below. In particular, the Secretary/DOJ *expressly* argued below that Congress need only disclose "*the existence* of the condition itself," 2-ER-57 at 36:10-20 (emphasis added); *accord* 2-ER-85—*i.e.*, not what the condition actually *does*. Remarkably, they somehow prevailed on that absolutist position, with the district court expressly holding that Congress need only "mak[e] the *existence* of a condition known." 1-ER-8 (emphasis in original).

But that position/holding is outright indefensible—and now barely defended. On appeal, the Secretary offers only a token paragraph (at 23-24) in defense. Rather than honorably conceding error on this point or expressly making an affirm-on-other-grounds request, however, the Secretary now attempts to pull a switcheroo: silently swapping out a completely indefensible contention with one that is merely bad (*i.e.*, contending that the meaning of the Tax Mandate's conditions is sufficiently clear).

But that argument still contravenes Supreme Court precedent and provides no basis for affirmance.

The Secretary's evasiveness extends to the standing issues here as well. The Secretary does not defend—or indeed acknowledge—the district court's conflation of standing and merits when rejecting standing based on compliance costs. Opening Br.37. Instead, she advances a new and skeletal waiver argument for the first time on appeal, contending (at 12-13) that the State "did not challenge the interim final rule." That fails for multiple reasons, including that: (1) the State did fully advance/brief this argument below, and (2) there would be no relevant compliance costs *at all* if the Tax Mandate is enjoined, since the IFR would necessarily fall with it. And Defendants' attempt to invoke waiver on an argument that was *both pressed and passed upon* below is bizarre, particularly as Defendants have themselves waived their waiver argument by not presenting it below.

The Secretary's standing arguments also never meaningfully grapple with the State's sovereign injury. The State contends (with ample precedent) that it has a sovereign and constitutional right to clear conditions under the Spending Clause. Thus, any ambiguity in those conditions imposes sovereign and cognizable injury. That is, essentially *by definition*, how constitutional rights work: when violated, they give

rise to injury that courts can redress. After all, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy[.]" *Marbury v. Madison*, 5 U.S. 137, 147 (1803). So it is here: the State had a right to clarity in the conditions from ARPA, the Tax Mandate failed to supply that clarity, and the State therefore has cognizable injury from that violation.

The Secretary's dodginess similarly defeats her ambiguity arguments. By ignoring all of the thorny questions presented by the Tax Mandate and remaining at an absurdly high level of generality, the Secretary attempts to paint a picture of clarity. But that putative clarity cannot withstand any meaningful scrutiny below Defendants' surface-level *ipse dixits*. And even those 10,000-foot characterizations are deeply flawed: while Defendants characterize (at 19) the Tax Mandate as "unremarkable," they tellingly have failed to identify a *single* remotely equivalent provision in the entire history of our Republic restricting the States' sovereign taxing powers. And "sometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action." *NFIB v. Sebelius*, 567 U.S. 519, 550 (2012) (cleaned up). There is no such precedent here.

The Secretary's instant position (at 19) that the Tax Mandate is "simple" and imposes no limitation on state taxing authority also contravenes *her own prior admissions* that the Tax Mandate's meaning actually presents "thorny issues" and "hard … question[s]." Nor does the Secretary make the slightest attempt to reconcile her prior candid admissions with her superficial insistencies here. She had it right the first time.

The Secretary's answers to the State's other constitutional arguments regarding coercion, relatedness, and federalism/structural limitations are similarly scant. But this Court need not reach them because the Tax Mandate's patent ambiguity renders those additional constitutional violations superfluous.

Because the State has Article III standing and the Tax Mandate is unconstitutional, this Court should reverse and direct entry of judgment in favor of the State.

ARGUMENT

I. THE STATE HAS ARTICLE III STANDING

The State has standing here on four separate bases, any one of which is independently sufficient.

A. The Compliance Costs Imposed By ARPA Alone Confer Standing

It is undisputed that the State will incur compliance costs resulting from the Tax Mandate. The Secretary does not contend otherwise. Nor does she even attempt to defend the district court's actual reasoning regarding them. Opening Br.37. She further does not contest that, if compliance costs exist and were properly raised, they would confer standing. All of this is now conceded.

On appeal, the Secretary's *only* defense is a newly-minted waiver one, contending (at 12-13) the issue is waived because "Arizona did not challenge the interim final rule in the complaint." That fails for six reasons.

