No. 22-10560

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF MISSISSIPPI; STATE OF LOUISIANA,

Plaintiffs-Appellees,

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR, in his official capacity as Acting Inspector General of the Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE OF THE
NEW CIVIL LIBERTIES ALLIANCE
IN SUPPORT OF APPELLEES

October 31, 2022

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CERTIFICATE OF INTERESTED PERSONS

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v.

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Defendants-Appellants.

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees: State of Texas, represented by Judd Edward Stone, II, Eric J. Hamilton, Ryan Daniel Walters, and Jeffrey Michael White (in the district court) of the Office of the Attorney General of Texas; State of Mississippi, represented by Justin Lee Matheny of the Office of the Attorney General for the State of Mississippi; and the State of Louisiana, represented by Elizabeth Baker Murrill of the Office of the Attorney General for the State of Louisiana.

Defendants-Appellants: Janet Yellen, in her official capacity as Secretary of the Treasury; Richard K. Delmar, in his official capacity as Acting Inspector General of the Department of the Treasury; United States Department of the Treasury; and United

States of America, who are all represented by Daniel Winik, Alisa Beth Klein, and Michael Patrick Clendenen (in the district court) of the U.S. Department of Justice, Civil Division, Appellate Section

***Amicus*:** The New Civil Liberties Alliance is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code. It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

***Counsel for Amicus*:** Sheng Li, John Vecchione, and Margaret Little of the New Civil Liberties Alliance.

/s/ Sheng Li
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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 administrative power and spending conditions imposed as another means of legislating outside proper constitutional channels.[1] NCLA challenges constitutional defects in the modern administrative state by initiating original litigation, defending Americans from administrative actions, filing *amicus curiae* briefs, and with other advocacy. NCLA views the administrative state as an especially serious threat to civil liberties because agencies too often refuse to play by the rules—and courts too often let them. 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's practice of imposing "conditions" on federal spending is particularly disturbing. Far too often, Congress attaches conditions on the receipt of federal funds, thereby insidiously defeating constitutional guarantees and purchasing submission by States and the people to an unconstitutional power grab. This historically unprecedented case goes even further and usurps core power exclusively

[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. All parties have consented to the filing of this *amicus* brief.

assigned to the States—the power to change or reduce the taxation of their citizens. Worst of all, Congress has done so by ambiguous legislation and unconstitutional delegation to the U.S. Department of Treasury, which in turn published a Final Rule that only compounds the constitutional injury. When Congress purports to tell States what their tax policies must—or cannot—be, whether by law or agency regulation, it violates state sovereignty. This structural violation of the Constitution intrudes upon the States' core sovereignty to direct their own fiscal affairs and make choices about how to tax their residents.

NCLA was founded to restore constitutional limits on administrative power and to protect the civil liberties of all Americans—including their right as citizens of the United States to be governed only by federal and state legislation passed via constitutional channels and their right as self-governing state citizens to have the States alone set tax policy in their respective legislatures. As explained below, Congress's attempted usurpation of state legislative powers, which were reserved to the several States by the enumeration of limited congressional powers and by the Tenth Amendment, violates bedrock provisions of the U.S. Constitution that define and constrain federal lawmaking.

INTRODUCTION

The condition in the American Rescue Plan Act of 2021 ("ARPA" or "the Act") that States accepting ARPA funds must not reduce their own taxes upends the Constitution's structure. This result is true regardless of whether the States are coerced

into accepting ARPA funding, because the Constitution's limits are not alterable by private, state, congressional, or executive consent. Accordingly, the federal government cannot lawfully escape its constitutional bounds by purchasing the consent of any lesser body, whether individuals, or States. *New York v. United States*, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, … the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."). Looking 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 nation's Founding proved, and it is not only unconstitutional but downright dangerous to centralize control over state taxes in the hands of federal officials. The state electorate votes for state officials to decide—and be held accountable for—state fiscal policy. Congress's arrogation of power over state taxation and attempted delegation of such power to the Treasury Department breaks that social compact, disenfranchises state electorates, and violates the Constitution as elucidated by the Court in *New York*.

