IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

STATE OF WEST VIRGINIA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al., Defendants.	CASE NO: 7:21-cv-00465-LSC

BRIEF FOR *AMICUS CURIAE* NEW CIVIL LIBERTIES ALLIANCE

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CORPORATE DISCLOSURE STATEMENT

The New Civil Liberties Alliance states that it is a nonprofit organization incorporated under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF INTEREST

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization founded by Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power and conditions imposed on spending as another means of legislating outside proper constitutional channels.[1] NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

Congress' practice of imposing "conditions" on federal spending is particularly disturbing. Far too often, Congress attaches conditions on the receipt of federal funds, thereby defeating state constitutional guarantees. Even worse, this case goes further and constitutes an historically unprecedented usurpation of core power exclusively assigned to the state legislatures—the power to change or reduce the taxation of its citizens. When Congress purports to tell States what laws their legislatures can—and cannot—pass or what their tax policies must be, it has violated

[1] No counsel for a party authored any part of this brief. And no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to finance the preparation or submission of this brief.

state sovereignty. This "commandeering" tramples on the Tenth Amendment by cramming conditions down on the States, which restrict their use of funds collected from all United States citizens. Such commandeering is a structural violation of the Constitution that intrudes upon the States' core sovereignty over their own fiscal affairs and choices about how to tax their residents.

The New Civil Liberties Alliance was founded to restore constitutional limits on administrative power and to protect the civil liberties of Americans—including their right as U.S. citizens to be governed only by federal legislation passed via constitutional channels and their right as self-governing state citizens to have the States alone set tax policy in the state legislatures. As explained below, Congress' attempted usurpation of state legislative powers that not only were never conferred upon the federal government, but were reserved to the several States by the Tenth Amendment, violates several bedrock provisions of the U.S. Constitution that define and constrain its lawmaking.

STATEMENT OF THE CASE

The American Rescue Plan Act of 2021 (ARPA), enacted on March 11, 2021, includes a short—but constitutionally alarming—provision, which impermissibly seizes taxing authority from the States. This is how it works: ARPA offers approximately $195 billion to States and their residents to assist with recovery from the economic damage inflicted by the Covid-19 pandemic. The Act expressly enumerates four purposes to which States may put those funds:

(1) "respond to the public health emergency with respect to [Covid-19] or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality";

(2) "respond to workers performing essential work" during the pandemic by providing premium pay or grants;

(3) provide government services "to the extent of the reduction" in local revenue "due to [Covid-19] relative to revenues collected in the most recent full fiscal year . . . prior to the emergency"; and

(4) "make necessary investments in water, sewer, or broadband infrastructure."

42 U.S.C. § 802(c)(1).

The Act imposes further restrictions on the "use of funds," one of which provides:

> A State or territory shall not use the funds provided under [§ 802] . . . 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.

42 U.S.C. § 802(c)(2)(A).

This restriction, referred to herein as the "Tax Cut Ban," forbids States from decreasing taxes on their citizens for over three years,[2] while allowing them to increase taxes on their citizens and residents without restriction. The Act also prohibits States from using the funds for "deposit[s] into any pension fund." 42 U.S.C. § 802(c)(2)(B).

[2] The Tax Cut Ban's statutory coverage period runs from March 3, 2021, to the last day of the concluding fiscal year in which a State receives funds under ARPA. This could be as late as December 31, 2024, the date through which funds are available. It could run even longer if the Department of the Treasury ("Treasury") seeks recovery of funds. *See* 42 U.S.C. § 802(g)(1).

Significantly, ARPA allows cities and localities to use ARPA funds to reduce taxes, because the Tax Cut Ban does not apply to cities or localities. *See* 42 U.S.C. § 803(c); Tribal governments are also exempt from the Tax Cut Ban.

The Tax Cut Ban thus forces States to surrender control over an inherent and core sovereign power, or else, in the midst of a deadly pandemic no less, forfeit massive economic relief. This is because the vast pot of federal relief represents around 25% of the annual budgets for middle-of-the-pack States among the 13 Plaintiff States.