First, the State's argument was unambiguously raised below: it was presented as an entire subsection titled "The Tax Mandate Imposes Compliance Costs On Arizona." FER-18. It was further expressly argued at the June 22 hearing. 2-ER-41.

This Court does "not consider an issue waived or forfeited if it has been 'raised sufficiently for the trial court to rule on it.'" *Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1191-92 (9th Cir. 2009) (citation omitted). That is plainly the case here: the district court not only

understood and acknowledged the State's argument, but in fact decided it. 1-ER-9.

Second, and relatedly, because the district court *actually* decided the issue of whether compliance costs imposed by the IFR conferred standing, there is no waiver. Waiver applies only where "a question not pressed *or* passed on … below;" thus, where a lower court has "expressly ruled on the question, [it is] an appropriate exercise of [a higher court's] appellate jurisdiction" to review it. *United States v. Williams*, 504 U.S. 36, 42 (1992) (cleaned up).

Third, the Secretary's argument that Arizona's complaint failed to plead this injury sufficiently fails. The State's Complaint specifically alleged that "[t]he Tax Mandate creates very complicated issues as to what the proper baseline against which potential tax-cut measures are to be judged," 3-ER-373, and it is an eminently reasonable implication that resolving such complexity would not be completely costless, thus giving rise to compliance costs. *See Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 842 (9th Cir. 2007) ("[W]hen notice of a claim is given that satisfies Rule 8, concerns about specificity in a complaint are properly addressed through discovery devices."). This allegation was

sufficient to put the Defendants on notice that the Tax Mandate imposes costs on the State.

Fourth, even if the State were somehow barred from challenging the IFR specifically, the compliance costs are still directly attributable to the Tax Mandate itself. If the mandate were invalidated, it is undisputed that the IFR's Tax Mandate provisions could not survive that invalidation, and that the State thus would not have *any* relevant compliance costs. That establishes redressability. Similarly, the State's injury is fairly traceable, particularly as the Secretary does not argue that the Tax Mandate is even capable of being implemented without imposing compliance costs. The State thus has standing even if it had somehow waived a challenge to the IFR itself, since the compliance costs at issue would be eliminated by enjoining enforcement of the Tax Mandate, and are fairly traceable to it.

Fifth, the Secretary's waiver argument is itself waived. The Secretary had full knowledge that the State was raising its compliance-cost based standing argument below based under the existing pleadings, and she chose to answer that argument purely on the merits, without asserting waiver. 2-ER-65; FER-1-15. Having failed to raise a waiver

argument then, she waived any waiver argument here herself. *See*, *e.g.*, *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010) ("It is well-established that a party can waive waiver implicitly by failing to assert it." (cleaned up)).

Sixth, even if waiver somehow otherwise applied, this case would readily fall within this Court's exception to waiver for an "issue [that] is purely one of law." *United States v. Stegmeier*, 210 F.3d 387 (9th Cir. 2000). The factual existence of compliance costs is not disputed here—only whether they create cognizable injury. That is a pure question of law, and one that courts have uniformly answered in the affirmative. *See* Opening Br.34-35.

In any event, even if the Secretary's waiver argument had any merit here, enforcing a waiver would be pointless and inefficient. Because the alleged waiver is in the State's complaint, the State would be entitled to amend or supplement its complaint on remand. *See Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) ("[A] district court should grant leave to amend even if no request to amend the pleading was made [absent futility]."). At that point, the district court would presumably dismiss again for the same reason it did previously, and the State would

then appeal again presenting the exact same issues. Enforcing a waiver here would thus likely just effectuate a remand for the district court to re-decide an issue it has already decided and the State to then re-appeal. That would be inane.

* * *

The State's compliance costs thus resolve the State's standing completely and this Court can simply end its jurisdictional inquiry there. The Secretary's *only* response is a waiver argument that is simply untenable.

B. The State Has Cognizable Sovereign Injury Resulting From The Tax Mandate's Ambiguity

1. The State Has A Sovereign And Constitutional Right To Clarity In Spending Clause Conditions

As explained previously, the States possess a sovereign right under the Constitution to clarity in any conditions imposed by the Spending Clause. Opening Br.39-41. The Secretary argued below, and the district court held, that "*the existence* of the condition itself," 2-ER-57 at 36:10-20 (emphasis added)—*i.e.*, not what it does. That holding was pivotal to the decision below, and drove both its standing and merits analysis. And it is now barely acknowledged, let alone meaningfully defended. *See* Answering Br.23-24.