BACKGROUND

ARPA, enacted on March 11, 2021, offers approximately $195 billion to States and their residents to assist with economic recovery from the Covid-19 pandemic. But there is a catch: States must not use the funds "to either directly or indirectly offset a

reduction in the net tax revenue of such State … resulting from a change in law, regulation, or administrative interpretation … that reduces any tax." 42 U.S.C. § 802(c)(2)(A). Treasury issued a Final Rule on January 27, 2022, purporting to implement the Tax Cut Ban, after inviting comments on a nearly identical Interim Rule. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4,338 (Jan. 27, 2022) ("Final Rule"); *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) ("Interim Rule"). The Final Rule adopted the Interim Rule's convoluted four-step process whereby a State is required to estimate and report to Treasury whether any change in state law or policy reduces tax revenue and the amount of such reduction that was offset directly or indirectly by ARPA funds. 87 Fed. Reg. 4,426-28; *see* 31 C.F.R. § 35.8 (b)(1)-(4). A fifth step gives Treasury the final say based on its consideration of "all relevant facts and circumstances" whether to recoup any reduction in tax revenue it identifies as violating the Tax Cut Ban. 87 Fed. Reg. 4,438; 31 C.F.R. § 35.10.

ARGUMENT

I. SECTION 802(c)(2)(A) USURPS STATES' TAXATION POWERS

Treasury insists that § 802(c)(2)(A) "does not prohibit a State from cutting taxes; it merely requires that a State offset revenue losses from the tax cuts by using its own revenue sources," rather than ARPA funds. Appellants' Br. at 6 (citing *Missouri v. Yellen*, 39 F.4th 1063, 1069-1070 (8th Cir. 2022)). Read in isolation, a prohibited "offset" under § 802(c)(2)(A) could mean *direct one-to-one matching* of state tax reductions with ARPA funds, thus permitting tax cuts that are not directly paid for with such funds. But that

verb cannot be read in isolation because it is modified by the phrase "either directly *or indirectly*." 42 U.S.C. § 802(c)(2)(A) (emphasis added).

Because "[m]oney is fungible, … *any* ARPA funds the Plaintiff States receive could be viewed as indirectly offsetting *any* reduction in net tax revenue from a change in state law or policy. After all, a decrease in one part of a State's revenue is necessarily offset somehow to achieve a balanced budget." *West Virginia v. U.S. Dep't of Treasury*, 571 F. Supp. 3d 1229, 1250 (N.D. Ala. 2021) (emphases added) (appeal pending). This appears to have been swing-vote Senator Manchin's motivation in adding the provision. *See* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts*, N.Y. TIMES (Mar. 12, 2021).[2] Treasury's Final Rule likewise recognized that, "because money is fungible, even if [ARPA] funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the state's or territory's funds[.]" 87 Fed. Reg. 4,424.

During oral argument at the *Arizona* case, counsel for Treasury agreed that "Congress used the phrase 'directly [or] indirectly' to make clear the condition is a broad one. Because money is fungible, a State can't take these federal funds, use them to reduce its own spending, and use that saving to pay for a tax cut." *Arizona v. Yellen*, No.

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[2] Available at https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html.

21-16227, Oral Argument at 40:30 (9th Cir., Jan. 13, 2022).[3] The Ninth Circuit ultimately held that Arizona had standing to bring a pre-enforcement challenge to § 802(c)(2)(A)'s prohibition against using ARPA funds to "directly or indirectly offset" that tax cut. *Arizona v. Yellen*, 34 F.4th 841, 851 (9th Cir. 2022) ("There is a realistic danger that Arizona, after accepting federal funds under ARPA and passing a billion dollar tax cut, will be forced to repay federal funds for directly or indirectly using those funds to offset its tax cut, in violation of the Offset Provision.").

