No. 22-___

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

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, AND THE U.S. DEPARTMENT OF THE TREASURY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 21-3787

STATE OF OHIO,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

No. 1:21-cv-00181—Douglas Russell Cole, District Judge.

Argued: January 26, 2022

Decided and Filed: November 18, 2022

Before: GRIFFIN, DONALD, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Daniel Winik, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Benjamin M. Flowers, OFFICE OF THE

OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Daniel Winik, Sarah E. Harrington, Alisa B. Klein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Benjamin M. Flowers, Sylvia May Davis, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Joseph D. Henchman NATIONAL TAXPAYERS UNION FOUNDATION, Washington, D.C., Paul D. Clement, KIRKLAND & ELLIS LLP, Washington, D.C., Gary P. Gordon, Jason T. Hanselman, Kyle M. Asher, DYKEMA GOSSETT PLLC, Lansing, Michigan, Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, John J. Vecchione, NEW CIVIL LIBERTIES ALLIANCE, Washington, D.C., Timothy Sandefur, Jacob Huebert, GOLDWATER INSTITUTE, Phoenix, Arizona, Drew C. Ensign, OFFICE OF THE ARIZONA ATTORNEY GENERAL, Phoenix, Arizona, for Amici Curiae.

OPINION

JOHN K. BUSH, Circuit Judge. Seeking to mitigate the devastating economic effects of COVID-19, Congress enacted the American Rescue Plan Act ("ARPA" or "the Act") in March 2021. *See* 42 U.S.C. § 802 *et seq*. ARPA appropriated $195.3 billion in aid to the states and the District of Columbia. But to get the money, states had to certify that they would comply with several conditions. One was ARPA's "Offset Provision," which forbids a state from using the funds "to either directly or indirectly offset a reduction in the net tax revenue" that "result[s] from" a tax cut. § 802(c)(2)(A). Claiming that this condition amounts to a prohibition on tax cuts during ARPA's "covered

period," *id.*, and that such a condition would violate the Constitution in multiple respects, Ohio brought the present challenge. *See, e.g.*, Mot. for Prelim. Injunction at 1–2, 5, R. 3. And the district court found Ohio's objections persuasive, permanently enjoining enforcement of the Offset Provision on the ground that its terms are "unconstitutionally ambiguous" under the Spending Clause. *Ohio v. Yellen*, 547 F. Supp. 3d 713, 740 (S.D. Ohio. 2021).

The Treasury Department appeals, arguing, among other things, that the district court should never have reached the merits of this case, as Ohio failed to establish a justiciable controversy. We agree with Treasury. Regardless of standing, the controversy is moot. Treasury later promulgated a regulation (the "Rule") disavowing Ohio's interpretation of the Offset Provision and explaining that it would not enforce the Provision as if it barred tax cuts *per se*. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786 (proposed May 17, 2021) (interim final rule); *see also* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338 (Jan. 27, 2022) (final rule); 31 C.F.R. § 35 *et seq.* We have no reason to believe that Treasury will not abide by its disavowal of Ohio's interpretation of the Offset Provision as it administers the statute. So, we hold, Treasury's credible disavowal of Ohio's broad view of the Offset Provision mooted the case. We thus reverse the district court's determination that the case is justiciable and vacate the permanent injunction.

I.

Like its sister-states, Ohio stood poised to receive billions of dollars from the federal government if it

agreed, in accepting its ARPA funds, to abide by a number of attached conditions. For instance, the Act provides that states must expend their funds in four particular areas that Congress deemed relevant to recovery from the pandemic:

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (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;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

42 U.S.C. § 802(c)(1)(A)–(D).

The Act also provides that states may *not* use their ARPA funds for two particular applications. For

instance, "[n]o State or territory may use funds made available under this section for deposit into any pension fund." § 802(c)(2)(B). Nor may the states use ARPA funds:

> 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.

§ 802(c)(2)(A). This is the so-called "Offset Provision"—which Ohio has labeled the "Tax Mandate"—that lies at the center of the present suit.

Accompanying the Offset Provision are a couple of related enforcement mechanisms. First is the statute's reporting requirement, which instructs the states:

> To provide to the Secretary periodic reports providing a detailed accounting of—
>
> (A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and
>
> (B) such other information as the Secretary may require for the administration of this section.

