No. 21-6108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, and
STATE OF TENNESSEE
Plaintiff-Appellees,

v.

JANET YELLEN, ET AL.,
Defendant-Appellants.

On Appeal from the United States District Court
For the Eastern District of Kentucky
No. 3:21-CV-00017

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, ALABAMA ALASKA, ARKANSAS, KANSAS, LOUISIANA, IDAHO, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA

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Amici curiae—the States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kansas, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia—all have a compelling interest in protecting their sovereign powers under the Constitution and our federal system of dual sovereigns. Indeed, "[t]he federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (citation omitted). "For this reason, 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.' ... Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *National Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 577 (2012) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

To these ends, Amici States have compelling interests in ensuring that States can challenge federal statutes that unconstitutionally infringe on their sovereign rights and violate the federal principles of the Constitution. Moreover, States have a strong interest in being able to enact their own tax policy without federal interference. As explained below, Kentucky's and Tennessee's interests in enacting their own policies amply supports their Article III standing here.

INTRODUCTION

This case involves a straightforward, recurrent, and fundamentally important question: whether federal courts have authority under Article III to protect important State interests from federal encroachment. The Supreme Court has long ago settled that question, by repeatedly intervening to ensure that federal legislation does not "undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577; *accord Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 188. The federal government's primary argument in this case seeks to limit the ability of States to protect those interests. This Court should reject that argument.

This case involves a challenge brought by the States of Kentucky and Tennessee to a provision of the American Rescue Plan Act (hereinafter, the "Tax Mandate"), which prohibits the States from using

ARPA moneys to "either directly or indirectly offset" any reduction in net tax revenue as a result of a tax policy change. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 9901 (2021) (adding § 602(c)(2)(A) to the Social Security Act (42 U.S.C. § 801 *et seq.*)). Any state that violates this provision is required to repay funds to the Treasury. *Id.*

Although Congress may impose conditions on the States in exchange for the receipt of federal money, this power is limited. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

The Federal Government argues in the main that the States fail to present a justiciable controversy. This argument misapprehends State standing under Article III in several ways and rewrites the Tax Mandate in the process. The district court properly rejected the government's erroneous legal arguments. This Court should too.

ARGUMENT

The government's argument against the States' standing commits two fundamental errors. First, the government utterly ignores the injuries the Tax Mandate is causing now, which are well established in case law and substantiated by the States' uncontroverted evidence. Second, Defendants misunderstand the standard for pre-enforcement review set forth in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) and insists that States only have standing to challenge the Tax Mandate if they effectively violate the law—and perhaps must even *admit* to the violation as well. That is not the law. And Defendants distortion of *Susan B. Anthony List* is exemplified by the fact that they gloss over the inconvenient fact that the decision was a *unanimous reversal* of a holding that a challenger lacked Article III standing for a pre-enforcement challenge.

I. The Tax Mandate Is Presently Injuring The States' Sovereignty And The States' Pocketbook

A plaintiff has standing if he can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). For purposes of evaluating whether jurisdiction exists, this Court "must assume *arguendo* the merits of [the State's] legal claim." *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007).

A. The Tax Mandate Injures The States' Sovereign Interests

The State taxing power is "indispensable" to State's sovereign authority. *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824). "It is an essential function of government," and "[t]here is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation." *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76–77 (1868).

In *NFIB*, the Supreme Court explained that the ability of States to "voluntarily and knowingly" accept spending conditions "is critical to ensuring that Spending Clause legislation" respects the constitutionally enshrined separate sovereignty of the States. *NFIB*, 567 U.S. at 577. Under this federal system, Congress may neither "command[] a State to regulate or indirectly coerce[] a State to adopt a federal regulatory system as its own." *Id.* at 578. As in *NFIB* itself, the Supreme Court has repeatedly rebuked Congress for attempting to "commandeer" or "undermin[e]" the status of States. *Id.* (citing cases). This system of dual sovereignty serves several important interests, including protecting political accountability and enhancing individual liberty. *Id.* at 578.

Against that backdrop, a coercive spending condition that interferes with State taxing power imposes a concrete injury on the States. As with any commandeering case, absent the federal interference, a State would otherwise be able to enact any policy it likes. But by narrowing the scope of options available, the Tax Mandate constrains the States' sovereign prerogative over this "indispensable" power. This narrowing takes place through two mechanisms. First, the Tax Mandate expressly constrains the States from adopting certain tax policies, if those policies directly or indirectly offset the spending of Rescue Plan funds. Second, the Tax Mandate is simply unclear as to the scope of "indirect offsets," which is an independent constitutional violation because that alone prevents the States from adopting or considering certain policies due to the ambiguous nature of the conditions.