In short, the fungibility of money means § 802(c)(2)(A) effectively prohibits States from reducing their net tax revenue. Therefore, that provision is properly understood to comprise a Tax Cut Ban for States that accept ARPA funds. Treasury's contention that the prohibition against net tax reductions "is not implicated if the State cuts taxes but maintains its prior level of state tax revenue as the result of economic growth" misses the point. *See* Appellants' Br. at 3. Section 802(c)(2)(A) prohibits the use of ARPA funds "to directly or indirectly offset a reduction in the *net* tax revenue" and there is obviously no *net* reduction if a State's tax revenue increases due to "economic growth." Treasury thus makes the wholly irrelevant point that the Tax Cut Ban does not prohibit States from collecting *more* tax revenue.

Treasury also claims that tax cuts are permissible if paid for "by cutting … expenditures of state funds in a 'department, agency, or authority' where it is not

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[3] Available at https://www.ca9.uscourts.gov/media/video/?20220113/21-16227/.

spending Fiscal Recovery Funds." Appellants' Br. at 4 (quoting 87 Fed. Reg. 4,328). Treasury's January 2022 Final Rule explains that it "allow[s] only spending reductions in areas where the recipient government has not spent [ARPA] funds to be used as an offset for a reduction in net tax revenue." 87 Fed. Reg. 4,328-29. But as the district court in another ARPA case explained, Treasury "does not define 'areas'" from which such spending cuts can come. *West Virginia*, 571 F. Supp. 3d at 1255. In any event, "because the Final Rule 'provides benefits across several areas' due to the breadth with which ARPA funds can be used, few [if any] 'areas' of State spending will be suitable candidates for spending cuts that could offset a decrease in revenue." *Id.* (quoting 86 Fed. Reg. at 26,816). The inescapable conclusion is that Congress has used revenue raised through federal taxation of States' residents and businesses to purchase States' sovereign taxation power.

II. CONGRESS CANNOT PURCHASE STATES' SOVEREIGN POWER OF TAXATION

A. The Tax Cut Ban Commandeers State Officials

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*, 505 U.S. at 181. 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 v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

The Tax Cut Ban unconstitutionally commandeers state tax policy, and Treasury's Final Rule compounds this violation by forcing state officials to establish and staff an unwanted and convoluted accounting-and-reporting bureaucracy. 87 Fed. Reg. 4,426-28; *see* 31 C.F.R. § 35.8 (b)(1)-(4). No enumerated power in the Constitution confers authority upon Congress to pass statutes that direct, let alone micromanage, state tax policy. The Commerce Clause, by its very terms, does not. ARPA is neither "necessary" nor "proper" and thus it also cannot be authorized by the Sweeping Clause. U.S. Const., art. I, sec. 8, cl. 18.[4]

B. Federal Direction of State Tax Policy Is a Structural Violation

Courts have affirmed some Spending Clause conditions under a contract-based theory of state consent. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). But that legal fiction is strained because state consent is purchased by funds taken from the State's own tax base, *i.e.*, federal taxation of state citizens and businesses. There is no parity between contracting parties if one of those parties, the federal government, has its hands in the pockets of its counterparties, the States. Accordingly, "unfettered use of this [spending] power, especially when coupled with Congress's power to tax, could quickly alter the balance of powers between the federal government

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[4] "The [Necessary and Proper] clause … restricts Congress to carrying into execution only the powers *vested* by the Constitution in different persons and parts of government. The clause thus reinforces vested powers and carefully does not authorize Congress to divest any part of government of its powers or to vest such powers elsewhere." Philip Hamburger, PURCHASING SUBMISSION: CONDITIONS, POWER AND FREEDOM (2021), pp. 99-100 (emphasis in original).

and the States." *Ohio v. Yellen*, 547 F. Supp. 3d 713, 729 (S.D. Ohio July 1, 2021) ("*Ohio II*") (appeal pending).