§ 802(d)(2)(A)–(B). Second is the statute's recoupment procedure. Should a state violate the Act's

requirements, Treasury may initiate a recoupment action to seek reimbursement from a state "equal to the amount of funds used in [the] violation." § 802(e).

Six days after President Biden signed this text into law, Ohio filed its complaint outlining its objections to the Offset Provision. First was its Spending Clause coercion argument. In essence, Ohio said, by offering such a generous aid package during an economic crisis, the federal government left Ohio with "no real choice" but to accept the funds. Complaint ¶40, R. 1. And such coercion was especially egregious because of its intrusion upon Ohio's "sovereign authority to set tax policy as it sees fit." *Id.* ¶41. Specifically, "because changes to tax policy that reduce revenues violate the Tax Mandate," Ohio alleged, the federal government had essentially conditioned the aid on Ohio's promise not to reduce taxes during ARPA's "covered period." *Id.* Otherwise, "[s]uch violations could be used to force the State to return funding received through the Act." *Id.* Second, Ohio claimed that the Offset Provision also violates the Spending Clause because "it is ambiguous regarding what precisely constitutes a change in tax policy that 'indirectly' offsets a loss in revenue." *Id.* ¶43. Yet "Spending Clause legislation must articulate 'unambiguously' the conditions it imposes on the states." *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1983)).[1] And last, Ohio relatedly alleged that

[1] Ohio appears to have made these arguments in the alternative: that the Offset Provision either (1) forbids tax cuts, making it an unconstitutional intrusion upon state taxing authority, or, alternatively, (2) at least *could be read* to forbid tax cuts, but does not forbid such cuts sufficiently clearly to satisfy the Spending Clause.

Congress had violated the Tenth Amendment by "commandeer[ing] state taxing authority" with the Offset Provision. *Id.* ¶48.

On the same day it filed its complaint, Ohio also moved for a preliminary injunction. *See* Mot. for Prelim. Injunction, R. 3. It asked the district court to restrain the Treasury Department from pursuing any recoupment action during the litigation—until the district court could rule on Ohio's ultimate request for permanent-injunctive relief. And its accompanying memorandum further described the nature of Ohio's constitutional challenges. As to ambiguity, Ohio pointed out the basic principle that "[m]oney is fungible." *Id.* at 1 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010)). Thus, it said, "any money that a State receives through the Act will necessarily offset, either directly or indirectly, every tax reduction that the State might pursue." *Id.* So the Offset Provision, which contains a prohibition on "indirectly" offsetting a tax cut with ARPA funds, could at least arguably be construed to bar states' ability to pursue tax cuts. *See, e.g.*, *id.* at 5 ("[E]very change in tax policy that leads to a decrease in tax revenue violates the Tax Mandate."). But even assuming that Congress might otherwise be able to impose such a condition with *unambiguous* text, Ohio argued alternatively, it couldn't have done so in *these* circumstances. For offering the state $5.5 billion in the midst of a crisis went beyond mere "mild encouragement" to surrender control over state taxation policy. *Id.* Such a generous offer was instead asserted to represent the very "coercion" and "dragooning" the Supreme Court has held the Spending Clause to forbid. *Id.* at 10–11 (citing *Nat'l*

Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 582 (2012) (opinion of Roberts, C.J.)). Accordingly, Ohio asked the district court to enjoin enforcement of—and *only* of—the Offset Provision. *Id.* at 18 ("Ohio seeks to enjoin *only* the Tax Mandate[.]"). It thus left unchallenged ARPA's corollary restrictions, such as the four approved spending categories and the reporting requirement.

Treasury responded about a month later. It argued as an initial matter that Ohio's challenge was not justiciable under Article III. Ohio lacked standing, it said, because it had not alleged that it planned to enact "*any* tax cut, let alone shown that any hypothetical tax cut [would] decrease net tax revenue[,] or that the State plans to use Rescue Plan funds to offset that theoretical reduction." Opp'n to Mot. for Prelim. Injunction at 1, R. 29. Relatedly, it argued that Ohio's challenge was unripe. *Id.* at 1–2; *see also id.* at 8–12. Ohio's asserted injury was a potential recoupment action, yet Ohio had given the court no reason to think such enforcement proceedings were imminent. And it opposed Ohio's merits arguments across the board, contending that the Offset Provision was neither coercive (it does not threaten to take away *existing* state funds) nor ambiguous (it clearly conditions states' receipt of ARPA funds on a promise not to use such funds to finance state tax cuts). *See id.* at 12–23.

