No. 22-10168

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF WEST VIRGINIA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF THE TREASURY, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

No. 7:21-cv-00465-LSC

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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 and 26.1-2, the undersigned counsel certifies that there are no persons who may have an interest in the outcome of this case other than those persons that the parties already listed in Appellants' January 27 Certificate of Interested Persons, Appellees' February 18 Certificate of Interested Persons, and Appellants' February 23 Amended Certificate of Interested Persons.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Respectfully submitted this 25th day of March 2022.

/*s*/ Lindsay S. See
Lindsay S. See

Counsel for Plaintiff-Appellee West Virginia

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe oral argument is unnecessary. The district court's decision was well-reasoned, and the legal principles that this case implicates are well-established. That said, Appellees recognize the importance of the issues at stake. If the Court decides that argument is appropriate, Appellees welcome the opportunity to present their arguments orally and address any questions the Court may have.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on November 15, 2021, and Appellants filed a timely notice of appeal on January 14, 2022. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Through a vague and unusual provision of the American Rescue Plan Act of 2021 ("ARPA"), Congress prohibited States from using ARPA funds to offset state tax cuts—either "directly or indirectly." *See* Pub. L. No. 117-2, § 9901, 135 Stat. 4 (enacting § 602(c)(2)(A) to the Social Security Act (42 U.S.C. § 801 *et seq.*)). The district court held this "Tax Mandate" violates the U.S. Constitution's Spending Clause. *See* U.S. CONST. art. I, § 8, cl. 1. It therefore permanently enjoined the Tax Mandate as to the thirteen Appellee States.

The questions presented on appeal are:

1. Do the States have standing to challenge the Tax Mandate when it infringes their sovereign interests in taxation, imposes compliance costs, and creates the looming threat of costly recoupment actions?
2. Does the Tax Mandate violate the Spending Clause because it is ambiguous, coercive in tying this condition to billions in funds to the States, unrelated to APRA's purpose of repairing the pandemic's economic damage, or independently unconstitutional?
3. Does the Tax Mandate violate the Tenth Amendment's anti-commandeering rule by improperly directing the activities of state legislators and tax assessors?

STATEMENT OF THE CASE

1. On March 11, 2021, President Biden signed the $1.9 trillion American Rescue Plan Act of 2021. In that Act, Congress allocated $195.3 billion to the States to counter the economic damage that the COVID-19 pandemic wrought. 42 U.S.C. § 802(b)(3)(A). In doing so, Congress directed that a State could use these funds for four things: (1) responding to the public-health crisis or "negative economic impacts" stemming from COVID-19; (2) supporting essential workers; (3) providing for "government services to the extent of the reduction in revenue of such State"; and (4) advancing certain infrastructure investments. *Id.* § 802(c)(1)(A)-(D). Categorical restrictions like these are typical in congressional grants, as they ensure the funds reach their intended purposes. But in a novel move beyond them, Congress also imposed a special restriction on the States' taxing powers, the Tax Mandate:

> 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.

Id. § 802(c)(2)(A). This Tax Mandate is a long-running obligation: It began on March 3, 2021 and ends on "the last day of the [last] fiscal year" in which a

State spends, returns, or otherwise turns back over a single dollar of ARPA funds to the Secretary. *Id.* § 802(g)(1). ARPA funds remain available until December 31, 2024. *Id.* § 802(a)(1).

Congress did not define the phrase "directly or indirectly offset." Nor did Congress extend the Tax Mandate to Tribal governments, cities, or localities. *See* 42 U.S.C. § 803(c). But Congress *did* require recipient States to "provid[e] a detailed accounting" to the federal government of "all modifications to the State's ... tax revenue sources" for years to come, as well as "such other information as the Secretary may require for the administration of" the law. *Id.* § 802(d)(2). And Congress authorized the Treasury Secretary to recoup any funds she determines the States have used in violation of the Tax Mandate, potentially years after the fact. *Id.* § 802(e). Further, the Secretary must issue "regulations as may be necessary or appropriate to carry out" the law's provisions, opening the door to yet more restrictions or obligations. *Id.* § 802(f).

2. Twenty days after ARPA's signing, the States of Alabama, Alaska, Arkansas, Florida, Iowa, Kansas, Montana, New Hampshire, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia sued to enjoin the Tax Mandate. A25-57. Around the same time, Arizona, Kentucky, Missouri, Ohio, and Tennessee filed similar suits in district courts in the Sixth, Eighth, and Ninth Circuits. *See generally Arizona v. Yellen*, 550 F. Supp. 3d 791 (D. Ariz. 2021) ("*Arizona*") (complaint filed Mar. 25, 2021), *appeal filed*, No. 21-16227 (9th Cir.); *Kentucky v. Yellen*, No. 21-cv-17, 2021 WL 4394249 (E.D. Ky. Sept. 24, 2021) ("*Kentucky*") (complaint, with Tennessee, filed Apr. 6, 2021), *appeal filed*, No. 21-6108 (6th Cir.); *Missouri v. Yellen*, 538 F. Supp. 3d 906 (E.D. Mo. 2021) ("*Missouri*") (complaint filed Mar. 29, 2021), *appeal filed*, No. 21-2118 (8th Cir.); *Ohio v. Yellen*, 547 F. Supp. 3d 713 (S.D. Ohio 2021) ("*Ohio*") (complaint filed Mar. 17, 2021), *appeal filed*, No. 21-3787 (6th Cir.). A suit by Texas, Louisiana, and Mississippi soon followed. *See Texas v. Yellen*, No. 2:21-79 (N.D. Tex. May 3, 2021).

3. Two weeks after filing suit, the States here moved to preliminarily enjoin the Treasury Department from enforcing the Tax Mandate. *See* A18. Defendants—the Department of the Treasury, Treasury Secretary Janet Yellen, and Treasury's acting inspector general—responded in part by insisting that the States had demonstrated no injury that would give them standing to sue. *See* A66. But the district court disagreed: The States had adequately pleaded the injury of having to "decid[e] whether to accept or decline" ARPA funds "based on unconstitutionally-ambiguous terms." A73.

They had also sufficiently alleged that the Tax Mandate posed a credible threat of enforcement in the form of a recoupment action that could affect the States' Tenth Amendment rights. A74-75.

Though the district court put to rest Appellants' jurisdictional objections, it did not reach the merits of the States' claims at that time. It deferred that issue because it thought the States had not demonstrated that irreparable harm was likely in the time between the court's ruling on the preliminary injunction motion and the court's ultimate resolution of the case. A79. After the district court "encouraged" expedited briefing, A82, the States moved for a final judgment permanently enjoining the Tax Mandate and declaring it to be unconstitutional under the Spending Clause. They also alleged that the Tax Mandate violated the Tenth Amendment's anti-commandeering rule. Appellants opposed the States' motion and moved to dismiss the suit for lack of subject-matter jurisdiction and failure to state a claim.