Even if that proposition were actually contested, the Secretary offers no response *whatsoever* to the State's demonstration that the district court's existence-only holding directly violates the *core holding* of their *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). Opening Br.29. If her existence-only argument below was correct, *Arlington* would necessarily have been an affirmance rather than the reversal it was. *Id.* Because the Secretary does not make *any* effort to reconcile her existence-only argument with *Arlington*, she effectively concedes the issue.

2. The Alleged Failure To Provide Sufficient Clarity Concerning Conditions Causes Cognizable Injury

The State's sovereign and constitutional right to clear conditions generally is thus apparent. The applicable question then becomes: can Congress violate that undisputed right without injuring the State's sovereign interests? To ask that question is nearly to answer it: violating individuals'/entities' constitutional rights injures them through denial of that right. Indeed, for two centuries it has been "a settled and invariable principle, that every right, when withheld, must have a remedy." *Marbury*, 5 U.S. at 147.

That is also the straightforward holdings of the *Ohio* and *West Virginia* courts. The *Ohio* court, for example, explained that "intruding on Ohio's sovereign right to receive a clear offer … [was] a sufficient injury in fact." *Ohio v. Yellen*, __F.Supp.3d__, 2021 WL 1903908, at *8 (S.D. Ohio 2021). Similarly, the *West Virginia* court held that "the injury in fact that the Plaintiff States have suffered is that they were not offered a clear understanding of the deal that Congress is offering." *West Virginia v. Dep't of Treasury*, __F.Supp.3d__, 2021 WL 2952863, at *6 (N.D. Ala. 2021).

The Secretary's response is confined to a concise and conclusory footnote (at 15 n.3), contending only that "those rulings were incorrect and should not be followed here." The Secretary never actually engages with this relevant reasoning directly, presumably because she cannot. In any event, the *Ohio* and *West Virginia* courts' reasoning is correct.

3. Defendants' Contrary Arguments Overwhelmingly Conflate Standing And Merits Issues

The Secretary's principal (and likely only) response to the State's sovereign injury instead appears to be doubling down on the district court's conflation of standing and merits issues. The Secretary thus

devotes an *entire section* (I.A, at 8-12) to arguing that the State lacks standing because a particular construction of the Tax Mandate is "Contrary To The Offset Provision's Plain Text." The standing/merits conflation is thus patent even from the Secretary's own section titles.

The correct construction of the Tax Mandate, however, is a quintessential *merits* question, which federal courts only have authority to reach *after* standing has been established. Federal courts cannot resolve *any* of the disputes between the parties as to whether the Tax Mandate is actually "broad" or "narrow," or "clear" or "ambiguous"—or *anything* else—without *first* establishing jurisdiction. This is basic stuff. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998), ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (citation omitted)).

The Secretary thus cannot defeat *standing* by arguing that the State's interpretation is wrong on the merits. But that, rather bizarrely, is apparently her primary argument (at 8-12) against the State's sovereign injury. It fails. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits.").

4. Direct Violation Of Specifically-Held Constitutional Rights Is Sufficiently Concrete To Confer Standing

It is possible that the Secretary is also contending that the State's sovereign injury theory fails because it is too abstract, although that argument about abstraction is confined entirely to her argument (at 14-15) that a pre-enforcement challenge is unripe here (which fails as explained previously, Opening Br.40-41, and below, *infra* at 18-19). If the Secretary is making such an argument, it lacks merit.

Sovereignty as a concept is often abstract—but Arizona's sovereign interest vis-à-vis its right to clarity in conditions is anything but. The alleged violations here vitiate a specific interest guaranteed to the State by the Constitution. When a person possesses a constitutional right, a concrete violation of it by the government confers standing even if the harm is not accompanied by physical or economic injury. Consider a few examples:

- Suppose that a criminal defendant is denied a jury. Would he have to show the president judge is a less favorable fact-finder to have standing?

- Suppose police illegally search a family's home. Would they have to prove that something embarrassing or incriminating was found during the search?
- Suppose voters are illegally denied the ability to vote. Must they prove their votes would have affected electoral outcomes?
- Suppose the federal government quarters troops in a family's house while they are away on vacation. Would they have to show specific harm to the condition of the home?

The answer to all of these questions is "no," which is both intuitively and doctrinally obvious. The reason is simple: when an individual possesses a distinct constitutional right personally, the concrete invasion of that personally-held right invariably creates cognizable injury conferring standing. That is so even though in all of these examples the injury might be considered somewhat abstract.