Courts must police the boundaries of consent vigilantly with two important limitations to ensure Spending Clause conditions do not violate the Constitution's structure. *First*, Congress may not coerce States into accepting a spending condition by threatening to withhold the return of large amounts of federal taxes taken from the States' own citizens and businesses. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581-82 (2012) ("*NFIB*")("[T]he financial 'inducement' Congress has chosen is … a gun to the head" because "[t]he threatened [withholding] of over 10 percent of a State's overall budget … is economic dragooning that leaves the States with no real option but to acquiesce[.]"). *Second*, the federal government may not use spending conditions to "direct the functioning of the state [government], and hence to compromise the structural framework of dual sovereignty." *Printz*, 521 U.S. at 932. As explained below, the Tax Cut Ban traduces both limitations.

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. Congress cannot direct States in their choices of how to govern; 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. 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.

Financial inducement crosses over into unconstitutional commandeering if it is so large it amounts to "a gun to the head." *NFIB*, 567 U.S. at 581. "The 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. Here, the $195 billion in Americans' tax dollars dangled in front of the States exceeds 23% of state governments' revenue nationwide,[5] a sum that eclipses even the massive Medicaid funding held to be impermissibly coercive in *NFIB*. *Texas v. Yellen*, No. 2:21-CV-079-Z, 2022 WL 1063088, at *5 (N.D. Tex. Apr. 8, 2022) ("Although the 10-percent mark in *NFIB* is not a dogmatic threshold that must be met for unconstitutional financial coercion to exist, the figure guides this Court when determining whether Congress has offered 'undue influence' or 'relatively mild encouragement.'" (quoting *NFIB*, 567 U.S. at 578, 579-80)). The funds at issue here represent 13 percent of Texas's 2021 budget, 31 percent of Mississippi's budget, and 7 percent of Louisiana's budget. *Id.* The threat to withhold such vast sums—collected in large part by the federal government from States' own residents—if States do not agree to the Tax Cut Ban is indubitably "economic

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

dragooning." *NFIB*, 567 U.S. at 582.

But it isn't just the size of the carrot that demotes States from independent sovereigns to mere federal vassals—it is the price of surrender that also renders this scheme unconstitutional. The Tax Cut Ban is an attempt by Congress to purchase "the taxation authority of state government," which is "recognized as central to state sovereignty." *Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). In *McCollough v. Maryland*, Chief Justice Marshall held that a State cannot tax a federal entity because "the power to tax involves the power to destroy[.]" 17 U.S. 316, 431 (1819). So too here, running in the other direction, the federal government's insistence that States maintain their current level of net taxation is equally destructive of sovereignty. *See Providence Bank v. Billings*, 29 U.S. 514, 544 (1830) (recognizing "[t]he power of taxation is 'an incident of sovereignty;' and the government in whom it resides is alone competent, within its own jurisdiction, to judge and determine how, in what manner, and upon what objects that power shall be exercised.") (Marshall, C.J.).

In commandeering cases, federal intrusion had been limited to a particular area of state government decision-making—*New York* concerned disposition of nuclear waste and *Printz* involved gun control. The Tax Cut Ban, however, is not so limited because tax policy affects *every* aspect of state government. The Tax Cut Ban further seeks to control States' spending powers, since spending levels to support various state programs determine whether a State can pay for a reduction in tax revenue using non-ARPA funds. *See* 31 C.F.R. § 35.8(b)(4). A State must consult Treasury's rule to test its

every policy decision or else risk claw back of federal funds. Even after consultation, the answer may still elude the State, which must then rely on the mercy of its federal paymaster. Without full state control over tax and spending policy, the Constitution's guarantee of dual sovereignty transforms into a "Mother may I" relationship between the States and the federal government. If federal courts were to agree that the political branches may control state taxes, they would greenlight the destruction of federalism.

It makes no difference that the instrument of such destruction is a spending condition to which a State nominally consented, as opposed to a direct federal mandate. Under the Tax Cut Ban, the federal government imposes high tax rates on residents and businesses of the 50 States and then offers each State a portion of those federal proceeds to purchase control over that State's tax and spending policies. Because a State's tax and spending powers are integral to sovereignty, purchasing such powers is tantamount to purchasing state sovereignty itself. That is simply not permitted under the Constitution's dual-sovereign structure, irrespective of the amount of money being offered. A State can no more bargain away its sovereignty than an individual may lawfully contract himself or herself into bondage.