4. In November 2021, the district court granted the States' motion, denied Appellants' motion, and entered final judgment for the States.

First, and before moving to the merits of the claims, the court discussed an Interim Final Rule implementing ARPA. The Treasury Department had released that rule while the States' preliminary-injunction motion was pending. *See* A98-101 (citing Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (May 17, 2021)). Starting from the unobjectionable premise that "money is fungible," Treasury determined that ARPA funds may "be used in a manner inconsistent with the statute by indirectly being used to substitute for the State's or territory's funds that would otherwise have been needed to cover the costs of the reduction." A99 (quoting 86 Fed. Reg. at 26,807). This supposed "indirect" violation can happen even if ARPA funds are "not explicitly or directly used to cover the costs of changes that reduce net tax revenue." *Id.*

The interim rule created a complicated framework for identifying these purportedly illegal indirect offsets. Under it, States must "identify and value" any State actions that might reduce net tax revenue. A99. States must then show how they intend to "pay for" them with non-ARPA funds. A99. Except for "de minimis" decreases in tax revenue and instances when actual tax revenue exceeds a State's inflation-adjusted 2019 tax revenue, the State must identify alternate funding sources or spending cuts to account for the total value of covered tax changes. A99. Treasury then notifies the State of potential recoupment of the greater of either the total value of revenuereducing changes (less the permissible offsets) or "the difference between the State's actual tax revenue and its inflation-adjusted 2019 tax revenue." A99-100 (citing 86 Fed. Reg. at 26,807-10, 26,823).

So when it comes to identifying which spending cuts can be used to "pay for" any tax cuts, Treasury must extend its supervision beyond how States spend ARPA funds to how they spend *state* funds. Spending cuts in "areas" where States spend ARPA funds are not good enough and cannot offset a decrease in revenue. A100 (citing 86 Fed. Reg. at 26,810). Covered offsets thus include changes that increase tax revenue and spending cuts in areas other than where ARPA funds reach. A99 (citing 86 Fed. Reg. at 26,807-09). And spending cuts that a State considers "covered" in one year may become "uncovered" years later. If, while "monitor[ing spending] changes," Treasury determines that the later cut was "replaced with [ARPA] Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change," Treasury may treat that structure as evasion and go after the State in a recoupment action. A100-01 (quoting 86 Fed. Reg. at 26,810). Although Treasury will consider "all relevant facts and circumstances" in evaluating whether a State has violated the Tax Mandate, A101, it has not said what circumstances are, in fact, "relevant."

Second, the district court identified three developments in the States since the case was filed. It first canvassed "some of the revenue-related laws that each of the thirteen [Appellee] States ha[d] passed" since ARPA's enactment. A102-03. Then it noted a declaration from an Alabama legislator describing the Tax Mandate's harmful, chilling effect on proposed legislation. A103. And it explained that Treasury had disbursed over $10.6 billion to the ten Appellee States that had certified acceptance of ARPA funds as of August 12, 2021. *Id.* As Appellants note, Op. Br. 9 & n.3, that number has since grown as all thirteen Appellee States have now received their first checks.

Third, the district court turned to the parties' arguments—which, for Appellants, largely amounted to unsuccessful efforts to avoid the merits. The district court again rejected Appellants' standing arguments, finding that the States "had established that they were entitled to clarity" when exercising their "sovereign prerogative of deciding whether to accept" the strings attached to an "offer of conditional funding." A107. The Tax Mandate injured the States because it provided no such clarity. A107.

The district court also found that the case was not moot merely because most (and now all) of the States certified compliance with ARPA and accepted funds under the statute's terms. Although certification answered the question "whether [the States would] accept an ambiguous deal," the States "continue to suffer the closely related harm to their sovereign authority to set their own tax policies." A107-09. Certification thus did not affect their ability to stay in the suit. Nor was the greater evidentiary burden to establish standing at the permanent-injunction stage reason to dismiss. Appellants could no more convert ARPA's ambiguous deal into a clear one than they could wish away the "list of revenue-related laws passed by the [Appellee] States since [] ARPA's passing." A110. And challenging the merits of the States' arguments against the Tax Mandate had no bearing on whether the States had standing to make them. A110.

On the merits, the district court also found Appellants' arguments wanting. The court started from two basic conclusions: "[m]oney is fungible," and ARPA does not define the phrase "directly or indirectly." A129. Given those two realities, "any ARPA funds the [Appellee] States receive could be viewed as indirectly offsetting any reduction in net tax revenue from a change in state law or policy." A129-30. That broad potential reach in turn left the States with "*no guidance* on critical interpretive questions" and "no way … to clearly understand their obligations … by looking to the text of the provision itself." A136 (emphasis in original). So even though Appellants disavowed any "interest in proscribing state tax policy," the Tax Mandate "dictates what States do" with federal funds *and* state funds. A138. In other words, the Tax Mandate "pressures States into adopting a particular—and federally preferred—tax policy." A138. And "[t]he inherent ambiguity in the text of the mandate" may chill the States from adopting tax cuts "for fear of forfeiting ARPA funds," which posed a clear "federal invasion of State sovereignty." A138.

Lastly, the district court determined that the Interim Final Rule did not cure the Tax Mandate's unconstitutional ambiguity. A139. Appellants conceded that a rule could not patch up the statute's holes. But beyond that, the rule itself "leaves States guessing as to how they may exercise their sovereign power to tax" because it *still* does not clearly define "indirectly offsets." A139-40. The rule also made the statute's troubling timing implications more obvious: Using ARPA funds even years after a State makes tax cuts could subject the State to a costly recoupment action from Treasury. A139. This, the Court held, would not do.

After finding the Tax Mandate unconstitutional, the district court held that the permanent-injunction factors weighed in Appellee States' favor. It thus permanently enjoined the Treasury Secretary from enforcing the Tax Mandate against them. A140-44. This appeal followed. A146.

SUMMARY OF THE ARGUMENT

I. Appellants' failed arguments on standing are no more persuasive on appeal. Though Appellants try to say that the States have not yet suffered an injury, the Tax Mandate subjects the States to concrete harm. It infringes the States' sovereign interests by striking at the heart of one of the States' most important powers: the power to tax and spend as they see fit. The law also saddles the States with onerous tracking, accounting, and reporting requirements that result in significant compliance costs. And the statute's terms and Treasury's actions create an imminent threat of enforcement. The federal government can determine after the fact that it does not care for the way a particular State structured its post-ARPA budget, and it can file a recoupment action to grab back millions. Any of these facts present genuine harms that give the States standing.