This injury is illustrated by the uncontroverted evidence the States presented below. Specifically, the Policy Director to the Governor of the State of Tennessee persuasively explained that "the availability of Fiscal Recovery Funds for some expenses will have an impact on the State's decision whether to cut taxes and spending in other areas of the budget…. [T]he potentially far-reaching nature of the ambiguous Tax Mandate means that any reductions in taxes means that any reductions in taxes arguably could be traced back … to Tennessee's use of Fiscal Recovery Funds." [Niknejad Decl. R.25-2, PageID#225 (¶13)]. Accordingly, the Tax Mandate has caused the State to "defer slow, or reconsider some of its taxing decisions." *Id.* ¶14. Further, any future tax policy "will now need to be shaped around the permissibility or impermissibility of any proposed change … under the Tax Mandate." *Id.* ¶¶15-17.

The federal government does not contest any of this evidence. Instead, they argue that Tax Mandate does not infringe sovereignty because the Mandate is simply a restriction on states' "use of funds." *Id.* at 15. But this is precisely the interpretive question which is disputed: the States argue that the Tax Mandate is not a mere restriction on the use of funds but is an ancillary condition designed to deter the States from cutting taxes, akin to the condition struck down in *NFIB*. *See NFIB*, 567 U.S. at 580 (op. of Roberts, C.J.) (comparing conditions on the use of funds with "such conditions [that] take the form of threats to terminate other significant independent grants…as a means of pressuring the States to accept policy changes"). *See also Dole*, 483 U.S. at 206–07 (explaining that Congress may use spending clause power to further ancillary policy objectives). Defendants cannot defeat *jurisdiction* by arguing on that they are right on the *merits* of their statutory interpretation arguments.

The actual restrictions on the uses of funds are listed in 42 U.S.C. § 802(c)(1); the Tax Mandate is instead placed in 42 U.S.C. § 802(c)(2) and is structured differently; prohibiting "indirect offsets." The differences between these sections are ignored by the federal government, which simply seeks to read "indirect" out of the statute entirely. But even if the government were right, this is a *merits* question. And for purposes of standing, merits questions must be resolved in favor of the Plaintiffs. *See Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015).

B. The Tax Mandate Inflicts Real Compliance Costs On The States

Apart from the threat of enforcement and the damage to the States' sovereignty, Kentucky and Tennessee have standing to challenge the Tax Mandate because it directly imposes compliance costs on them. The Final Rule implementing the Tax Mandate requires States to, among other things, "identify and calculate the total value of changes that could pay for revenue reduction due to covered changes and sum these items." 87 Fed. Reg. at 4,427. The Rule also explicitly requires the States to report "[e]ach revenue-reducing change made to date during the covered period and … [e]ach revenue-raising change" as well as "[e]ach covered spending cut" and compare those cuts against a "spending cut baseline." *Id.* at 4,428. The breadth of the information demanded by Treasury's Rule is necessary because the Tax Mandate has such a broad sweep. These costs are traceable to the unconstitutional provision, as without the Tax Mandate, none of this information would be necessary to collect—no other provision of ARPA requires tracking of spending offsets, or the value of changes in tax policy, or the tracking of particular types of policy, like tax delays. *Compare with California v. Texas*, 141 S. Ct. 2104, 2119-20 (2021) ("[T]he problem for the state plaintiffs is that these other provisions also operate independently [from the challenged provision]."). These requirements plainly impose some burden on the States. Indeed, the Treasury Department has expressly stated in its own rule that the reporting requirements "will generate administrative costs … includ[ing], chiefly, costs required to … file periodic reports with Treasury." 87 Fed. Reg. at 4,444. Put simply, the Treasury Department has never truly doubted that the Tax Mandate would impose compliance costs. Those costs establish Article III standing here.

The States also submitted specific evidence of the costs inflicted by the Tax Mandate. For example, Tennessee submitted a declaration from the Commissioner of the Department of Finance and Administration, stating, among other things, that the Mandate requires Tennessee to track revenue losses when a new law delays implementing a tax, and that it requires Tennessee connect expenditures to specific revenue sources—two activities that, normally Tennessee would not do in the course of its budgeting. [Eley Decl., R.25-3, PageID#229–30 (¶¶6-8)]. This evidence is simply uncontroverted by the government, which only points out (at 10) that, for some of the recordkeeping required by the Tax Mandate, the State will be able to rely on existing budgeting processes. But this at most goes to the *amount* of the burden, and says nothing about the additional burden inflicted by the Tax Mandate. Even if that incremental burden is small, it is still justiciable. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (upholding jurisdiction, noting that injury of "perhaps only a dollar or two" would even be sufficient). The cost of Tax Mandate compliance is not minor, but even if it were, it would be sufficient to establish standing. *Id.*

It would be incredible if the Tax Mandate—which is a significant constraint on the States and directly regulates them—did not impose any costs on the States. Because it does impose significant costs, there is a justiciable controversy over the validity of the provision.