The Supreme Court has long acknowledged the clear danger posed to federalism by the unfettered use of federal tax power, on one hand, and spending power on the other. The line between legitimate and abusive spending power is drawn best in *United States v. Butler*, 297 U.S. 1 (1936). Where Congress has no enumerated power to legislate, it "may not indirectly accomplish those ends by taxing and spending to purchase

compliance." *Id.* at 74. Otherwise, Congress's tax-and-spend powers "would become the instrument for total subversion of the governmental powers reserved to the individual states." *Id.* at 75.

The Supreme Court has refined this analysis, holding that Congress may "grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take." *NFIB*, 567 U.S. at 576 (internal quotation marks omitted). But the Court also "recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives … . 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." *Id.* at 576-77. As such, spending conditions must not be imposed coercively, and "Spending Clause legislation [must] not undermine the status of the States as independent sovereigns in our federal system." *Id.* at 577. If these limits mean anything at all, they must prohibit the Tax Cut Ban.

C. Commandeering Infringes Americans' Right of Self-Government

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. Whatever else this provision secures, it at least protects Americans from federal interference in their freedom of elective self-government in the States. Even an elected government is not "Republican" if it is deprived of the power to enact its own laws. Federal efforts that disrupt the fiscal powers essential to *all aspects*

of such a government are anathema to the Guarantee Clause.

"[T]he 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 181-82 (alteration in original)). "'[T]his is not division for division's sake.' At its founding … [t]he Framers adopted a system of checks and balances … meant to promote … individual liberty." *Ohio II*, 547 F. Supp. 3d at 717.

No constitutional provision authorizes the federal government to abridge 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 sentence is the sole express restriction on state taxing power in the Constitution, and it is flatly inapplicable to the federal government's imposition of a broadly interpreted Tax Cut Ban prohibiting 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 Controul of the Congress." *Id.* This, along with the Constitution's careful delineation of federal tax power in several

provisions, reveals that the Framers knew how to limit the taxing powers of States 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 beyond the Import-Export Clause dictates that Congress must respect state prerogatives to tax or relieve tax burdens as the States see fit, as long as those taxes do not run afoul of other, broad-gauge constitutional restrictions (*e.g.*, by trenching upon the rights of due process or equal protection).

Further restrictions on state tax power cannot be found in the Constitution. "The fact of a single exception [to offset state inspection laws] suggests that no other qualification of the absolute prohibition was intended." *Richfield Oil Corp v. State Corp. of Equalization*, 329 U.S. 69, 76 (1946). *See Dep't 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"). Under this *expressio unius* reasoning, even if both (a) the Tax Cut Ban were not ambiguous but clearly banned state tax reductions;[6] *and* (b) a State somehow opted to earmark any new ARPA monies it received to fund a reduction in a preexisting state tax, the State Tax Cut Ban would still be unconstitutional.

[6] But the Tax Cut Ban, in fact, is unclear and ambiguous and remains so even after Treasury's Final Rule. *See* Argument Section III, *infra*.

D. Courts Have a Duty to Uphold the Law, and May Not Abandon States to the 'Political Safeguards of Federalism'

By vesting Congress with only limited federal powers, the Constitution simultaneously protected the States and individuals from federal incursions into the spheres of state sovereignty on the one hand and private rights on the other. But even while protecting state sovereignty, the Constitution indirectly secures individual rights as well, for what is called *federalism* is, at the most fundamental level, the freedom of individuals to enjoy localized self-government. Federalism is itself a matter of guaranteeing personal liberty. *See NFIB*, 567 U.S. at 536 ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.") (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).