II. The district court also correctly held that the Tax Mandate violates the U.S. Constitution's Spending Clause.

When Congress wants to condition a grant of funds to the States, it must be unambiguously clear about what those conditions are. Conditions must be clear enough that States can make a knowing and voluntary choice whether to accept the strings attached to a federal check. Here Congress was not clear in the least. By forbidding any "direct or indirect" offset of tax cuts with fungible ARPA funds, Congress has left the States to guess whether any net reduction in state tax revenue is permissible once a State accepts Congress's bargain. Even now, Appellants have identified no clear understanding of what these statutory terms mean. The Constitution makes that lack of clarity fatal.

The Tax Mandate is also unduly coercive. It is the condition for hundreds of billions of dollars in funds amid a unique global catastrophe. Because only the federal government can raise funds of this magnitude, no real alternative exists to accepting this "offer"—particularly for the many States constrained by balanced-budget requirements. By dangling this critical relief in front of the States, Appellants have effectively wielded the "gun to the head" that the Supreme Court has said constitutes an unconstitutional condition.

The Tax Mandate does not relate to ARPA's purpose, either. The Act's undisputed aim is to repair the economic damage that the COVID-19 pandemic wrought—particularly on state budgets. But the Tax Mandate *limits* state options to respond to the pandemic, depriving States of flexibility to address this pressing economic and public-health crisis. Even though the federal government has recognized that tax relief can be an effective policy tool during times like these, and even though Congress deployed that tool in other parts of ARPA itself, the Tax Mandate takes it out of the hands of the States. Lastly, the Tax Mandate fails on Spending Clause grounds because it intrudes into powers the Tenth Amendment reserves to the States.

III. The Court should also hold that the Tax Mandate violates the anti-commandeering doctrine. The Tax Mandate forces state legislators and tax authorities to implement federal "pro-tax" budgeting priorities for at least the next three years. This degree of control over state budgets and actors crosses the constitutional line and offends the Tenth Amendment.

STANDARD OF REVIEW

This Court reviews the district court's "decision to grant a permanent injunction for an abuse of discretion," its "conclusions of law … de novo," and "[i]ts findings of fact … for clear error." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1315-16 (11th Cir. 2018) (quoting *Estate of Brennan ex rel. Britton v. Church of Scientology Flag Serv. Org., Inc.*, 645 F.3d 1267, 1272 (11th Cir. 2011)). This Court also "review[s] de novo the constitutionality of a challenged statute." *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939 (11th Cir. 2013).

ARGUMENT

The district court did not abuse its discretion in permanently enjoining the Tax Mandate. *First*, the district court got it right that the States have standing and this case is ripe and ready for resolution. The Tax Mandate generates compliance costs and poses a significant enforcement threat, thus injuring the States. *Second*, Appellants are wrong on the merits. The Tax Mandate is no "unremarkable" condition. Op. Br. 12. In reality, it offends the Constitution for multiple reasons. As the district court correctly found, it violates the Spending Clause because it is ambiguous. But it does more than that: it also violates that Clause because it is unduly coercive, disconnected from ARPA's purpose, and otherwise unconstitutional. And Spending Clause defects aside, the Tax Mandate violates the Tenth Amendment's anti-commandeering provisions, too. The Court should affirm.

I. Appellee States Have Standing.

As they did in the district court, Appellants again seek to avoid the merits by arguing the States lack standing to challenge the Tax Mandate. Again, they are wrong.

The States have standing so long as they are in danger of "actual or imminent" injury that is "fairly traceable to the challenged action" and "likely" to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992) (cleaned up). And despite Appellants' cursory argument to the contrary, Op. Br. 12, this case can move forward if even one State has standing. Though this Court has said that "[e]ach plaintiff must establish standing on the facts of the case before the court," *Houston v. Marod Supermakets, Inc.*, 733 F.3d 1323, 1340 (11th Cir. 2013), it made that observation in a *single-plaintiff* case. In context, the Court was cautioning district courts against expanding *Houston*'s "fact-specific inquiry" too broadly, as injunctive relief often turns on "the specific facts in the record" of a given case. *Id. Houston*, then, did not upend the ordinary rule: "So long as one party has standing, other parties may remain in the suit without a standing injury." *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006); *see also Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) (expressly following court of appeals' lead in analyzing just one plaintiff's standing based on this rationale).

A. In any event, all Appellee States have shown concrete harm.

First, a State's authority to set its own tax policy remains "central to state sovereignty." *Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994); *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819) ("[T]he power of taxing the people and their property[] is essential to the very existence of government."). Whether ARPA restricts all or some of the States' taxing powers, a choice between declining ARPA funds and accepting them along with the ambiguous Tax Mandate is a choice between retaining and relinquishing the "constitutional right" of co-sovereigns. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004); *see also Ohio*, 547 F. Supp. 3d at 726 ("That type of thumb on the legislative scale is a current and ongoing injury to Ohio in its sovereign capacity."). And interference with these state-sovereignty interests is sufficiently concrete: It "can cause concomitant injury" even for individuals. *Bond v. United States*, 564 U.S. 211, 225 (2011). Here the States are pressing their interests directly. *See* A107-08 (holding that the lack of clarity in the Tax Mandate threatened the States' "sovereign prerogative of deciding whether to accept the offer" and then left those who had accepted with "[in]sufficient information … to determine the impact [any tax] changes will have on their ability to retain [] federal grant money").

Second, thanks to the Tax Mandate, the States are subject to onerous reporting requirements. But for the provision, the States would not have to perform the sort of economic analysis and produce the extensive documentation required to ensure Treasury can adequately assess changes to state revenues and expenditures. *See* 42 U.S.C. § 802(d)(2) (requiring ARPA fund recipients to provide a "detailed accounting" of "the uses of funds by such State, … including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period"); 31 C.F.R. § 35.4(c) (describing Treasury's reporting requirements and potential requests for information). Self-evidently, putting this information together takes time and costs money. And "compliance costs" like these are "a classic injury-in-fact." *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 293 (3d Cir. 2015); *see also Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1084 (11th Cir. 2019) ("Certainly, an economic injury qualifies as a concrete injury."). For standing purposes, even a "dollar or two" of economic harm will do. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008).