Further, ARPA requires the State to provide an initial certification, signed by a state official, to the Secretary of the Treasury assuring the Secretary that the funds will be used consistent with the requirements in ARPA and that the State is not violating the Tax Cut Ban. 42 U.S.C. § 802(d)(1). The state official signing the initial certification could be penalized, or even held criminally liable, for an incorrect certification or reporting under the False Claims Act. *See* 18 U.S.C. § 287; *see also* 31 U.S.C. §§ 3729-3733. ARPA also requires the States to periodically report all changes to their tax revenues. 42 U.S.C. § 802(d)(2)). This reporting process allows Treasury to monitor the States' tax revenues and related actions using their taxing powers. 42 U.S.C. § 802(f). ARPA also expressly provides for recoupment of funds from any State, territory, or Tribal government that has failed to spend funds on permitted uses or violates the statute's other prohibitions on usage—including for States

implementing any unpermitted state tax relief as prohibited by the Tax Cut Ban. 42 U.S.C. § 802(e).

The scope, reach, and interests put at stake by this prohibition are breathtaking. Any action taken by a recipient State that directly or indirectly reduces state tax revenue may subject it to a federal claw back: it then must repay the funds to the U.S. Treasury in "an amount equal to the amount of funds used in violation" of the Act. 42 U.S.C. § 802(e). Congress thus effectively freezes state tax law and policy for three years or more against the will of state legislatures and arrogates to Congress the power to centralize in Washington, D.C., major aspects of state tax policy. Meanwhile, States would have to deploy a bevy of accountants to be sure they toe the federal lines—all on penalty of claw back. Far worse, States would be hamstrung from passing any form of fiscal tax relief or adjustment designed to respond to *any* need that elected state lawmakers may want to enact in their judgment, whether to address non-pandemic matters or even to address pandemic matters in a different way than the federal government dictates.

ARGUMENT

Congress may not impose conditions on States' use of federal funds unless (1) the expenditure benefits the general welfare; (2) the conditions are unambiguous; (3) the conditions are reasonably related to the grant's purpose; and (4) the grant and any conditions attached to it do not violate an independent constitutional provision. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). The Tax Cut Ban is unconstitutional

because it violates every *Dole* requirement except, perhaps, the first.[3] We address three of these requirements in this brief, with two, ambiguity and reasonable relationship, covered in Parts I and II, respectively. Parts III and IV address the constitutional-violation requirement—explaining how, respectively, the Tax Cut Ban unconstitutionally commandeers States and intrudes into their sovereignty.

I. THE TAX CUT BAN IS AMBIGUOUS

Two separate constitutional doctrines converge to establish that ARPA's significant ambiguities must be interpreted to invalidate the Tax Cut Ban.

A. The Tax Cut Ban Fails the *Dole* Requirement That It Be Unambiguous

ARPA does not define the ambiguous and amorphous term "directly or indirectly" at all. The term is thus open to speculation, possible post-distribution-of-funds rulemaking, recoupment demands by the Inspector General, or other enforcement actions or penalties brought against the States.

From one perspective, the key verb in the Tax Cut Ban is "offset." To "offset" appears to require an *explicit one-to-one matching* of state tax reductions during the "covered period" with the federal "funds provided under this section," and so would continue to allow state tax cuts having nothing to do with receiving ARPA Covid-

[3] An excellent case can be made that a federal law that advances billions to the States, but which at the same time prohibits all 50 States from pursuing their own vision of the public welfare by reducing tax burdens and providing other fiscal relief, in fact works *contrary* to public welfare by preventing the public's interests from being optimized in a more local, responsive and nimble fashion—letting 50 state flowers bloom. Thus, the Tax Cut Ban is in some respects contrary to the public interest, or at least a mixed bag on that point.