Judges have a duty to uphold these freedoms. The federal government increasingly dictates state policy on matters far outside federal authority and of inherently localized concern, such as state taxation, land use, and K-12 education. *See* Hamburger, PURCHASING SUBMISSION, at 139-41. Indeed, federal conditions have restructured internal state governance in line with federal administrative models. *See id.* at 41-45. So, the notion that States can protect themselves politically is an illusion. *See id.* at 137-39.

Political power is not a substitute for law. The Constitution was adopted to enable Americans and their institutions to rely on law in place of raw power or force.

It is "emphatically" the duty of the judges "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Judges must not abdicate their constitutional role to enforce the Constitution when States come into court. To do so is to abandon judicial duty, misunderstand the political process, and abet the lawless expansion of federal power, thereby eviscerating federalism and the individual freedom it safeguards.

III. REGULATION CANNOT CURE THE TAX CUT BAN'S IRREDEEMABLE AMBIGUITY

A. The Tax Cut Ban Is Ambiguous on Its Face

While this Court should uphold district court's conclusion that the Tax Cut Ban is unconstitutionally coercive, the Court could also affirm the decision below on the alternate ground of unconstitutional vagueness. Setting aside for a moment that Congress may never purchase state taxation power, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously[.]" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). This additional requirement ensures States' knowing consent on which the constitutionality of spending conditions rests. *Pennhurst*, 451 U.S. at 17. "States cannot knowingly accept conditions … they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17). A clear statement that is "plain to anyone reading the [statute]" is especially needed where, as here, the condition infringes on federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). *Gregory*'s 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 Tax Cut Ban's condition that States must not use ARPA funds to "indirectly offset" a net tax revenue reduction has proven indecipherable. The district court in the Northern District of Alabama "determined that the Tax Mandate falls short of the clarity required when Congress exercises its powers under the Spending Clause." *West Virginia*, 571 F. Supp. 3d at 1254. The Southern District of Ohio likewise "could not ascertain what an indirect offset may (or may not) be. And the Court was not alone in that [bewilderment]. At oral argument …, the Secretary declined to take any position on that term either." *Ohio II*, 547 F. Supp. 3d at 732.

Treasury's own ever-shifting interpretations reinforce the Tax Cut Ban's ambiguity. In *Missouri v. Yellen*, Missouri objected that a "broad interpretation [of § 802(c)(2)(A)] would prohibit a State from enacting any tax-reduction policy that would result in a net reduction of revenue[.]" 538 F. Supp. 3d 906, 910 (E.D. Mo. 2021), *aff'd* 39 F.4th 1063 (8th Cir. 2022). Treasury persuaded that court there was no alleged injury to Missouri's taxation authority by "explicitly assert[ing] that [it] do[es] not agree with the 'broad interpretation' proposed by Missouri." *Id.* at 914. Treasury took the same tack in Arizona's ARPA case, claiming in its brief that "'directly' and 'indirectly' are adverbs that *cannot alter* the meaning of the word that they modify (here, 'offset')." *Arizona v. Yellen*, No 21-cv-00514-DJH, Dkt. 31 at 18 (Apr. 30, 2021) (emphasis added). But then at oral argument of the *Arizona* appeal, Treasury took the opposite position

that "Congress used the phrase 'directly and indirectly' to make clear the [offset] condition is a broad one. … That's not ambiguous[.]" *Arizona v. Yellen*, No. 21-16227, Oral Argument at 40:30 (9th Cir, Jan. 13, 2022).[7] Treasury's Final Rule, published two weeks after the *Arizona* oral argument, also adopts a broad interpretation in which "offset" is modified by "indirectly," contradicting Treasury's prior interpretation to inflict the very injury Treasury disclaimed in the *Missouri* and *Arizona* cases. 87 Fed. Reg. 4,424 ("[B]ecause money is fungible, even if [ARPA] funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the state's or territory's funds[.]").