So too here. The State possesses a distinct and *specific* sovereign right to clarity in any Spending Clause conditions imposed by Congress. That confers standing, as parties suffer cognizable injury when they assert a personal right to something concrete which is wrongfully denied

to them by the government. *See*, *e.g.*, *FEC v. Akins*, 524 U.S. 11, 21-26 (1998); *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Violation of personally-held, concrete rights thus creates cognizable injury. The Secretary does not cite a single precedential decision to the contrary. And if violation of personally held constitutional rights is beyond the jurisdiction of judiciary to remedy, federal courts may need to start putting "rights" in scare quotes in their decisions.

In any event, the State's injury is not particularly abstract. This case does not involve some abstraction like "federalism" generally, but rather a concrete and specific entitlement to clarity in Spending Clause conditions. Moreover, *billions* of dollars are at stake based on resolution of the issues presented, making these disputes far more concrete than the abstractions at issue in the cases cited by the Secretary (at 15). And if the "informational injury" in *Akins* was sufficiently concrete to confer Article III standing, the State's injury here necessarily is *a fortiorari*.

C. The Coercion Imposed By ARPA And Its Tax Mandate Inflicts Cognizable Injury

For substantially similar reasons, the coercive force of the Tax Mandate confers standing here as well: *i.e.*, (1) the State has a right not to be coerced by Congress using its Spending Clause powers, *NFIB*, 567

U.S. at 581-82, (2) the Tax Mandate is alleged to violate that right, and (3) the State therefore has standing. And to the extent that the Secretary contends that the Tax Mandate does not "pass the point at which 'pressure turns into compulsion," *id.* at 580, that is a *merits* question, and not one of jurisdiction.

Notably, in *NFIB*, Congress had "threatened loss of over 10 percent of a State's overall budget" through the challenged conditions. *Id.* at 582. But *not one* of the nine Justices thought standing was even a close enough call even to *merit even a word* of discussion. And here the funds at issue similarly are roughly 10% of the State's annual budget as well. Opening Br.69. That is surely enough to assert a claim not "wholly insubstantial and frivolous," *Steel Co.*, 523 U.S. at 83—which is the only manner in which the mixing of merits and standing issues attempted by the Secretary (at FER-5-15) and adopted by the district court could be appropriate.

D. A Pre-Enforcement Challenge Is Also Viable Here

The Secretary also asserts (at 11-12) that Arizona has failed to state a "credible threat" that the statute will be enforced against it. That is irrelevant because the State has standing *now* due to compliance costs

and the sovereign injuries from ambiguity and coercion. *See* Opening Br.43-44. But it has established a "credible threat" of future enforcement against it in any event.

The Secretary's argument largely reiterates the district court's reasoning that the State has not claimed that its tax cuts would result in a "reduction in its net income" or shown how the State has used ARPA funds to "supplement a reduction in its net income." Answering Br.11-12 (quoting 1-ER-7).

This argument is tantamount requiring that Arizona admit to violating the statute as a prerequisite to filing suit. But, as the Supreme Court has made plain, the standing/ripeness inquiry is simply whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quotations omitted). Accordingly, Article III does not "require plaintiffs to 'bet the farm by taking violative action' before 'testing the validity of the law.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490 (2010) (quoting *MedImmune*, 549 U.S. at 129) (alteration omitted)).

As a result, "[a] plaintiff need not expose itself to liability to show an injury in fact." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 720 (8th Cir. 2021). But that is precisely what the district court and the Secretary wrongly demanded, by conditioning standing on admissions of violating the Tax Mandate.

As district court in *Kentucky v. Yellen* explained, the "Tax Mandate may fairly be considered a guardrail as to how States may spend ARPA funds," and combined with its alleged unconstitutionality, this is enough to create a justiciable controversy. *Kentucky v. Yellen*, __F.Supp.3d__, 2021 WL 4394249, at *3 (E.D. Ky. 2021). Defendants did not even meaningfully engage with these arguments.

II. THE TAX MANDATE IS UNCONSTITUTIONALLY AMBIGUOUS

The Tax Mandate's most obvious constitutional infirmity in its patent ambiguity. The Secretary's response never meaningfully grapples with its novel and unprecedented terms, particularly the inscrutable scope of "indirect offsets." Because the Tax Mandate's manifest ambiguities prevent the States from knowingly and voluntarily accepting its conditions, the Tax Mandate exceeds Congress's power under the Spending Clause and violates principles of federalism.