relief funds. *See Oxford Advanced American Dictionary*, defining "offset" as "*to use* one cost, payment, or situation to cancel or reduce the effect of another," *available at* https://www.oxfordlearnersdictionaries.com/us/definition/english/offset_1?q=offset (emphasis added); *see also Merriam-Webster Dictionary* (defining the verb "offset" as "*to place over against something*" and "offset" in noun form as "something that serves to counterbalance or to compensate *for something else*." https://www.merriam-webster.com/dictionary/offset (emphasis added)). The Treasury Department seems to interpret the provision this way. *See* Laura Davison, *Treasury Clears States to Cut Taxes—But Not With Stimulus*, Bloomberg (Mar. 18, 2021), *available at* https://tinyurl.com/2s5eb6fv; Letter from Janet L. Yellen to 21 State Attorneys General (Mar. 23, 2021), *available at* https://tinyurl.com/tsn9t9a7.

But from another perspective, the provision can also be read more broadly because it restricts state power "directly or indirectly" and thus could be intended to head off at the pass the inescapable fungibility of money. This appears to have been swing-vote Senator Manchin's position. *See* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts,* N.Y. Times (March 12, 2021), https://www.nytimes.com/2021/03/12/us/politics/bidenstimulus-state-tax-cuts.html. The choice between these two interpretations accordingly represents a fatal ambiguity under the *Dole* test defining proper Spending Clause restrictions on state power. And, as explained further in Argument Section III, this ambiguity equally runs afoul of the constitutional clear-statement rule for incursions on state sovereignty.

Further, we *independently know* the conditions are dangerously ambiguous from the pre-suit communications between the States and the Department of Treasury. Letter from Janet L. Yellen to Hon. Mark Brnovich (March 23, 2021) (stating that States remain "free to make policy decisions to cut taxes" so long as they do not "use the pandemic relief funds to pay for those tax cuts."). But when Secretary Yellen was pressed on what that statement means in a world where money is fungible and tax cuts are not "paid for" by invoice, she admitted that the issue is "thorny." Hearing on CARES Act Quarterly Report, Sen. Banking, Hous. & Urb. Affairs Comm (March 24, 2021). In an exchange at that hearing between Secretary Yellen and Senator Crapo about the Act's bar on using the relief funds even to "indirectly" contribute to a revenue decrease and the "fungibility of money," the Secretary conceded that it is "hard . . . to answer" exactly how ARPA may "hamstr[i]ng" the States. *Id.*

Secretary Yellen, speaking through the U.S. Justice Department, has had to go on record in federal court once so far—to resist Ohio's challenge to the Tax Cut Ban. *See* Br. in Opp. to Ohio's Mot. for Pr. Inj., in *Ohio v. Yellen*, No. 1:21-cv-00181-DRC, Dkt #29 (Apr. 16, 2021). The federal government strangely but repeatedly emphasizes that States are free to cut any particular tax, as long as state tax levels as a whole do not go down: "Under the Act's plain terms, a State is free to impose taxes as it believes appropriate, with no effect on the amount of the federal grant, as long as the changes—taken together over the reporting period—do not result in a reduction to the State's net tax revenue." *Id.* at 17; *see also id.* at 2, 6. How generous of the

federal government! State tax collection can be shifted around (*e.g.*, state personal income tax cuts can be offset by state sales tax increases), but during the period ARPA is in effect, *net tax burdens* must not be reduced. What the federal government overlooks is that there is no constitutional basis whatsoever for the federal government to stand in the way of state government downsizing, if that is the will of the voters.

The Supreme Court insists that Congress must condition spending "unambiguously" so States may "exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (requiring "clear notice" of conditions). The condition here is neither clear nor unambiguous and cannot be made so, given the logic of why legislation will always affect fungible funds. Future guidance or regulations cannot cure the problem, especially given that we are in a pandemic. States need to address pandemic and non-pandemic public policy *now*. Additionally, some States, like Alabama, face a legislative session that will close in a month. But for all States, no clarifying guidance or regulations—even assuming, contrary to logic, there could be such things—is even possible for the Plaintiff States, who are on the clock and must enact laws and balance budgets long before Treasury could conjure up such uncertain, non-binding, or illusory assurances.