Remarkably, Treasury attempted to reverse course once again in another ARPA case to assert that "[t]he phrase 'directly or indirectly' simply underscores that a State cannot circumvent Congress's restriction on the use of federal funds through a mere formality" and that "[e]ven if that phrase were stricken from [§ 802(c)(2)(A)], the restriction on using federal funds to 'offset' a reduction in net tax revenue would properly be read to mean the same thing." Appellants' Br., *West Virginia v. Yellen*, Case No. 22-10168 at 13 (Feb. 23, 2022). To summarize, Treasury first said "indirectly" unambiguously does not modify "offset," then it said "indirectly" unambiguously broadens "offset," and then it reverted to its original interpretation. "The legitimacy of

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[7] Available at https://www.ca9.uscourts.gov/media/video/?20220113/21-16227/.

Congress's exercise of the spending power … 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." *NFIB*, 567 U.S. at 577 (internal quotation marks and citations omitted). A State cannot voluntarily and knowingly accept a condition that Treasury interprets narrowly one day, broadly the next, and narrowly again the day after that.

B. The Nondelegation Doctrine Prohibits Treasury from Clarifying the Tax Cut Ban Through Regulation

In addition to arguing that the Tax Cut Ban is somehow both unambiguously narrow and unambiguously broad, Treasury told the district court that "a funding condition may be 'largely indeterminate[.]'" ECF 19 at 21 (quoting *Pennhurst*, 451 U.S. at 23); *see also* ECF 46 at 9. According to Treasury, Congress merely needs to notify States of "the existence of [an indeterminate] condition," ECF 19 at 18, and "any particularized questions can be addressed by agency regulations and by other formal or informal guidance," *id.* at 23 (citations and internal quotations marks omitted). This approach, however, would amount to an unconstitutional delegation of legislative and Spending Clause powers.

"Article I, § 1, of the Constitution vests all legislative powers herein granted … in a Congress of the United States. This text permits no delegation of those powers." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001) (cleaned up). Accordingly, it

is *Congress* rather than an agency that must clearly articulate Spending Clause conditions. *Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021) ("The needed clarity cannot be [agency] provided—it must come directly from the statute."). While an agency may sometimes supply administrative details, that is possible only if "[t]he requisite clarity … is provided by [the statute]" in the first place. *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 666 (1985); *see also Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (adopting Judge Luttig's dissenting opinion at the panel stage to conclude that *only* statutory language, not any regulatory follow-on, matters for Spending Clause clarity purposes).

"Congress may grant regulatory power to another entity only if it provides an 'intelligible principle' by which the recipient of the power can exercise it." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989). When the Southern District of Ohio attempted to decipher the Tax Cut Ban's text, it was forced to throw up its hands and say: "the Court cannot 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 802, 818 (S.D. Ohio, May 12, 2021) (*Ohio I*) (quoting 42 U.S.C. § 802(c)(2)(A)). A second round of briefing "further confirm[ed] the [district] Court's suspicion that the phrase is *unintelligible*." *Ohio II*, 547 F. Supp. 3d at 733 (emphasis added).

Treasury's contention to the district court that ARPA authorizes it to "issue such regulations as may be necessary or appropriate" to implement the otherwise

unintelligible Tax Cut Ban, ECF 46 at 1 (quoting 42 U.S.C. § 802(f)); *see also* ECF 19 at 24, is thus foreclosed as a "sweeping delegation of legislative power," *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)). In *American Petroleum*, the Supreme Court rejected the Secretary of Labor's argument that the Occupational Safety and Health Act authorized him to promulgate whatever regulations he deemed were "reasonably necessary or appropriate to provide safe or healthful employment." 448 U.S.at 639-40 (quoting 29 U.S.C. 652(8)). As the D.C. Circuit in *International Union v. OSHA* explained, authorizing an agency to regulate in whatever manner it deems "necessary or appropriate" to achieve vague policy objectives, such as workplace health and safety, would "raise a serious nondelegation issue" and thus must be rejected. 938 F.2d 1310, 1317 (D.C. Cir. 1991). Treasury's reliance on the same "necessary or appropriate" standard in 42 U.S.C. § 802(f) to regulate in furtherance of an equally vacuous anti-tax-cut objective likewise fails.