Third, the threat of a recoupment proceeding governed by rules nobody has (or even can) adequately explain is a cognizable injury. A109; *see also*

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159, 164 (2014). The States must routinely pass budgets that might cause a net revenue reduction. Even aside from the recent tax-related laws Appellee States catalogued below, A110, reform laws that include tax cuts are commonplace when they do so. *See, e.g.*, John Raby, *West Virginia House Passes 10% Personal Income Tax Reduction*, ASSOC. PRESS (Feb. 11, 2022), *available at* https://bit.ly/3D6iR4C. And States now face a substantial threat of enforcement for these state policy decisions.

For one thing, the statute mandates recoupment actions. *See* 42 U.S.C. § 802(e) (explaining that "*[a]ny* State" that "has failed to comply" with the Tax Mandate "*shall* be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection" (emphases added)). Many Appellee States asked Treasury for clarification on the Tax Mandate's scope days after ARPA became law, and Treasury's response failed to identify any statutory test to resolve what "indirectly offset" means. A45. The detailed metrics in the Interim Final Rule were similarly unhelpful on that score. And Appellants have in fact threatened enforcement of what they take to be ARPA's limits. *See* Andrea Shalal, *Treasury warns Arizona it cannot use* *federal funds to undermine mask norms*, REUTERS (Oct. 6, 2021), https://reut.rs/3D94igB.

B. Appellants cannot brush these injuries aside. To begin, they dress up many of their merits arguments as standing ones. *See*, *e.g.*, Op. Br. 10 (framing the Tax Mandate as restricting "only *the use of [federal] Fiscal Recovery* Funds to pay for tax cuts" (emphasis in original)), 11 (challenging assumption behind district court's standing analysis as "contrary to the statute's plain text"). That choice is a poor one, as "[s]tanding in no way depends on the merits of the plaintiff's contention." *DeKalb Event Ctr., Inc. v. City of Chamblee*, 15 F.4th 1056, 1061 (11th Cir. 2021) (cleaned up); *see also* A110 ("[W]hether [Appellee] States have standing to bring this lawsuit is not dependent on whether the constitutional claims ultimately succeed."). Though two out-of-circuit district courts bit on the same merits-focused argument, they "confuse[d] weakness on the merits with absence of Article III standing." *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1382 (11th Cir. 2019); *see generally Arizona*, 550 F. Supp. 3d at 797; *Missouri*, 538 F. Supp. 3d at 912-14. Other lower courts—like the one below—had no trouble rejecting this error. *See* A104-11; *Ohio*, 547 F. Supp. 3d at 722-27; *Kentucky*, 2021 WL 4394249, at *2-3.

Next, Appellants try to distort the States' injuries by framing this case as an "abstract" "pre-enforcement" dispute about "conduct the [States] might later undertake." Op. Br. 6, 8. As explained above, nothing can be called "abstract" about a case in which the States have *already* been injured—enough for the district court to conclude that the States need not make out a separate showing of harm under a pre-enforcement review theory. A110 & n.3. And in any event, the States meet that standard, too. *See*, *e.g.*, *New York v. DHHS*, 414 F. Supp. 3d 475, 571 (S.D.N.Y. 2019) ("HHS's suggestion that plaintiffs must await an enforcement action to claim a violation of the Spending Clause, however, is wrong. As *NFIB* teaches, a federal threat to a State to 'do this, or else' is coercive at the moment it is uttered; the State's conduct may be influenced long before the 'or else' comes to pass.").

None of Appellants' preferred authorities impose a more aggressive injury requirement. Op. Br. 8. In *Arlington Central School District Board of Education v. Murphy*, for example, the Supreme Court did not fixate on the facts of the case or the specific injury to the party. 548 U.S. 291, 296 (2006). Instead, it analyzed whether a reasonable state official would read the relevant statute to impose a Spending Clause condition. *Id.* Likewise, it was true in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981), and

Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985), that some actual violations of the challenged condition had already occurred—but that's not to say that those cases *required* such high degree of injury to proceed. Appellants identify no cases holding that a party must violate a spending condition before it can bring a Spending Clause claim. Such a rule would effectively foreclose pre-enforcement Spending Clause challenges, contrary to Supreme Court precedent. *See Ohio*, 547 F. Supp. 3d at 723 ("So, the Supreme Court's silence on jurisdiction in *NFIB* provides at least an implicit recognition that this type of injury creates standing."). And Appellants say nothing about the anti-commandeering claim; no court would hold that a State must wait until its actors are formally "captured" before taking steps to fix the situation.

Further, if Appellants' protests about "abstract" injury form a ripeness argument, they are also off base. Ripeness assesses "the hardship that a plaintiff might suffer without court redress and the fitness of the case for judicial decision." *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006). The States will suffer significant hardship if they are forced to labor under the ambiguous Tax Mandate. Turning down billions in funding is not a realistic option, nor is putting tax relief on hold for potentially years to avoid breaching the Tax Mandate. As for fitness, the States raise "purely legal" claims that the Court can and should resolve now. *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 581 (1985). Whether Treasury brings recoupment actions in the future, for example, will not change the fact that the Tax Mandate is ambiguous. As written, it is unconstitutional today.

Finally, the district court was right that the States' standing evidence was good enough for final judgment. A110 ("[Appellee] States have bolstered their allegations with a list of revenue-related laws passed by the thirteen States since [] ARPA's passing as well as a declaration by a State senator."). The States neither failed to show a "credible threat" nor presented evidence that contradicted their allegations. Op. Br. 9-10. What more evidence is needed where part of the States' injury *is* the unconstitutionally "ambiguous deal" they were coerced into taking, A108, and the ever-present threat of recoupment that colors state officials' decisions?

The district court also correctly rejected the argument that accepting ARPA funds erases the States' harm. Op. Br. 9. Standing is assessed based on the facts when the complaint is filed, before all the States made that decision. A108 (citing *Lujan*, 504 U.S. at 569 n.4). Nor does it matter that the States have enacted tax policies without announcing an intent to use ARPA funds "to pay for a reduction in net tax revenue." Op. Br. 11. Courts "do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). In other words, the States need not provide evidence they plan to pay for tax cuts in ways that Treasury might find wanting under an ambiguous statute. And of course, injuries to state sovereignty and the compliance costs ARPA imposes are both ongoing and unaffected by any laws the States may choose to enact in the meantime.

The fact is: Appellee States were harmed when they were subjected to an unconstitutional choice and continue to suffer harm today. Confusion about what the Tax Mandate covers, accounting and reporting costs as States seek to comply, delay as legislators are forced to second-guess every fiscal decision they make, and fear of a future action clawing back potentially billions—the States have more than established standing.