Soon after that briefing, the district court held a hearing on the preliminary injunction, and it issued its decision denying such relief in May 2021. It agreed with the Treasury Department that Ohio's imminent-recoupment theory could not suffice for Article III

jurisdiction, given that an enforcement action was then "too remote to satisfy the injury-in-fact requirement." Op. & Order at 17, R. 36. The district court reasoned that Ohio had not yet accepted ARPA funds at that point, so it was difficult to see why any enforcement proceeding might soon transpire. *Id.* For the same reason, it declined to issue a preliminary injunction on the merits: Because it was doubtful that Treasury would pursue recoupment before the district court could rule on Ohio's request for permanent relief, the district court exercised its equitable discretion to withhold preliminary relief. *Id.* at 32–35.

But the district court declined to dismiss Ohio's entire case on justiciability grounds, given its conclusion that Ohio was suffering a distinct, justiciable injury: the receipt of an "unconstitutionally ambiguous" spending offer. *Id.* at 15, 17–18. The district court reasoned that, under the Supreme Court's Spending Clause jurisprudence, states have the right to receive a spending offer that is unambiguous about whatever conditions it requires. *See, e.g.*, *id.* at 9 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Yet the Offset Provision was far from clear. *See, e.g.*, *id.* at 27. Its prohibition on "indirect" offsets, for instance, at least arguably could be read in the way that Ohio asserted it could: to prohibit essentially *any* tax cuts during ARPA's covered period. *Id.* at 26–27. True, Treasury disputed Ohio's reading and attempted to offer its own narrowing construction. *See, e.g.*, Opp'n to Mot. for Prelim. Injunction at 2–3, 21–23, R. 29. But because the Offset Provision itself did not clearly proscribe such cuts, the district court said, Ohio had suffered an "affront" to its sovereignty. Op. at 17, R. 36. In

essence, it was forced to "ponder accepting an ambiguous deal." *Id.* at 15. So the district court believed *that* injury, even if insufficient for a preliminary injunction, sufficed to establish jurisdiction concerning the case overall. *Id.*

A day later, on May 13, 2021, Ohio accepted its ARPA funds. *See* Murnieks Dec. ¶3, R. 38-1. It thus certified to the federal government that it would comply with the Offset Provision and the "regulations implementing [it]." Award Terms & Conditions, R. 38-1. Six days later, however, it filed its combined motion for a declaratory judgment that the Offset Provision is unconstitutional and a permanent injunction against the Offset Provision's enforcement.

Treasury's response argued, once again, that Ohio's challenge was both nonjusticiable and failed on the merits. At the permanent-injunction stage, however, it offered slightly different justiciability objections. First, Treasury pointed out that Ohio could no longer rely upon the injury the district court had first found persuasive: that the state was being forced to decide whether to accept the funds under the cloud of allegedly ambiguous conditions. Opp'n to Mot. for Permanent Injunction at 7–8, R. 45. For Ohio now *had* accepted the funds, mooting any concern about whether Ohio was suffering "a cognizable injury from uncertainty over the proposed deal." *Id.* at 8. Second, even if the Offset Provision itself were ambiguous, Treasury had now promulgated an Interim Final Rule ("IFR")—posted three days before Ohio had accepted the funds and published in the Federal Register four days after—that clarified Ohio's particular obligations. *Id.* at 8–9. And, indeed, the IFR

disavowed Ohio's broad, money-is-fungible reading of the Offset Provision. *See* 86 Fed. Reg. at 26,807. Treasury explained that it did not read the Offset Provision to proscribe tax cuts *per se*, but only to bar tax cuts that (1) result in revenue reductions, and (2) for which a state fails to identify a permissible source of alternative offsetting funds, such as funds derived from a state tax increase on another activity, from a state spending cut in an area where the state is not expending ARPA funds, or from macroeconomic growth. *Id.* So Treasury claimed that the IFR had likewise mooted Ohio's "supposed ambiguity-as-injury" argument. Opp'n to Mot. for Permanent Injunction at 8, R. 45. And last, Treasury again pressed its view that the Offset Provision was neither coercively imposed nor a violation of the Tenth Amendment. *Id.* at 10–23.