B. ARPA Must Be Construed Using the Constitutional Clear Statement Rule

Gregory v. Ashcroft requires as a threshold matter that any infringements on state

sovereignty be "plain to anyone reading the [statute]." 501 U.S. 452, 467 (1991). The rule is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. Specifically, the *Gregory* clear-statement rule "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

The Court in *Gregory*, where the historic state power to define the qualifications of its judges was threatened, thought the federal statute there did not just go "*beyond* an area traditionally regulated by the States," instead classing "it [a]s a decision of the most fundamental sort for a sovereign entity," 501 U.S. at 460 (emphasis added). The state taxing power is more fundamental yet, since "the taxing power of a State is one of its attributes of sovereignty . . . it exists independently of the Constitution of the United States, and underived from that instrument; and . . . it may be exercised to an unlimited extent upon all property, trades, business, and avocations . . . within the territorial boundaries of the State . . . ." *Union Pac. R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873).

Gregory's dissenters thought it obvious that the federal Age Discrimination in Employment Act ("ADEA") overrode Missouri's mandatory retirement age for judges, given the incongruity of deeming such a judge an ADEA "appointee at the policymaking level" under 29 U.S.C. § 630(f). *See Gregory*, 501 U.S. at 487-88

(Blackmun, J., dissenting).[4] Obviously, the majority disagreed. But the point is that the ambiguity here is much stronger. Instead of imposing a clear prohibition on any state "reduction in the net tax revenue," the Tax Cut Ban can be read more modestly only to bar using ARPA monies to "offset" such funds. To be sure, the phrase "directly or indirectly," coupled with the concept of fungibility, pulls in a different direction, so Congress may or may not have intended to block all state tax reductions. But what Congress did *not* do is speak clearly.

Thus, this Court should at the very least declare that the Tax Cut Ban leaves the States in possession of their traditional authority to cut taxes unless they *specifically* employ ARPA monies to keep the services funded by taxes at the same, pre-tax cut levels. "*The extent to which* [*state tax power*] *shall be exercised*, the subjects upon which it shall be exercised, and *the mode in which it shall be exercised*, are all equally within the discretion of the legislatures to which the States commit the exercise of the power." *Peniston*, 85 U.S. at 30 (emphases added). And as *Peniston* concludes, "[t]here is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by National legislation." *Id.*

[4] The dissenters also argued that even were the ADEA ambiguous, the EEOC's "reasonable construction" of the statute should get deference. *See Gregory*, 501 U.S. at 487 (Blackmun, J., dissenting). But the holding of *Gregory* applies a canon which, as a "traditional tool of statutory interpretation," applies to lock in the statute's meaning at *Chevron* step one. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). This forecloses any attempt by Treasury to issue regulations purporting to interpret the Tax Cut Ban broadly and makes waiting for the issuance of those regulations a waste of time.

Because the Tax Cut Ban is open to interpretation by post-distribution rulemaking or other administrative or executive action, States have no *ex ante* assurance of what they must do to comply with the Tax Cut Ban. A State may not know until months or even years after funds are already received and long spent that the federal government deems the State to have violated the Tax Cut Ban, or Treasury's interpretation of it. This also has a chilling effect—because to avoid the federal claw back penalty, a state will have to err in favor of raising revenues in order to avoid an inadvertent miscalculation that incurs federal wrath.

"The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (*NFIB*) (internal quotation marks and citations omitted). The Tax Cut Ban thus fails the ambiguity test because it presents a black box with contents that may not become fully clear until years down the road.