A. Supreme Court Precedent Demands Clarity On Fundamental Terms And Construes Secondary Ones Against Federal Encroachment

As explained above, the Secretary now effectively concedes that the Constitution demands clarity not merely in the *existence* of Spending Clause conditions, but also as to what they actually do. *Supra* at 10-11. In lieu of actively defending her existence-only victory below, the Secretary now relies almost exclusively on arguing that the Tax Mandate's content is unambiguous.

In doing so, she attacks straw men. The State is not arguing that Congress must "set forth every conceivable variation." Answering Br.22-23 (cleaned up). Rather, the Supreme Court's Spending Clause precedents operate essentially on two successive levels—with the Secretary's arguments failing at both.

At the fundamental level, the essential parameters of a condition imposed by Congress need to be sufficiently clear such that States can ascertain the principal terms of the proposed "deal." "The legitimacy" of any attempt by Congress to impose conditions "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

"There can, of course, be no knowing acceptance if a State … is unable to ascertain what is expected of it." *Id.* This is a limitation on Congress's Spending Clause power to protect the fundamental federal, dual-sovereign character of our Republic.

The failure of Congress *in Pennhurst* to provide clarity of central terms thus meant that the entire provision at issue "simply d[id] not create substantive rights" at all. *Id.* at 11. So too here: because the Tax Mandate leaves the fundamental contours of the "deal" offered to the States hopelessly ambiguous, Congress has exceeded its powers and the Tax Mandate simply fails outright to create any obligations on the States.

Where, unlike here, Congress has provided sufficiently clarity for the States to accept the essential "deal," a second-order principle kicks in to address ambiguity in the content of the deal. Under it, Congress need not supply every conceivable detail, but the issue instead is whether Congress provided "clear notice regarding the liability at issue." *Arlington*, 548 U.S. at 296.

The issue in *Arlington* was not the fundamental contours of the condition at issue—the States had ample notice that accepting federal funds put them on the hook for attorneys' fees as part of costs to

prevailing parties in IDEA suits, and so the first-order *Pennhurst* principle was not at issue. *Id.* at 296-98. But because the requisite "clear notice" was lacking as to the ancillary detail of whether "costs" and "attorneys' fees" also included expert fees, there was no such condition that could be imposed under the Spending Clause. *Id.*

The Court thus made clear that whatever Congress may have intended with respect to the content of spending clause conditions is not controlling: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend *but what the States are clearly told regarding the conditions* that go along with the acceptance of those funds." *Id.* at 304 (emphasis added). In essence, the Supreme Court has imposed a *contra proferentem* construction principle for spending conditions, where the States can only be bound by what the text establishes unambiguously with "clear notice."

Because the Tax Mandate fails to provide the requisite clarity as to its fundamental terms, it fails outright under *Pennhurst* as explained previously and next. But even if it did not, the Secretary does not make any effort to construe the Tax Mandate under *Arlington*'s rule of construing the condition narrowly such that it only imposes mandates

that for which there is "clear notice." Thus, even if the parameters of the historically unprecedented Tax Mandate were somehow only an ancillary detail, the Secretary has failed to offer any construction of it that could pass constitutional muster under *Arlington*.

B. The Tax Mandate Is Unconstitutionally Ambiguous

The question, then, is whether the Tax Mandate actually does provide such "clear notice" so that States can knowingly and voluntarily accept its fundamental terms. Defendants argue that it does, but almost exclusively by analogy (at 22-25) to the spending condition in RLUIPA. Courts have generally upheld this RLUIPA condition as not unconstitutionally ambiguous, including this Court in *Mayweathers*. *See* Answering Br.22-23. But the RLUIPA analogy merely illustrates the Tax Mandate's comparative constitutional infirmities.

As the Eleventh Circuit recognized: "RLUIPA forbids the states from imposing substantial burdens on religious exercise absent a compelling government interest accomplished by the least restrictive means necessary to serve that interest. This standard is not new to Georgia or any state." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). Because RLUIPA imposes compliance with the strict scrutiny

standard used countless times by courts in innumerable cases, state officials can "clearly understand" what RLUIPA's condition does and how it is likely to apply in different factual contexts.