The district court confronted these issues in its opinion and order on the permanent injunction, issued on July 1, 2021. *See Ohio*, 547 F. Supp. 3d at 713. Of particular importance is the district court's rationale for why it believed Ohio's challenge remained justiciable—even after Ohio's acceptance of the funds and after Treasury's promulgation of the IFR. The district court acknowledged that the initial reason for why it believed Ohio's challenge justiciable—that Ohio was "contemplating whether to accept an ambiguous deal"—was "now gone." *Id.* at 724–25. Ohio had already accepted the funds, in other words, and so it was no longer "ponder[ing]" whether to accept the deal under a cloud of uncertainty. *Id.* But with *that* injury moot, the district court reasoned that the challenge remained justiciable because of a different injury Ohio was now suffering: that, having

accepted the funds, it faced an "unlawfully-imposed quandary in determining how to exercise its sovereign taxing power." *Id.* at 725.

This particular theory of injury was intertwined with the district court's merits conclusion about the Offset Provision—that it is "unconstitutionally ambiguous" under the Spending Clause. *Id.* In essence, it said, because of the Offset Provision's indeterminacies, Ohio still labors under significant uncertainty about when Treasury might deem it to have "indirectly offset" a tax cut with ARPA spending. *Id.* at 725–27. And so the Offset Provision continued to unlawfully intrude upon Ohio's sovereign taxing authority, since it "cast[s] a pall over legislators' abilities to contemplate such tax changes." *Id.* at 725. Moreover, it concluded, the IFR could not cure that "pall" by providing the guidance required to make the funding conditions sufficiently clear to satisfy the Spending Clause. It grounded that conclusion on two bases. First, as it had already explained in its preliminary-injunction opinion, the IFR was just that—an *interim* final rule—and so its details could at least potentially change after the notice-and-comment period when Treasury promulgated its Final Rule. Op. at 28, R. 36. And second, in any event, the district court suggested that the Rule was simply *ultra vires* agency action. *Ohio*, 547 F. Supp. 3d at 734–39. For under the federalism canon and the major-questions doctrine, Congress had not delegated to Treasury, with sufficient clarity, the authority to promulgate a rule attempting to clarify the Offset Provision. *Id.* The district court thus concluded that the IFR's promulgation had not mooted Ohio's case.

On the merits, the district court then explained its view that the Offset Provision is "unconstitutionally ambiguous" under the Spending Clause. *Id.* at 740. Two major indeterminacies in the text of the Provision drove that conclusion. First, its prohibition on "indirect" offsets provides little guidance about when Treasury might deem Ohio to have used ARPA funds for an impermissible purpose. *Id.* at 731–33. Money is fungible, after all, and so the Offset Provision at least arguably could be read to proscribe Ohio's desired tax cuts during ARPA's "covered period." *Id.* at 733. Moreover, the Offset Provision itself never explains the fiscal-year baseline against which Treasury will measure a "reduction" in net tax revenue. *Id.* at 731–32. And, depending on whichever baseline Treasury selects, Ohio's obligations could change substantially. The district court thus permanently enjoined the Treasury Department from enforcing the Offset Provision against Ohio. *Id.* at 741. Treasury timely appealed.

II.

The district court's permanent-injunction order was a "final decision." *See, e.g.*, *Trayling v. St. Joseph Cnty. Emps. Chap. of Local #2995*, 751 F.3d 425, 426 (6th Cir. 2014). As a result, we have statutory jurisdiction to consider Treasury's appeal under 28 U.S.C. § 1291. We examine Article III jurisdiction below.

III.

A fundamental principle under Article III is that we may adjudicate only live cases or controversies. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Thus, the plaintiff must show at the outset of

the suit its standing to sue—that it has suffered an actual or imminent and concrete and particularized injury in fact traceable to the defendant and likely to be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). And the plaintiff must continue to have a live interest in such a remedy throughout the proceeding. *Trump v. New York*, 141 S. Ct. 530, 534 (2020). If that interest is lost—for instance, through the advent of an "intervening circumstance" after the complaint is filed—then the plaintiff's case may become moot. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). When that intervening circumstance is the defendant's voluntary abandonment of a contested behavior, however, the case remains live unless the defendant establishes that there is no "reasonable possibility" it will resume such behavior. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 529 (6th Cir. 2022) (en banc).