II. THE TAX CUT BAN IS NOT REASONABLY RELATED TO THE GRANT'S PURPOSE AND SO IS NOT A PERMISSIBLE SPENDING CONDITION

The federal government has apparently concluded that net tax decreases would undercut ARPA's goals and therefore should be banned. But ARPA's funding mandate is so broad and amorphous that the ban cannot possibly satisfy *Dole*'s

requirement for spending conditions to be reasonably related the funding's purpose. 483 U.S. at 208. ARPA appears to grant States an extraordinary degree of discretion in using grant funds for pandemic-related purposes. They may, for example, use funds to respond to the "negative economic impacts" of the pandemic, "including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality." 42 U.S.C. § 802(c)(1)(A). But to accept the federal government's argument—that its net-tax-decrease ban is sufficiently related to ARPA's loosely defined goals—would effectively nullify *Dole*'s reasonable-relationship requirement. When statutory goals are stated in such broad and amorphous terms, reviewing courts have no effective means of determining whether restrictions on state sovereignty are sufficiently related to "federal interests in particular projects or programs." *Dole*, 483 U.S. at 207.[5]

Moreover, ARPA's text makes plain that notwithstanding the statute's broad Covid-relief purposes, the State Tax Ban is reasonably related to none of those purposes. The federal government has an interest in ensuring that funds it provides to States be spent in the manner specified in the grant. *See*, *e.g., Sabri v. United States*,

[5] In any event, the relationship between maintaining high taxes and promoting pandemic relief is quite obscure. Indeed, most citizens attempting to recover from the economic hardship brought on by the pandemic would likely welcome state tax reductions. Moreover, as the economy begins to recover and incomes rise, citizens will face higher overall tax burdens unless States respond by lowering tax rates to offset those increases. Yet ARPA defines a prohibited tax decrease as including any "provi[sion] for a reduction in a rate, a rebate, a deduction, a credit, or otherwise." 42 U.S.C. § 802(c)(2)(A).

541 U.S. 600, 608 (2004). But none of the Plaintiffs appears to be contemplating the expenditure of ARPA funds for purposes other than those specified in ARPA. And any tax decrease could not be deemed an expenditure of ARPA funds because a tax decrease *is not an expenditure.*

Congress' decision to allow cities, localities, and tribal governments to use funds unhampered by anything like the Tax Cut Ban's prohibition further undermines any connection between Covid-19 relief and Congress' unprecedented intrusion into state taxing power; instead, it appears to advance a pro-urban relief, whereas the States may not want to focus Covid-19 relief just on urban areas. Or to look at it another way, Congress is leaving alone the power of cities, localities, and tribes to reduce taxes, but stripping those same powers from the States, making them poor cousins when as a constitutional matter they are the most independent of the full range of sub-federal sovereigns. There is no rational relationship to ARPA's pandemic objectives here. Indeed, the policy objective of elevating cities, local governments and tribes over States is constitutionally upside-down.

If the federal government wants to prevent States from decreasing the amount of their own, tax-generated revenues they already devote to *pandemic relief efforts*, it could condition grants on recipients' agreements not to adopt any such decreases. But ARPA imposes no such conditions. Instead, it seeks to impose significant restrictions on States' authority to set their own tax rates and policy. Indeed, the

pandemic may end before the Tax Cut Ban ostensibly designed to fight the pandemic ends—an important mismatch that goes unexplained.

States' acceptance of ARPA funds would thus reduce their citizens' liberty, because individuals will have lost the structural protections stemming from the longstanding, "healthy balance of [taxation] power between States and the Federal Government," a balance that "reduces the risk of tyranny and abuse." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

The Tax Cut Ban also offends the Constitution's requirement that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4, cl. 1. A government is not "Republican" if it is deprived of the power to enact its own laws. Federal efforts that disrupt *all forms* of such a government are surely anathema to the Constitution.

III. THE TAX CUT BAN COERCES AND COMMANDEERS THE STATES

The Tax Cut Ban also clearly violates the fourth and fifth *Dole* requirements: the grant amounts to coercion as opposed to encouragement and the threat of claw back unconstitutionally commandeers the States. The principle that the federal government may not commandeer the States is deeply embedded in the U.S. Constitution. The anti-commandeering doctrine serves as "one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). The Constitution "divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). It does

so by "confer[ring] on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy*, 138 S. Ct. at 1476. No enumerated power in the Constitution confers authority upon Congress to pass statutes that infringe state tax policy.