II. The Tax Mandate Violates The Spending Clause.

When Congress provides federal funds to the States, the Spending Clause allows it to condition those funds on certain restrictions or requirements, even ones Congress could not implement directly. *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012) (op. of Roberts, C.J.) ("*NFIB*"). But this power is not unlimited. To be constitutional, a Spending Clause restriction must satisfy five elements:

1. the expenditure must benefit the general welfare;
2. any condition must be unambiguous;
3. any condition must be reasonably related to the grant's purpose;
4. the grant and any conditions attached to it cannot violate an independent constitutional provision; and
5. the grant cannot be so coercive that it amounts to compulsion.

South Dakota v. Dole, 483 U.S. 203, 207-08, 211 (1987). As the district court recognized by stopping with the second factor, if just one element isn't met, the condition violates the Spending Clause. Here, the Tax Mandate fails to satisfy four of the five: Its requirements are ambiguous; the amount of money at stake coerces the States to accept the federal government's strings; its restrictions are unrelated to the grant's purpose; and it invades the States' powers under the Tenth Amendment.

A. The Tax Mandate strikes an impermissibly ambiguous deal.

If Congress "intends to impose a condition on the grant of federal moneys," it must "speak with a clear voice"—that is, state the condition "unambiguously." *Pennhurst*, 451 U.S. at 17. Because Congress's power to obligate a State under the Spending Clause "rests on whether the State voluntarily and knowingly accepts the terms under which federal funding is offered, such legislation is binding on States only insofar as it is unambiguous."

Gallardo by & through Vassallo v. Dudek, 963 F.3d 1167, 1175 (11th Cir. 2020) (cleaned up). As the district court explained, "such clarity is critical to a State's ability to exercise its sovereign prerogative of deciding whether to accept that offer." A107.

Unambiguous conditions are "define[d] … clearly enough for the states to make an informed choice." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) (citing *Pennhurst*, 451 U.S. at 25). Congress must "*define* the condition sufficiently so that States can know how to comply with it." A133. A provision that, when "literally read, admits of two plausible interpretations," doesn't cut it. *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 419 n.2 (2005). Instead, the Court "must view the [Act] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with" them. *Arlington*, 548 U.S. at 296.

1. The Tax Mandate fails from that vantage point. Nothing in ARPA, for instance, helps a State answer whether its net tax revenues were "reduc[ed]" in a way that triggers liability under the Tax Mandate in the first place. *See* 42 U.S.C. § 802(c)(2)(A). The statute is deliberately broad—reductions can come from changes in "law, regulation, or administrative interpretation," *id.*—but the States are left wondering what counts within this universe. The term "reduction in the net tax revenue" is undefined, and it is not a term of art or understood legal term. Are reductions measured at the front end or the back, with the baseline the prior year's tax revenues, a five-year or other average lookback, or projected revenues for the upcoming year? And will Treasury evaluate compliance based on the States' reasonably anticipated revenue changes, or are States strictly liable for their actual tax receipts in the midst of an unknowable economic environment? A law meant to help States as they emerge from the pandemic's economic upheaval should not force them into such a risky guessing game.

Moving to the crux of the district court's analysis, Congress also failed to define clearly what it means to offset a covered reduction. States may not "directly *or indirectly* offset" reduced revenue. 42 U.S.C. § 802(c)(2)(A) (emphasis added). This concept is extraordinarily expansive. Even *Black's Law Dictionary* says that, unmodified, an "offset" is "something … that balances or compensates for something else" or that "calculate[s] against" another factor; it offers no help with how much broader an "indirect" offset might be. BLACK'S LAW DICTIONARY 1120 (8th ed. 2004). Worse still in this context, "[m]oney is fungible." *Holder v. Humanitarian Law Project*, 561

U.S. 1, 37 (2010). So virtually any change to any law, rule, or policy that intentionally or inadvertently causes reduced net revenue may trigger the Tax Mandate's clawback provision. *See* A129-30 ("[A]ny ARPA funds the [Appellee] States receive could be viewed as indirectly offsetting any reduction in net tax revenue from a change in state law or policy.").

Appellants' examples do them no favors in clarifying the Tax Mandate's scope. They first describe a situation in which a State uses ARPA funds to directly offset a state tax cut. Op. Br. 13. Other Spending Clause objections aside, no ambiguity concerns there. But then they describe a purportedly impermissible *indirect* offset where a State cuts its "own expenditures by $2 billion to offset [a $2 billion] tax cut and us[es] $2 billion in federal funds to pay for those expenditures instead." *Id.* Appellants argue this example shows that "indirectly" is an innocuous term to avoid gamesmanship, *id.*; it actually highlights that "indirectly" has no statutory limit.

The second example seems driven by a concern that States might exploit a federal windfall to fund tax breaks they could not have afforded otherwise. But the whole purpose of emergency pandemic relief is that States face expenses no one imagined just over two years ago. ARPA ensures the States have money to meet these needs without sinking their reserves or putting all other budgetary priorities on indefinite hold. The upshot is that whenever the federal government gives a State money for critical COVID-related issues, that State does not have to use its own money for those same purposes—and *can use it for something else instead*. The Tax Mandate is agnostic to many of those choices; for instance, a State can use money that might have otherwise gone to COVID relief for any number of other spending programs. But if the State wants to use the same money for tax relief, ARPA says no. Tax cuts are thus uniquely disfavored. And because all decreases in state revenue must be offset *somehow* to achieve a balanced budget, Treasury could always argue that a State "indirectly" funded its tax cuts through federal largesse. So it really does appear that Appellants want to leave themselves room to argue that any tax cut would be an impermissible offset—period. And if that "literal[]" interpretation seems too broad, *Graham Cnty.*, 545 U.S. at 419 n.2, the trouble is that Appellants still cannot point to anything in the statute that tells the States where Treasury must draw the line. The Spending Clause requires more: "States cannot knowingly accept conditions … which they are unable to ascertain." *Arlington*, 548 U.S. at 296 (cleaned up).

2. Appellants' remaining arguments are no reason to reverse.

First, Appellants fall flat when trying to minimize the breadth of "indirectly." Through a little statutory reimagining on the fly, Appellants argue now that "indirectly" "simply underscores that a State cannot circumvent Congress's restriction … through a mere formality." Op. Br. 13. Even assuming this construction were a valid limiting principle grounded in the statute, courts owe no deference to an interpretation offered for the first time during litigation. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156 (1991). Much less where the new reading is unmoored from the text and inconsistent with Treasury's prior recognition that "the Tax Mandate may be ambiguous." *Ohio v. Yellen*, 539 F. Supp. 3d 802, 819 (S.D. Ohio 2021) (characterizing federal government's position during oral argument) (appeal pending).