Applying those principles, we conclude that, irrespective of whether Ohio established its initial standing to sue, its challenge is now moot.[2] As the

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[2] Though we must dismiss a cause before reaching the merits upon the discovery of a jurisdictional defect, "there is no mandatory 'sequencing of jurisdictional issues.'" *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Rather, "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Id.* (citing *Ruhrgas*, 526 U.S. at 585). Thus, we need not conclusively decide whether Ohio's theories sufficed to establish its standing when the complaint was first filed. We are barred from reaching the merits in any event because of our

district court itself acknowledged, the injury that Ohio asserted in its complaint—that it was "ponder[ing]" whether to accept its ARPA funds under a cloud of uncertainty about the Offset Provision's meaning—"is now gone." *Ohio*, 547 F. Supp. 3d at 724. Ohio accepted the funds nonetheless, and so it is no longer contemplating whether to take them. *That* alleged injury is now well in the past. But there is, of course, no jurisdiction for injunctive relief unless the plaintiff establishes why a past harm is inflicting some injury at present or is likely to inflict some injury in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *see also Kanuszweski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 406 (6th Cir. 2019). Thus, as the district court recognized, Ohio cannot rest on its claim that it was injured by having had to "ponder" a deal with unclear conditions. *Ohio*, 547 F. Supp. 3d at 724. It instead must illustrate some ongoing or imminent future injury to keep the case alive.

The district court thought that showing satisfied, however, by what we will label the "pall" theory—that, at present, the Offset Provision "casts a pall over [Ohio's] abilities to contemplate" desired tax changes because it must labor under "an unlawfully-imposed quandary in determining how to exercise its sovereign taxing power." *Id.* at 725. The district court believed that this "pall" theory was distinct from the question whether any recoupment action is imminent, and so Ohio's challenge remained live even if there were no

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determination that Ohio's challenge is moot. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

realistic, imminent prospect of recoupment. *Id.* at 726–27 (claiming that Ohio "need not rely on the prospect of future recoupment to avoid mootness"). So it deemed the case live on that basis and entered its injunction accordingly.

Yet we cannot agree that Ohio's challenge remained live even absent any imminent recoupment action. The very reason why there might be some "pall" over Ohio's tax policy is because pursuing a particular policy could entail a real-world consequence—a recoupment action. It is not enough that a statute may impose some "subjective chill" in the abstract upon a plaintiff's desired course of conduct.[3] *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (quotation marks omitted); *see also Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008). Rather, to mount a pre-enforcement challenge and obtain an injunction, the plaintiff must show why there is some realistic, likely risk of an enforcement proceeding if it were to engage in its desired behavior. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). After all, equity does not enjoin laws themselves, but enjoins officials from

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[3] We also note that it is difficult to see how the "pall" theory aligns with Ohio's real-world behavior. Even before the district court imposed its injunction, Ohio enacted a sizeable tax cut. *See* Appellee's Br. at 42. True, that was after the district court deemed the Offset Provision likely unconstitutional in its opinion denying a preliminary injunction. *Id.* at 48. But Ohio presented no evidence that its legislators considered any potential ramifications from the Offset Provision before enacting that tax cut. *See* Appellants' Br. at 10 ("Ohio identifies nothing in the record suggesting that the Offset Provision played any role in state legislators' enactment of that budget.").

taking action based upon those laws. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)). And, moreover, justiciability must be established with the degree of evidence required at each successive stage of the proceeding. *Lujan*, 504 U.S. at 561. To obtain a permanent injunction, therefore, Ohio needed to submit concrete evidence about why Treasury might imminently pursue a recoupment action in response to its behavior past, present, or future.