While a showing that the federal government has issued direct orders to the States suffices to demonstrate violation of the anti-commandeering doctrine, it is not a necessary condition. What matters under the anti-commandeering doctrine is not the precise form of the challenged federal action but the bottom line: has the challenged action substantially altered the balance of power between federal and state government? If it has, it sufficiently threatens the individual liberty interests the constitutional structure was designed to protect and thereby violates the anti-commandeering doctrine. That is so because "the Constitution divides authority between federal and state governments for the protection of individuals," and a "healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 180-81 (1992) (alteration in original)).

The Supreme Court explains that commandeering is especially dangerous because "where the federal government compels states to regulate, the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168 (1992). Congress cannot direct states in their governance; it cannot require them to carry out

specific federal regulations; nor can it "require the States to govern according to Congress' instructions." *Id.* at 162, 178. The federal government simply lacks power to direct or command the States to adopt regulatory, spending, or other policies, whether by statute or administrative edict, and this "is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578.

The Supreme Court has held that Congress may use its Spending Clause powers "to grant federal funds to the States, and may condition such grants upon the States' taking certain actions that Congress could not require them to take." *Id.* at 581-82 (internal quotation marks omitted). But the financial inducement is unconstitutional commandeering if it is so large it amounts to "a gun to the head." *Id.* at 581. Here, the $195 billion in Americans' tax dollars dangled before the States exceeds 23% of state governments' revenue nationwide,[6] a sum that eclipses the massive Medicaid funding held to be coercive in *NFIB*. In *NFIB*'s context of Medicaid expansion, the Supreme Court held that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582. ARPA funding represents in many

[6] National Association of State Budget Offices, Fiscal Survey of the States, (Fall 2020), 58, 64 ("current total estimate" of state revenue nationwide in 2021 is $838.8 billion; $195 billion in ARPA funds amounts to 23.25%.)

cases much more than 10% of Plaintiff States' annual budgets, Complaint, ¶¶ 115-119 (showing ARPA funding to constitute 20-29% of the Plaintiff States' budgets), thus far surpassing the standard *NFIB* sets for the distinction between permissible encouragement and unconstitutional commandeering of state sovereignty. *Id.*

The unprecedented need for assistance arising from the Covid-19 pandemic combined with the dramatic financial carrot of ARPA funds (which only the federal government has means to provide) also makes it impractical for the Plaintiff States to refuse funding to which they are entitled under ARPA. Thus, States are in no political position to turn down the funds taken, in part, from their own residents and redirected to alleviating the far-reaching and undeniable economic and public health effects of a once-in-a-century pandemic.

But it isn't just the *size of the carrot* that effectively demotes the States from sovereigns to mere federal foot soldiers—it is the *price of surrender* that also renders this scheme unconstitutionally coercive. The Tax Cut Ban tells the States that for three or more years Congress and Congress alone can provide tax relief to Americans. Your state taxes are frozen. Worse, your state officials must now serve as Congress' auditors of state finances, upon potential criminal penalties for those officials. And if you slip up, we will claw back up to 20% or more of your budget. No prior unconstitutional conditions case has inflicted anything like this procrustean regime of coercion. *Dole*'s raising of the drinking age put at risk only 5% of South Dakota's federal highway funds. 483. U.S. at 211.

NFIB also held that the change to the subject program was a "shift in kind, not merely degree." *Id.* at 583. By purporting to restrict the Plaintiff States' ability to decide whether and how to tax their residents, the Tax Cut Ban clearly imposes conditions that represent a "shift in kind, not merely degree." Congress says to the States, here is an offer you can't refuse—and because we know you are over the barrel, surrender your sovereignty, account to us for your legislation and stewarding of the public fisc, and if you are lucky and your legislation over the next several years passes muster with us, we won't throw your public officials in jail. It is hard to envision a more coercive scheme. This isn't "encouragement"—it's a stick-up. Fortunately, Congress cannot lawfully demand that States surrender their sovereignty, so the courts can still stop this robbery in process.