Appellants also appear to ask the Court to treat "directly or indirectly" as a linguistic flourish. Op. Br. 13 ("[e]ven if that phrase were stricken" the restriction "would properly be read to mean the same thing" as "offset" alone). But courts are "obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (cleaned up). And Congress included this language deliberately. For example, "directly or indirectly" is missing from the very next subsection prohibiting topping off pensions with ARPA funds. 42 U.S.C. § 802(c)(2)(B).

Congress must have intended the phrase to mean *something*. *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1089 (11th Cir. 2017) ("When Congress uses different language in similar sections, we should give those words different meanings." (cleaned up)). But unless that "something" means States must hand over all power to reduce taxes for several years—a reading not even Appellants suggest—Congress did not tell the States how far that prohibition goes. The gap leaves States unable to make knowing and voluntary choices about the burdens they assume when they accept ARPA funds. The result is that States will become vulnerable to costly recoupment actions if they guess wrong about their extent, or States will needlessly forego their discretion to manage their own budgets if they guess wrong in the other direction. Either result is unacceptable. And if Appellees *are* now suggesting that the Tax Mandate acts as a backdoor mechanism to foreclose all tax cuts for years to come, the Court should reject that argument, too. *See* A138 ("The Tax Mandate's restriction on direct or indirect state tax cuts pressures States into adopting a particular—and federally preferred—tax policy. … This is a federal invasion of State sovereignty.").

Second, comparing the Tax Mandate to "maintenance-of-effort requirements" does not work. Op. Br. 13-14. The federal grants in *Bennett* were given to broaden specific "compensatory education programs for disadvantaged children" that "would not otherwise be available." 470 U.S. at 659. *Bennett*'s focus on discrimination already distinguishes it, as courts have recognized Congress's broad power to attach anti-discrimination conditions to federal spending. *See* A136-37. But more to the point, ARPA funds allow the States to help their citizens in an array of pandemic-related areas. 42 U.S.C. § 802(c)(1). In Appellants' own words, the funds were meant to help "mitigate the fiscal effects of the COVID-19 pandemic" generally. Op. Br. 2. Unlike in *Bennett*, no evidence suggests Congress intended these funds to only *expand* specific, preexisting state services. In any event, ARPA lacks an express requirement to maintain existing support. *Cf. Bennett*, 470 U.S. at 659. Nor is it clear how one would operate: Accepting funds for pandemic-related purposes could hardly mean that States must freeze funding decisions in every other area where "indirectly" might reach.

Appellants' other authority serves them no better. Like *Bennett*, both *Mayhew v. Burwell*, 772 F.3d 80 (1st Cir. 2014) (Medicaid) and *South Carolina Department of Education v. Duncan*, 714 F.3d 249 (4th Cir. 2013) (special education program) involved funds to expand particular programs. If anything, these cases show that Congress knows how to write maintenance-of-effort clauses that target specific programs and ensure States keep funding them. Instead of including anything like that here, Congress paired exorbitant funding with an ambiguous restriction on the States' traditional taxing power, making it impossible for States to "make an informed choice" about the costs of receiving ARPA funds. *Benning*, 391 F.3d at 1306; *see also Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997) (panel dissent adopted by en banc court) ("Insistence upon a clear, unambiguous statutory expression of congressional intent to condition the States' receipt of federal funds … is especially important where … [States must surrender] one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment.").

Third, the district court's approach would not require Congress to "specifically identify and proscribe in advance every conceivable state action that would be improper." Op. Br. 15. No one doubts that a condition can be constitutional despite some gray around the edges. It is far different to make States liable for crossing a line somewhere between blatant, direct offsets and handing over all power to reduce taxes, with no guidance where that limit might be. After all, Congress's use of its spending power "is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 2. Though not "all contract-law rules apply to Spending Clause legislation," the "contract-law analogy" works here. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Congress cannot manufacture a deal that tells the States only *some* of the strings attached. The deal must be so clear that a "state official would clearly understand … the obligations." *Arlington*, 548 U.S. at 296; *see also Dole,* 483 U.S. at 207 (explaining that conditions must be clear enough for States to be "cognizant of the consequences of their participation"). Here, it isn't.

Fourth, *Benning* did not rewrite the ambiguity standard into only "clear notice" that a condition "exist[s]." Op. Br. 15 (citing *Benning*, 391 F.3d at 1307). In *Benning*, the challenged condition was clear and the question was how it would manifest in different settings. The case involved a provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that "applie[d] strict scrutiny to government actions" in contexts involving federal funds. *Benning*, 391 F.3d at 1304. Georgia argued the condition was unconstitutionally ambiguous because the State could not know whether its actions would be found to satisfy strict scrutiny in a given case. *Id.* at 1305-06.

This Court disagreed. Instead of holding that the mere existence of a condition is all it takes to satisfy the Spending Clause, it did the extra work of explaining that strict scrutiny was "not new to Georgia or any state"; every lawyer knows the test, and the cases interpreting it are legion. *Id.* at 1306. RLUIPA thus made it unambiguously clear to States that if they accepted federal funds, they were agreeing to a known standard. *See* A135-36.

That familiar standard, then, was the context for *Benning*'s observation that Congress "need not specifically identify and proscribe in advance every conceivable state action that would be improper." *Benning*, 391 F.3d at 1306. Though Congress does not have to explain how every case will come out, it must still define the governing standard well enough for the States to make an "informed choice." *Id.* In that important sense the Tax Mandate is nothing like RLUIPA: Nobody can "fathom what it would mean to 'indirectly offset a reduction in the net tax revenue' of a State, by a 'change in law … that reduces any tax.'" *Ohio v. Yellen*, 539 F. Supp. 3d at 818. And unlike strict scrutiny, the meaning of "directly or indirectly offset" has not been worked out in *any* law or cases before the Tax Mandate. "Indirectly offset" is therefore not a "clear and actionable" condition. *Benning*, 391 F.3d at 1306.

Finally, the district court was right that the Interim Final Rule cannot salvage the Tax Mandate. A139-40; *see* 86 Fed. Reg. 26,786 (May 17, 2021). A rule is powerless to cure Spending Clause defects, as "*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 (emphasis added). More generally, an agency cannot "cure" an unconstitutional statute by "adopting in its discretion a limiting construction." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Here, agency action is another signal of statutory deficiency.

In sum, Congress may impose conditions on federal funding only if "the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. As with any other contract, if a State "is unable to ascertain what is expected of it," "[t]here can, of course, be no knowing acceptance." *Id.* The district court got it right: States cannot "knowingly" accept the Tax Mandate's nebulous terms.