But in this regard, Ohio came up short. Its steadfast contention below was that Treasury *could* read the Offset Provision in a broad way—as barring *any* tax cut during ARPA's covered period—and thus that it risked recoupment should it exercise its sovereign prerogative to cut taxes. Yet Treasury repeatedly disavowed Ohio's money-is-fungible reading of the statute. It did so in its briefing below, in the Interim Final Rule,[4] in its briefing before us,

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[4] As we mentioned, the district court held that the Interim Final Rule did not suffice to moot the case because it was merely interim and thus could be revised through the notice-and-comment process. Op. at 28, R. 36. But even if we assume that particular ruling is correct, Ohio has conceded that the Final Rule is the same as the Interim Final Rule in all respects material to this dispute. *See* Flowers Letter, ECF No. 49 ("Because the Final Rule is materially identical to the interim final rule in all respects relevant to this case, its issuance does not affect the analysis of the questions presented."). So even if there were a possibility Treasury could have modified its view of the Offset Provision from the Interim Final Rule to the Final

and in the Final Rule as well.[5] *See, e.g.*, Opp'n to Mot. for Prelim. Injunction at 17–18, R. 29; 86 Fed. Reg. at 26,807; Appellants' Br. at 5; 87 Fed. Reg. at 4,426. In the face of those facts, we conclude that Treasury established there is no "reasonable possibility" it will adopt Ohio's broad view of the Offset Provision.

Rule in a way that could have saved Ohio's claims, in actual fact, it did not.

[5] We have no need to opine here on whether agency regulations may validly clarify an otherwise-ambiguous Spending Clause condition or whether, even if an agency could do so for ordinary spending legislation, it could not have done so here under the major-questions doctrine or federalism canon. *Contra Ohio*, 547 F. Supp. 3d at 734–39. The argument that the Rule is *ultra vires* under the major-questions doctrine or federalism canon might have supported an attempt to seek vacatur of the Rule under 5 U.S.C. § 706, but Ohio has never asked for vacatur of the Rule. So the still-standing Rule continues to bind Treasury in its administration of the statute. The justiciability of Ohio's pre-enforcement constitutional challenge thus hinges on whether it showed it would violate *the Rule*—irrespective of whether the Rule is potentially unauthorized or does not represent the best reading of the statute—since violation of the Rule is what would provoke recoupment. In other words, even if the underlying spending legislation here *is* constitutionally infirm, the unchallenged Rule has prevented Ohio, based on the harms it asserted, from having established a concrete controversy in which it could advance its merits objections to the Offset Provision. We would also note that even if the Rule *were* vacated, Treasury has consistently represented that the text of the Offset Provision *alone* refutes the money-is-fungible interpretation. *See, e.g.*, Opp'n to Mot. for Prelim. Injunction at 17–18, R. 29 (explaining Treasury's position, before the advent of the IFR, that the text of the Offset Provision alone did not support Ohio's reading); *see also* Recording of Oral Arg. at 7:21–9:00 (disclaiming that the validity of the Offset Provision hinges "in any way" on the Rule, calling the Rule "not relevant," and arguing that the statute is valid on its own).

Resurrection Sch., 35 F.4th at 525. As a result, Ohio needed to establish why it would not only enact a tax cut, but *also* that such a cut would (1) result in a reduction in its net tax revenue, and (2) that Ohio would then offset such a reduction with ARPA funds, or (3) fail to identify a permissible source of offsetting funds from a state spending cut, state tax increases in some other area, or macroeconomic growth. 86 Fed. Reg. at 26,807; 87 Fed. Reg. at 4,426. Only *then* would Treasury seek recoupment. But we have no evidence that Ohio will pursue that course of conduct. So we have no reason to believe that Treasury will initiate recoupment against any policy that Ohio has shown, with evidence, it intends to pursue.

Resisting that conclusion, Ohio claims on appeal that it still suffers five distinct and cognizable injuries from the Offset Provision, and so its challenge remains live. We find none of those arguments persuasive, however, and we will address them one by one.

First, Ohio says, it was injured when it was denied its entitlement to an unambiguous and non-coercive offer. Appellee's Br. at 46–48. Yet we have already largely dealt with this assertion above. Even assuming that the initial offer was ambiguous or coercive, those are merely past injuries. That a past offer could have been clearer or fairer does not create jurisdiction for injunctive relief. Rather, Ohio had to establish why that past injury had some continuing negative effect redressable with a prospective remedy. *See Lyons*, 461 U.S. at 105; *see also Kanuszweski*, 927 F.3d at 406. So this theory of injury is insufficient, by itself, to establish jurisdiction.