II. The Federal Government Misunderstands The Standard For Pre-Enforcement Review

A crux of the government's argument is that the States cannot establish imminent injury from the Tax Mandate because the States have failed to show a likelihood of enforcement. This conclusion misunderstands the *Susan B. Anthony List* test for pre-enforcement challenges and requires States to effectively violate the law in order to establish standing. "[W]here threatened action by *government* is concerned, [federal courts] *do not require a plaintiff to expose himself to liability* before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (second emphasis added).

Under *Susan B. Anthony List*, an injury is imminent under Article III if (1) the plaintiff intends to "engage in a course of conduct arguably affected with a constitutional interest"; (2) the law at issue "arguably proscribe[s]" the plaintiff's intended conduct; and (3) there is a substantial threat of enforcement by the defendant. *Susan B. Anthony List*, 573 U.S. at 161–62 (citation omitted). Kentucky and Tennessee established all three elements.

A. The States Have A Constitutionally Protected Interest In Accepting ARPA Funds And Unfettered Tax Reform

The States need only show that they have intent to engage in a course of conduct "arguably affected with a constitutional interest." *Id.* at 161 (citation omitted). Here, the States submitted uncontroverted evidence that they have enacted and intend to continue to enact reform laws that could reduce net tax revenue. *See* [Niknejad Decl. R.25-2, PageID#225 (¶¶8-13)]. There is no doubt that there is a "constitutional interest" in the ability to pass these reforms unfettered from federal interference. *See Lane Cnty*, 74 U.S. (7 Wall.) at 76–77.

B. The Law "Arguably Proscribes" The Intended Conduct

It is sufficient to show that the statute "*arguably* proscribe[s]" the intended conduct. *Susan B. Anthony List*, 573 U.S. at 162 (emphasis added). This standard is easily met here; the language of the Tax Mandate prohibits any "indirect[] offset[s]" of Rescue Plan funds. Any decrease in net tax revenue could *arguably* trigger this provision.

Defendants assert that, because the States do not show specifically that a tax cut will be "paid for" by ARPA funds, they cannot show that the planned tax cuts are proscribed by the statute. In other words, the government wants the States to be required to show any tax cuts cannot be offset in any other way besides the Rescue Plan funds. But this proposed standard makes two main errors. First, it conflicts with the *Susan B. Anthony List* standard, which only requires that States intended conduct be "arguably" proscribed. And as long as the States' interpretation is correct, *any* reduction in net tax revenue is imperiled by the Mandate because "indirect" is a broad term without meaningful limits and money is fungible. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("[T]he law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures."). Treasury's Rule furthers that understanding and operationalizes that language into action, explicitly extending the Mandate's reach broadly and contemplating that Treasury will effectively review past conduct for indirect offsets through 2026. 31 C.F.R. § 35.10. This clearly indicates that *any* tax policy change is "arguably" into range of the Mandate, even if the State has not run through every possible potential offset and conclusively established an intent to use Rescue Plan funds to offset potential cuts.

The second error in the government's reasoning is that, if the States were actually required to show that their tax cuts could not be offset except by Rescue Plan funds, that would essentially require the States to show an actual violation of the Tax Mandate to obtain standing. This is effectively the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *School Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 278 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (*quoting MedImmune,* 549 U.S. at 129).

The States need not know whether their tax policy changes will lead to recoupment actions; the Tax Mandate is ambiguous, and the burden of evaluating every conceivable tax policy change for possible offsets is onerous. But the Constitution does not require plaintiffs to confess their own guilt in order to obtain jurisdiction. *See MedImmune*, 549 U.S. at 128–29 (2007) (emphasis added) (Article III "do[es] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

C. There Is A Credible Threat Of Enforcement

While the Tax Mandate is new, and States are just beginning to receive their Rescue Plan funds, there is a credible threat that it could be enforced against States who cut their taxes. Defendants tellingly have not disavowed bringing recoupment actions against States. Indeed, they have not "suggested that the newly enacted law will not be enforced, and [there is] no reason to assume otherwise." *Am. Booksellers Ass'n*, 484 U.S. at 393. On the contrary, Defendants have vigorously defended the law in court, promulgated a complex regulation and enforcement mechanism, and have already threatened at least one State with recoupment of Rescue Plan funds on other grounds.[1]

Kentucky and Tennessee therefore have good reason to fear enforcement actions by the federal government. This is sufficient basis for standing.

CONCLUSION

This Court should affirm the district court's conclusion that Kentucky and Tennessee have Article III standing to challenge the Tax Mandate.

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[1] David Lawder, *U.S. Treasury threatens to claw back Arizona funds over anti-masking school grants*, Reuters (Jan. 14, 2022), https://www.reuters.com/world/us/us-treasury-threatens-claw-back-arizona-funds-over-anti-masking-school-grants-2022-01-14/

March 17, 2022

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the Brief of *Amici Curiae* States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kansas, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia is proportionately spaced, has a typeface of 14 point and contains 2,921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kansas, Louisiana , Mississippi, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on March 17, 2021, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
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