B. The Tax Mandate unconstitutionally coerces the States.

A constitutional condition must also give States a true choice to accept or decline. "When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program." *NFIB*, 567 U.S. at 680 (Scalia, J., with Kennedy, Thomas, and Alito, JJ., dissenting). With no real ability to refuse ARPA's emergency funds, the Tax Mandate amounts to unconstitutional coercion.

NFIB flowed from Congress's decision to condition Medicaid funding on a State's willingness to expand Medicaid coverage using a "threatened loss of over 10 percent of a State's overall budget." 567 U.S. at 581-82 (plurality op.). An amount this high meant that the funding was not "relatively mild encouragement," but "a gun to the head." *Id.* at 581. Because of this, the Supreme Court found the legislation markedly different from the law *Dole* approved. *Id.* So too here. The Tax Mandate presents States with an unfair dilemma: They must either relinquish their sovereign taxing power or turn down *billions* of dollars in needed economic relief during a worldwide crisis. By even making this offer, Congress used "financial inducements to exert a power akin to undue influence." *NFIB*, 567 U.S. at 577 (cleaned up). Any "choice" made under these conditions is illusory.

Further, the Tax Mandate's conditional funding is a "shift in kind, not merely degree." *NFIB*, 567 U.S. at 583. ARPA uses the financial needs of the States and their people stemming from a pandemic with devastating economic effects to compel the States to surrender taxing authority three or more years into the future. *See, e.g.*, Ellison Berryhill, *FCP Oversight Boards: Considerations and a Proposal*, 9 Va. J. Crim. L. 249, 261 (2020-2021) (providing statistics illustrating how "state budgets are tight due to recessions and the COVID-19 pandemic"). As an absolute matter, the money on offer through ARPA is massive—almost $200 billion. *See Kentucky*, 2021 WL 4394249, at *4. The number is just as significant as a relative matter, amounting to "an average of about 25% of the thirteen [Appellee] States' annual budgets." A93; *see also, e.g.*, *Kentucky*, 2021 WL 4394249, at *4 ("If both Kentucky and Tennessee choose to accept the ARPA funds—if it can be referred to as a choice—they will both receive amounts equal to roughly *one-fifth* of their general fund revenues for the preceding year." (emphasis in original)). Only the federal government could so quickly borrow these staggering amounts, thanks in part to the States' taxpayers. *See* 42 U.S.C. § 802(b)(3).

And the demand Congress tied up with these funds—reordering States' taxing policies and budgetary processes—is of a sort the federal government has never made before. Congress used the Tax Mandate to regulate not just how States spend federal funds, but how States may spend their own funds, too. This condition improperly "pressur[es] the States to accept policy changes," representing "economic dragooning that leaves the States with no real option but to acquiesce." *NFIB*, 567 U.S. at 580, 582.

No bright line exists for when encouragement becomes coercion, but "wherever that line may be," the Tax Mandate "is surely beyond it." *NFIB*, 567 U.S. at 585. The Court should ask "whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 580 (cleaned up). That answer comes easily. In *NFIB*, conditioning "10 percent of a State's overall budget" on federal compliance—and under ordinary economic circumstances, no less—was coercion. *Id.* at 581-82. Here, the sheer size of the funds at play combined with the nature of the pandemic left States no real way to "defend their prerogatives" through a "legitimate choice" to say, "no thanks." *Id.* at 577-79. Just as "'Your money or your life' is a coercive proposition," *id.* at 582 n.12, with everything at stake for the States here, the Tax Mandate "crossed the line distinguishing encouragement from coercion." *New York v. United States*, 505 U.S. 144, 175 (1992).

C. The Tax Mandate offends other parts of *Dole*.

Congress's duties under the Spending Clause do not end with setting out the terms of the bargain clearly and holding back from unconstitutional coercion. The Tax Mandate violates Congress's other responsibilities, too.

1. For one, the Tax Mandate has a purpose problem. Federally imposed spending conditions must relate to the purposes of the grant. *Dole*, 483 U.S. at 208. They must be relevant "to federal interest in the project and to the over-all objectives" Congress pursued. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958). Otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority" by allowing Congress too free a hand in restricting the States' traditional powers. *New York*, 505 U.S. at 167.

ARPA's purpose is plain: Congress enacted it to help States and their citizens recover from the devastating economic effects of the COVID-19 pandemic. *See, e.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 356 (6th Cir. 2021) (calling ARPA a "coronavirus relief bill"); *Dickerson v. Texas*, No. CV H-21-2729, 2021 WL 4192740, at *1 (S.D. Tex. Sept. 15, 2021) (explaining that ARPA was meant "to further combat the continuing economic damage caused by the pandemic"); *Cowtown Found., Inc. v. U.S. Dep't of Agric.*, No. 21-CV-1342, 2021 WL

3633642, at *1 (D.D.C. Aug. 17, 2021) ("Congress passed the American Rescue Plan Act to support the country's recovery from the COVID-19 pandemic."). The four categories of state spending Congress authorized directly advance this goal, too. *See* 42 U.S.C. § 802(c)(1)(A)-(D) (authorizing spending for financially impacted households and businesses, essential worker compensation, lost government revenue, and infrastructure investment). The States recognize and support this "over-all objective[]." *Ivanhoe*, 357 U.S. at 295.

When it comes to the condition Congress set, however, the Tax Mandate undermines the goal of COVID-19 recovery. *Cf. Colorado v. U.S. Dep't of Just.*, 455 F. Supp. 3d 1034, 1055 (D. Colo. 2020) (cataloguing cases holding that a condition pertaining to immigration enforcement did not sufficiently relate to law-enforcement funding, even though "[c]riminal law is integral to immigration law"). The Tax Mandate has the opposite effect from providing meaningful relief to the individuals and entities the pandemic harmed. As it stands, a State could stop spending its own money on COVID relief, fund those expenditures with ARPA funds, and then use surplus state funds on anything else—except tax relief. The Tax Mandate thus precludes the States from choosing an important economic tool to help their cash-strapped residents.

See, e.g., CONGRESSIONAL RESEARCH SERVICE, TAX CUTS AND ECONOMIC STIMULUS: HOW EFFECTIVE ARE THE ALTERNATIVES? (May 14, 2020), *available at* https://crsreports.congress.gov/product/pdf/RS/RS21126 (describing how tax cuts might be used in response to COVID-19 economic impacts). Far from helping the States' pandemic-recovery efforts, removing the option to enact tax cuts of any kind runs outside of ARPA's purpose.