This is a judicially administrable standard, just like a "best efforts" or "good faith" clause in a contract. Even if the application of strict scrutiny to a particular fact pattern would not be immediately obvious to a state official, the presence of a judicially administrable standard and extensive relevant case law is sufficient for a State to "knowingly and voluntarily" consent, much like a contracting party could consent to a contract with a "best efforts" clause.

By contrast, the Tax Mandate gives no such standard, and is inscrutable to policymakers. This is for two main reasons. First, because money is fungible, the scope of when ARPA spending can be said to have "indirectly offset" a tax cut is indeterminate. Second, the statute provides no baselines for when a reduction in net tax revenue occurs and has innumerable key gaps.

Notably, in the government's defense of the Tax Mandate's lack of ambiguity, they essentially never try to explain what "indirect offset" means, even though the *Ohio* court correctly observed that "it could not

ascertain what an indirect offset may (or may not) be." *Ohio v. Yellen*, __F.Supp.3d__, 2021 WL 2712220 at *14 (S.D. Ohio 2021). Defendants insist that this does not mean that all state tax cuts are forbidden. But if so, where is the administrable standard which can guide states in telling which tax cuts *will* trigger recoupment? No one can articulate one, much less a standard with as much history and case law as strict scrutiny, because the statute is utterly silent.

The second major ambiguity is the meaning of "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." 42 U.S.C. §802(c)(2)(A). The statute gives no baseline for what amounts to a reduction, and does not explain how to consider multiple, simultaneous changes in law, among other ambiguities. Opening Br.51-53. Again, compared to RLUIPA nothing in the statute cabins the Treasury's discretion or provides a standard to evaluate possible recoupment and guide state conduct. *See Ohio*, 2021 WL 2712220, at *15 (observing that "it is almost as though Congress had written the Tax Mandate" to give the Secretary untrammeled discretion in determining when violation has occurred).

Thus, while RLUIPA adopted the well-known, well-worn strict scrutiny standard that provides clarity as to its applications, the Tax Mandate promulgated an unprecedented standard for which there is no case law or analog that could provide "clear notice" as to what it means. State officials that were forced to evaluate the Tax Mandate had no way to know what they are signing on to, as the Secretary's RLUIPA own analogy makes plain.

The Secretary's only response to these ambiguities is that they are cured by the regulation, but that fails as explained previously (at 61-64) and below.

C. The Tax Mandate's Patent Ambiguity Is Amply Demonstrated By The Federal Government's Shifting Positions

The ambiguity of the Tax Mandate's language is also amply demonstrated by the inability of Federal Defendants and their lawyers to agree *amongst themselves* on what it means. The State demonstrated that Federal Defendants have taken *diametrically opposed* positions as to whether (1) "indirectly" modifies "offset" and (2) whether "offset" requires volitional action. Opening Br.54-56.

On appeal, the Secretary does not even attempt to reconcile—or even *acknowledge*—these conflicting positions. (She could not have missed them: they were discussed extensively in an entire subsection and even illustrated with a chart. *Id.*). And her complete silence concedes both the irreconcilability of her shifting positions, as well as that such conflicts necessarily provide compelling evidence of the Tax Mandate's ambiguity.

Moreover, the Secretary still has yet to settle even on a stable view of the linguistic function that adverbs serve, given her intermittent view that they cannot modify verbs like "offset" (except for when they can). Opening Br.55-56. That she ever contended adverbs were linguistically incapable of modifying the verb "offset"—and now neither acknowledges nor disavows that absurdity—underscores the fundamental unseriousness of her Answering Brief.

D. The IFR Cannot—And Does Not—Cure The Tax Mandate's Ambiguity

The Secretary also attempts to rely on her IFR to "cure" the ambiguity in the Tax Mandate. She first contends (at 25) that the State's "arguments [about the IFR] are not properly before this Court." That is both incorrect, *supra* at 6-7, and unavailing: it is the Secretary that has injected the IFR into the ambiguity discussion to attempt to save the Tax

Mandate's terminal ambiguities. The Secretary's efforts fail for three overarching reasons.

First, agencies *cannot* cure unconstitutional ambiguities. The Fourth Circuit has expressly held as much, noting its importance to the "balance of power between the Federal Government and the States." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc). So has the Fifth Circuit. *Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361-62 (5th Cir. 2021).