"If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances. To that end the Constitution requires that Congress' delegation of lawmaking power to an agency must be 'specific and detailed.'" *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 536 (2009). The ambiguities in the Tax Cut Ban, however, are so vast that allowing Treasury to resolve them would essentially rewrite the statute to say: "the Secretary may recoup ARPA funding to the extent that the Secretary determines, *in her discretion*, that

[a tax] rate reduction resulted in the State losing tax revenues, and the Secretary further determines, *in her discretion*, that those losses were offset with ARPA funding," whether directly or indirectly. *Ohio II*, 547 F. Supp 3d at 734 (emphases added). Because it is impossible to discern what indirectly offsetting a reduction in tax revenue with ARPA funds means, this grant of power would be devoid of any intelligible boundaries on Treasury's discretion, let alone "specific and detailed" ones. *Fox*, 556 U.S. at 536. Rather, Treasury would have "unfettered discretion" that amounts to an unconstitutional delegation. *Jarkesy*, 34 F. 4th at 461.

"The idea that an agency can cure an unconstitutionally standardless delegation of power" is "internally contradictory." *American Trucking*, 531 U.S. at 473. This is because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority." *Id.* Courts and States are unable to ascertain what the Tax Cut Ban requires. *Ohio II*, 547 F. Supp. 3d at 733. Nor does Treasury have special insight into the Tax Cut Ban's unintelligible requirements—it has repeatedly confessed confusion on that score. *See, e.g.*, *supra* at Argument Section III.A. Treasury's attempt to "clarify" such requirements through regulation would amount to an impermissible enactment of its own agency-created Spending Clause condition, in clear breach of the Constitution's separation-of-powers safeguards.

"[T]he Final Rule still leaves States guessing as to how they may exercise their sovereign power to tax." *West Virginia*, 571 F. Supp. 3d at 1255. The power Treasury

gave itself in 31 C.F.R. § 35.10 to recoup state tax cuts that "are not paid for with other, permissible sources," *see* 87 Fed. Reg. 4,428, offers the easiest way to see that the Final Rule fails to purge ambiguity out of the ARPA deal. The Final Rule adopted the Interim Rule's burdensome and convoluted four-step process by which States must report the effect on tax revenue of every change in law or policy *and* whether any net reduction is being paid for with spending cuts, as opposed to ARPA funds. 31 C.F.R. § 35.8. But a fifth step gives Treasury the final word on whether an indirect offset has taken place. The Interim Rule stated that Treasury would be free to consider "all relevant facts and circumstances" whether "a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue." 86 Fed. Reg. at 26810. Commenters (including NCLA) objected that this circular approach under which the existence of an "offset" is determined based on "'all facts and circumstances' provide[s] Treasury with too much authority and create[s] ambiguity." 87 Fed. Reg. 4,438. The Final Rule recognized these concerns but added no substantive standards to Treasury's catch-all recoupment power. *Id.*

This standardless discretion renders opaque Treasury's recoupment scheme and is particularly insidious because executive enforcement choices are often unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 833 (1985). The unintelligible Tax Cut Ban, combined with the power Treasury has arrogated to itself to consider "all relevant facts," gives Treasury unchecked and uncheckable power over how, when, and from which States it will choose to claw back billions in ARPA funds. The resulting potential for abusive

and arbitrary enforcement is deeply troubling. Treasury's enforcement decisions are largely beyond review, so there would be nowhere for a State to turn if that extensive power were used for political or other illegitimate purposes—or even if that power were just executed capriciously or incompetently. By exceeding Congress' enumerated powers, ARPA has created the potential for Treasury to assert arbitrary prerogatives historically exercised by a royal sovereign over his fiefdoms—powers that the Constitution expressly forbids to the federal government.

CONCLUSION

For the foregoing reasons and those of the Appellees, this Court should affirm the decision below.

Respectfully submitted,

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October 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, an electronic copy of the foregoing brief *amicus curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it 6,407 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

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