IV. THE TAX CUT BAN INTRUDES INTO STATE TAXATION POWERS AT THE CORE OF STATE SOVEREIGNTY

"[T]he power to tax involves the power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). In the Sixteenth Amendment's wake, this is now most often thought of as the federal government's power to ruin *private entities or private citizens*. But even for state governments *as governments*, the power to tax is just as existential. For tax revenue is the economic and political life's blood of the States. Covid-19 should never be allowed to usher in an opportunistic rebalancing of federalism.

Apart from its Spending Clause and Tenth Amendment defects, aggressive interpretations of the Tax Cut Ban must be declared invalid and enjoined now to avoid historically unprecedented intrusions into the core realm of the States' tax powers. *First*, the Constitution already marks the metes and bounds of the areas where the States can tax, so an aggressive reading of ARPA is independently foreclosed. *Second*, even assuming Congress had been clear in stripping the States of their discretion to choose their own mixes of fiscal, borrowing, and tax policies to salve the economic impacts of Covid-19, no valid federal interests could outweigh the paramount need to safeguard federalism. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York*, 505 U.S. at 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

A. No Constitutional Provision Authorizes the Federal Government to Eliminate the State Power to Cut Taxes

Article I, Section 10, Clause 2 of the Constitution provides: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." This is the sole express restriction on state taxing power in the Constitution and it is flatly inapplicable to defend the validity of a broadly interpreted ARPA Tax Cut Ban to bar any state tax reduction during the "covered period."

The Import-Export Clause even prescribes where any state inspection-related

revenues must be deposited: "[T]he net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." *Id.* This, along with the fact that the Constitution carefully defines in several provisions the extent of federal tax power reveals that the Framers knew how to limit tax powers when they wanted to. *See* U.S. Const. Art. I, § 8, cl. 1; *id.* Art. I, § 9, cl. 1, 4, 5; amend. XVI. Constitutional silence thus dictates that Congress must respect state prerogatives to tax or relieve tax burdens as the States see fit, as long as they do not run afoul of other, constitutional restrictions.

Unstated restrictions on state tax power cannot be read into the Constitution. *See Department of Revenue of State of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 759-60 (1978) (the Import-Export Clause does not even bar all forms of state taxation on imports and exports but only those that qualify as "imposts" or "duties"); *Richfield Oil Corp v. State Corp. of Equalization*, 329 U.S. 69, 76 (1946) ("The fact of a single exception [to offset state inspection laws] suggests that no other qualification of the absolute prohibition was intended."). Under this constitutional brand of *expressio unius* reasoning, even if both (a) the Tax Cut Ban were not ambiguous but clearly banned state tax reductions; *and* (b) a State somehow opted to earmark any new ARPA monies it received to fund a reduction in a preexisting state tax, the Tax Cut Ban would still be unconstitutional. The power involved, as *Peniston* teaches, is pre-constitutional.

This unprecedented incursion on state sovereignty thus violates the anti-commandeering doctrine regardless whether, as the States allege, they are in essence compelled to accept ARPA funding. This means that Congress cannot require States to "consent" to the surrender of their sovereign taxing authority by accepting the billions in pandemic relief. Setting aside the coercive aspects of this scheme, the Constitution is a law. Being a law and, indeed, a law made by the people, its limits are not alterable by private or state consent, but only by the consent of the people. Accordingly, the government cannot escape its constitutional bounds by getting, let alone purchasing, the consent of any lesser body, whether individuals, private institutions, or states. As put by the Supreme Court in *New York*, "Where Congress exceeds its authority relative to the states, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." 505 U.S. at 182. Looking at it through the lens of enumerated powers, the court concluded, "[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.*

Whatever else the Constitution permits, state taxation must remain firmly in the hands of locally elected legislatures. Taxation can be a source of deep discontent, as our Founding proved, and it is not only unconstitutional but dangerous to centralize control over taxes in the hands of federal officials.