The Secretary attempts (at 26 n.6) to downplay *Riley* as mere "dicta." But that portion of the *en banc* plurality was joined by two additional judges-making it a binding holding of a majority of that court, and the conclusion on the inapplicability of the regulation was central to decision. *See Riley*, 106 F.3d at 567 (incorporating Judge Luttig's prior dissent); *id.* at 561 (*per curiam*); *id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment). This Court would there have to create a square—and unwarranted—split with two other circuits to accept the Secretary's cure argument.

Second, even if Congress could confer authority to cure a Spending Clause ambiguity violation, it has not done so here. Notably, the fact that

Congress permitted States to accept ARPA funds upon ARPA's enactment—and before any Treasury regulations could conceivably issue—fully demonstrates that Congress did not intend to have Treasury supply the necessary details. Opening Br.63. The Secretary tellingly ignores this argument entirely (at 25-27)—even though the *Ohio* court *expressly* held as much. *Ohio*, 2021 WL 2712220 at *20.

Moreover, Congress presumptively conveyed no such authority under the major questions doctrine. Opening Br.63. The Secretary retorts (at 27) that the "billions of dollars" is not a reason for that delay to apply. That misses the point: it is the unprecedented nature of the intrusion upon State sovereign taxing power that is a question of deep "economic and political significance" that is central to the statutory scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Third, even if Congress could convey, and had conveyed, such authority to the Secretary, her IFR fails to cure the ambiguity. The Secretary, for example, never explains how her determination that state statutes conforming to federal income definitions—thereby substantially reducing state tax revenues—could possibly be squared with any defensible interpretation of the Tax Mandate. Opening Br.65-67. It

cannot. The Secretary's need in the Rule to indulge in pure *ipse dixits* completely unmoored from the statutory text demonstrates that the IFR merely *compounds* the ambiguities here, rather than curing them.

III. THE TAX MANDATE IS UNCONSTITUTIONAL ASIDE FROM ITS AMBIGUITY

Even if the Tax Mandate provided the States with sufficient constitutional clarity, it would still be unconstitutional for two other fundamental reasons. *First*, the Tax Mandate is a condition unrelated to the purpose of the federal spending. *Second*, the Tax Mandate coerces the State into accepting its term, effectively commandeering State taxing authority.

A. To The Extent The Tax Mandate Is Not Ambiguous, It Prohibits The States From Cutting Taxes

The Secretary asserts the Tax Mandate is "simple" to understand: "States are free to lower [] taxes … they are simply not allowed to use [ARPA] funds to pay for a reduction in net tax revenue." Answering Br.16. Furthermore, the government argues (at 19) that the restriction on "indirect" offsets is "unremarkable"—it merely is similar to "maintenance-of-effort" requirements which are a "longstanding feature" of spending clause legislation. Both contentions are without merit, and

this understanding of the Tax Mandate defies its structure, history, and express purpose.

First, the best reading of the Tax Mandate's plain language, as well as its implementation in the IFR, suggest that this provision is far broader than the Secretary's instant contentions. Far from focusing on the specific "uses" of ARPA funds themselves, the Secretary looks to the State's overall tax policy in determining compliance. If "indirect" is not mere surplusage, this is the only reading that makes sense.

Take a simple example: if the State were to spend its ARPA funds consistent with one of the ARPA permissible purposes for those funds (*e.g.*, making "necessary investments" in broadband services) and then was to cut taxes reducing net revenue, the Treasury could certainly conclude that the ARPA funds spent on broadband are indirectly offsetting that loss of revenue. But for the tax cut, the State would presumably have paid for the broadband infrastructure with state funds. Defendants have never explained why this would not be the case.

This obvious reading of the statute is precisely why the Secretary acknowledged in her testimony to the Senate Banking Committee that the fungibility of money combined with this provision to pose "thorny"

questions. 3-ER-362-65. Many other neutral commentators made similar observations about the "indirect offset" language at the time the ARPA was passed. 3-ER-268-81, 282-87. There is also little doubt that this is what the drafters intended, with Senator Manchin stating that his explicit intent was to prevent states from cutting taxes—not simply to prevent them from "paying" for tax cuts with ARPA funds. 3-ER-288-98.

Far from "disavowing" this reasoning, the IFR accordingly recognizes the fungibility of money and specifically states that "even if Fiscal Recovery Funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for" a tax revenue reduction in a manner amounting to an indirect offset. 86 Fed. Reg. at 26,807.