The Tax Mandate even disagrees with the rest of the statute. *Cf. Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) ("[P]rovisions of a text should be interpreted in a way that renders them compatible."). After all, ARPA itself provides tax relief, suggesting that Congress determined tax cuts could be an important benefit amid the COVID-19 crisis. *See* ARPA, Pub. L. No. 117-2 § 9621 (expanding earned income tax credit), § 9673 (exempting small business revitalization funds from federal taxation). It cannot be that ARPA reflects a spending-only approach to economic recovery. And the suggestion that the Tax Mandate is an essential constraint on ARPA spending is betrayed by parts of the Act that provide billions in funds to localities to use in the same four categories as the States, but without the Tax Mandate's restrictions. *See* 42 U.S.C. § 803. Something else appears to be at work than an evenhanded policy judgment about the best way to move the economy forward.

Indeed, by allowing States to spend on non-COVID purposes while punishing them for providing tax relief when it might be needed most, the Tax Mandate undercuts ARPA's goal. So no matter what Congress's intent in inserting the Tax Mandate might have been, the condition fails because it is not germane to the Act's purpose.

2. The Tax Mandate also fails under a fourth part of the *Dole* test because, as further explained below, it violates an independent constitutional provision: the Tenth Amendment's anti-commandeering rule. The Supreme Court has not tolerated prior congressional attempts to condition a benefit to a State on the State's abdication of its fiscal authority. *See Coyle v. Smith*, 221 U.S. 559, 565 (1911) (finding that Congress could not condition admission of Oklahoma into the union on certain spending-related decisions, as the power to "appropriate its own public funds for [the] purpose [of building a capitol]" is "essentially and peculiarly [a] state power[]"). And if courts permit Congress "to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of a federal government of enumerated powers will have no meaning." *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1920 (1995) (cleaned up)).

For four independent reasons, then, the Court should affirm the district court's conclusion that the Tax Mandate violates the Spending Clause.

III. The Tax Mandate Violates The Anti-Commandeering Doctrine.

Though the district court stopped with the Spending Clause, A124, this Court can (and should) also affirm because the Tax Mandate constitutes congressional commandeering of state legislatures contrary to the Tenth Amendment. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (this Court can affirm "on any ground that finds support in the record," including an alternate ground); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984) ("a party may raise any argument in support of a judgment").

The federal government, of course, "may act only where the Constitution authorizes it to do so." *Printz v. United States*, 521 U.S. 898, 937 (1997). But "State sovereignty is not just an end in itself"—it is a bulwark of "[f]ederalism [that] secures to citizens the liberties that derive from the diffusion of sovereign power." *NFIB*, 567 U.S. at 536; *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (federal-state division of power exists for the "protection of individuals"). To that end, the anti-commandeering doctrine safeguards the "fundamental structural decision incorporated into the Constitution" that Congress may not issue affirmative (*do* this) or negative (*avoid* that) commands "directly to the States." *Murphy*, 138 S. Ct. at 1475. Negative directives are "direct orders to state legislatures," too. *Id.* at 1478; *see also Brackeen v. Haaland*, 994 F.3d 249, 299 (5th Cir. 2021) (orders to state government "to act *or refrain from acting* without commanding private parties to do the same [] violate[] the anti-commandeering doctrine" (emphasis added)), *cert. granted*, *Haaland v. Brackeen*, No. 21-376, 2022 WL 585881 (U.S. Feb. 28, 2022).

The Tax Mandate falls into this second category by commandeering the "legislative processes of the States" and directing state legislatures to refrain from enacting certain policies Congress disapproved. *New York*, 505 U.S. at 170. The Tax Mandate forces state legislators to enact specific laws—state budgets—that reflect federal directives against tax cuts. *Murphy*, 138 S. Ct. at 1478 ("It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."). It also forces state officials to assess and collect taxes they might otherwise not. And though the federal government might dismiss these significant intrusions as willingly borne, it is "immaterial whether states voluntarily choose to be part of a federal program, if Congress lacked the power to create such a program in the first place." *Carey v. Throwe*, 957 F.3d 468, 481 (4th Cir. 2020).

Whether an unconstitutional order presents as an affirmative or negative command, a couple other signs usually betray its nature, too. Commandeering threatens the "healthy balance of power between the States and the Federal Government," or it busts the normal mechanisms of political accountability by leaving state voters with the impression that the State acts "only because it has been commanded to … by Congress." *Murphy*, 138 S. Ct. at 1477 (citations omitted). Here, the Tax Mandate does both.

First, the Tax Mandate is an unparalleled intrusion on state sovereignty in the realm of tax policy, an "indispensable" power of the States. *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1869). The States have always retained their "original" sovereign right to determine their own taxation and fiscal policies, representing an important structural check on the federal government. *See Thomson v. Pac. R.R. Co.*, 76 U.S. 579, 591 (1869); *cf. Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527 (1981) (listing the many reasons why federal courts have long policed federal noninterference in state tax matters). Yet through the Tax Mandate, the federal government purports to impose a sweeping restriction across the tax policies of 50 States, the District of Columbia, and the Territories, permitting States to raise taxes, but not lower them. Appellants may object that this assessment exaggerates the situation, as they now say the Tax Mandate allows any tax cuts not offset by federal funds. Recall, though, that the statute does not explain how States (or Treasury) should draw that line—and that combining "indirectly" with a command focused on fungible state funds suggests that it may not exist at all.

Second, the Tax Mandate restricts States' powers to cut at least some taxes, and thus impairs voters' ability to hold their elected officials accountable. When a State imposes or retains taxes only because of congressional command, responsibility is blurred and political accountability avoided. *See New York*, 505 U.S. at 168-69. Anti-commandeering problems arise even when a State does not have to bear any direct costs from a federal directive, as the State is "still put in the position of taking the blame for its burdensomeness and for its defects." *Burban v. City of Neptune Beach*, 920 F.3d 1274, 1281 (11th Cir. 2019). The accountability problem is even greater here, when ARPA purports to limit state legislators for years after the Act's initial passage—making it harder with time for voters to trace the States' new tax policies back to the Act. *See*, *e.g.*, Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 724 (2009) ("Insofar as voters have imperfect memories, they might fail to fault policymakers for the ill effects (or credit them with the good effects) of policies they supported.").

Congress lacked the power to create and impose the Tax Mandate from the outset. Because it violates both principles of the anti-commandeering doctrine, the Tax Mandate is unconstitutional under the Tenth Amendment. This Court should say so.

CONCLUSION

The Court should affirm the district court's judgment enjoining the Tax Mandate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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