B. No Substantial Federal Interests Can Possibly Justify the Tax Cut Ban's Invasion of State Tax Powers

States, like the federal government, can proceed to problem solve by using whatever they see as a judicious mix of spending, tax, and borrowing policies. By one reading, the Tax Cut Ban handicaps the States' ability to access the full box of tax policy tools during the covered period, *i.e.*, the tax-cut tool specifically. What possible business of the federal government is it to bar Covid-19 relief going to beleaguered citizens through a state tax code instead of through state spending? This is especially true because the federal government itself has *not once but thrice delivered* stimulus money to combat the Covid-related downturn through its own federal tax code. *See, e.g., What to Know About All Three Rounds of Coronavirus Stimulus Checks*, *available at* https://tinyurl.com/t9xj8mwv (Mar. 15, 2021). Presumably, Congress opted to use tax policy to put money in people's hands because it is an efficient means of doing so. ARPA's text or legislative history does not explain why States cannot also follow that path.

One commentator, a Case Western Reserve law professor, takes a stab at these questions, arguing that the Tax Cut Ban is necessary because otherwise "[v]oters will not know whom to credit for their lower state taxes, and they might not realize that the federal government is subsidizing public services that would otherwise have to be reduced." Jonathan L. Entin, *Personal View: Dave Yost's American Rescue Plan challenge should fail,* Crain's Cleveland Business (Mar. 28, 2021). Respectfully, this makes no

sense. *First*, any such rationale would apply equally to States that used ARPA monies to fund operating programs. Many voters, for instance, would not realize that any new species of state spending sourced back to a federal pot of money. Yet, the Tax Cut Ban leaves such fiscal tools unmolested. *Second*, Professor Entin's surmise about Congress' objectives could be established by the far-less-intrusive expedient of simply requiring any state tax reduction to come with a spending condition that the States send their taxpayers a notice letter stating: "Know that this tax reduction is brought to you by the federal government alone." No muss, no fuss, no unprecedented intrusion on state tax powers.

Tax reduction is a particularly important tool for state governments to retain because they rarely possess the same flexibility the federal government possesses to run operating budget-deficits year after year. *Each year,* the States *must balance* their budgets. Tax Policy Center research confirms this and specifically shows that of the 13 State Plaintiffs here, all but one of them (Iowa) had either a strong constitutional or a strong statutory balanced budget requirement. *See* Tax Policy Center, *What are state balanced budget requirements and how do they work?*, *available at* https://tinyurl.com/z8u6tdne (2015).

No interest can justify the invasion of federalism that an aggressive reading of the Tax Cut Ban embodies. And the odds approach zero that a future Supreme Court would even authorize explicitly balancing federal interests against federalism and state sovereignty issues, now that we are 232-plus years deep into the Constitution's tenure.

See Printz, 521 U.S. at 907–908 (lack of early federal statutes commandeering state executive officers "suggests an assumed *absence* of such power" given "the attractiveness of that course to Congress").

CONCLUSION

The Tax Cut Ban upends the Constitution's pillars. It seeks to co-opt state opposition, thereby undermining a key structural limit on federal power, it commandeers the states, it violates the guarantee of a republican form of government, and eviscerates the very concept of enumeration of federal powers and the Tenth Amendment. The exertion of federal control over the core state taxing authority erodes federalism, including its structural limits on centralized power, its financial accountability, its dispersion of power to dilute the policy errors of centralization, and ultimately the freedom it accords to state self-government and local communities to pursue the vision of their own citizens.

The very wealth of doctrines that prohibit Congress from enacting the Tax Cut Ban, as it is framed, is itself evidence that a critical underpinning of federalism and state sovereignty has been eviscerated. Close examination of Supreme Court case holdings as to each of the governing doctrines leads to the same conclusion: Congress cannot usurp (or even seek to make inroads against) state taxing authority. This Court should declare the Tax Cut Ban unconstitutional and enjoin its enforcement forthwith.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of the district court briefing orders because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 14-point font in the body of the brief and 12-point for footnotes and it does not exceed 30 pages.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Alabama, Western Division, by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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