The Secretary's only meaningful attempt to grapple with the "indirect offset" is (at 19) to compare it to ordinary maintenance-of-effort provisions. But those provisions are far different, as they are both much simpler in language and far more commonplace (hence providing clear notice as to what they do).

For example, the provision at issue in *Bennett* stated that Title I education funding could "in no case," be used "to supplant such funds from non-Federal sources." *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 660 (1985) (citation omitted)). Similarly, the Secretary cites to *South Carolina Department of Education v. Duncan*, in which the Fourth Circuit considered the maintenance-of-effort provision in the IDEA, which provided that a "State must not reduce the amount of its own financial support for special education 'below the amount of that support [it provided] for the preceding fiscal year.'" 714 F.3d 249, 251 (4th Cir. 2013) (citation omitted). But those provisions simply required the State to continue spending on a single category of expenses at a particular level—not ensure that its entire tax policy does not "indirectly" use federal funds in some manner to "offset" revenue losses.

These examples show that Congress knows how to draft a maintenance-of-effort provision, but it critically *did not do so* with the Tax Mandate. Instead, the Tax Mandate prohibits States from "indirectly offsetting" tax cuts with ARPA expenditures.

Ultimately, all of this demonstrates that the Tax Mandate is best understood as an attempt to "pressure" the States not to cut taxes. *NFIB*,

567 U.S. at 577-78 (Roberts, C.J.). And in this posture, with the breadth of its scope, Arizona faces of a real risk that the Treasury, for the next several years, will be able to claw back ARPA funds whenever it finds—in its sole discretion—that it dislikes the State's tax policy. This is not a constitutional arrangement.

B. The Tax Mandate Is Not Related To ARPA's Purposes

As Tax Mandate can only be understood as a limitation on how the states may cut taxes, there is no question that it is not related to the purpose of the ARPA grants. This is because the Tax Mandate is significantly over-and-under-inclusive. First, the Tax Mandate is overinclusive because it prohibits States from cutting taxes for years and there is no cognizable connection between the scope of that restriction and helping the states recover from the economic impacts from COVID-19. Second, the Tax Mandate is underinclusive because it applies only to state governments—not to local governments or municipalities, and certainly not the federal government, which cuts taxes repeatedly in the ARPA itself (to the tune of $505 billion). Opening Br.68.

Because the Secretary offers no "relatedness" defense aside from her flawed interpretation of the Tax Mandate, she has failed to establish that the Tax Mandate satisfies *Dole*.

C. ARPA Unconstitutionally Coerces States Into Accepting The Tax Mandate

Defendants similarly argue against coercion on the basis that Tax Mandate only limits the uses of brand new ARPA funds, and that the coercion analysis only extends to threats to withdraw existing funding, not new funding. Answering Br.16-17 (citing *NFIB*, 567 U.S. at 585-86). According to the Defendants, because a majority of justices in *NFIB* upheld the Medicaid expansion vis a vis the "new funding" in the ACA, the Tax Mandate is immune to any and all coercion challenges. Answering Br.17-18.

Defendants' argument on coercion then is the same as the argument addressed above; Defendants are again relying—wrongly—on their conclusion that the Tax Mandate is a mere limitation on the use of new ARPA funds. But for the reasons previously explained, the Mandate is best seen as an attempt to coerce states to change their tax policies; that is, an attempt to use a financial inducement to strong-arm States not to cut taxes.

This is not dispositive on its own; Congress may engage in "relatively mild encouragement" to induce states to adopt specific policies Congress would not be able to force them to adopt. *NFIB*, 567 U.S. at 581. But Congress may not put a "gun to the head" to force this adoption. *Id.* Defendants never grapple at all with the question of whether the Tax Mandate is just such an offer they can't refuse.

Here, the funding offered by the federal government is at a similar scale to that offered in *NFIB*. And in the context of the economic hardship wrought by the COVID-19 pandemic, there is no question that the scale of this funding represents a power "akin to undue influence." *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). In that context, the Tax Mandate's attempt to discourage the States from cutting taxes is unconstitutional, and tantamount to commandeering.

And while *NFIB* noted that Affordable Care Act burdened *existing* funding, that was an observation that was at most a relevant factor—not a blanket blessing of coercion through new moneys. In any event, the Tax Mandate burdens *existing tax policy*, essentially by locking it in with a one-way ratchet. That, as in *NFIB*, constitutes unconstitutional coercion.

CONCLUSION

This Court should reverse the district court's dismissal and direct issuance of an injunction against the Tax Mandate on remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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