Second, perhaps realizing this prospectivity issue, Ohio asserts that the Offset Provision "arguably proscribes" its desired tax policies. Appellee's Br. at 41–43, 49. Ohio makes that argument by asserting, again, that "any revenue-negative reduction in tax rates *could be* read to contravene the Mandate." *Id.* at 42. But even assuming that's true, Treasury subsequently explained that it does *not*, in fact, read the Offset Provision as proscribing "*any* revenue-negative reduction in tax rates." *Id.* (emphasis added). Nor will it take enforcement actions based on tax cuts *per se*. Rather, it has repeatedly explained its position that it will pursue recoupment under the Offset Provision only should a state enact a revenue-reducing tax cut *and* then fail to identify a permissible source of offsetting funds, such as those derived from other state tax increases, state spending cuts, or macroeconomic growth. So even if the Offset Provision "*could be* read" in a broader way, Treasury pointedly does *not* read it that way. Given that Treasury has repeatedly and credibly disavowed Ohio's broad reading of the Offset Provision, we fail to see why there is a reasonable possibility of a recoupment action predicated on that broad reading. *See Missouri v. Yellen*, 39 F.4th 1063, 1069 (8th Cir. 2022).

Third, Ohio asserts, with little elaboration, that the Offset Provision interferes with its sovereign authority and the "orderly management" of its affairs. Appellee's Br. at 43–44. Again, however, we cannot see how this can be so, when, after Treasury's disavowals, Ohio never established any particular conduct it wishes to pursue but against which Treasury may credibly take action. Nor, as we explain below, did Ohio put forth any concrete evidence about

how the Offset Provision interferes with the "orderly management" of its affairs, at least in a way that might be redressed by enjoining enforcement solely of the Offset Provision.

Fourth, Ohio argues that it was injured when it was forced to choose between "receiving federal benefits" or "surrendering some of its sovereign authority over tax policy." Appellee's Br. at 45. But for the reasons we have already explained, a past choice without a demonstrated continuing negative effect does not establish jurisdiction for injunctive relief. *See Lyons*, 461 U.S. at 105; *see also Kanuszweski*, 927 F.3d at 406. Nor has Ohio established a continuing and concrete harm, given that it has identified no policy it wishes to pursue but that Treasury regards as proscribed. So there is no reason to suppose, based on what Ohio has shown it wishes to do, that there is a reasonable possibility Treasury will hale it into a recoupment action that a federal court of equity might enjoin.

Fifth and last, Ohio claims that the Offset Provision inflicts compliance costs upon it that would be redressed by letting the injunction stand. Appellee's Br. at 45–46. It says that these costs arise in two discrete ways. First, "States that accept Rescue Plan funds are statutorily bound to provide a 'detailed accounting' proving their compliance with, among other things, the Mandate." *Id.* at 46 (citing 42 U.S.C. § 802(d)(2)). And second, it asserts, Ohio has been "forced to reallocate resources to ensuring compliance with the Mandate." *Id.* Yet, separate from our mootness analysis above, we find neither of these

points sufficient to have even established Ohio's standing to seek an injunction of the Offset Provision.

Take the point about the reporting requirement first. Unlike the Offset Provision—which represents a substantive prohibition on how states may use ARPA funds—the reporting requirement simply instructs states to *report* "the uses of [such] funds" and "other information" pertinent to "the administration of this section." 42 U.S.C. § 802(d)(2)(A)–(B). So it is possible for a state to be in compliance with the Offset Provision—using ARPA funds exclusively for permissible purposes—yet in violation of the reporting requirement, should it fail to convey a "detailed accounting" of those permissible uses to Treasury. *Id.* Or, conversely, a state could violate the Offset Provision—directly or indirectly offsetting tax cuts with ARPA funds—and remain in compliance with the reporting requirement, so long as it informed Treasury that it was using ARPA funds for impermissible purposes. *Compare* 42 U.S.C. § 802(c)(2)(A), *with* § 802(d)(2)(A)–(B). So the Offset Provision and the reporting requirement are simply different portions of the statute with different purposes and different effects on the states.

But those facts are fatal to Ohio's compliance-costs argument. For even if enforcement of *the Offset Provision* were enjoined, Ohio still would have to furnish a "detailed accounting" of how it used its ARPA funds so that Treasury could ensure Ohio's compliance with all the other *unchallenged* use restrictions. *See, e.g.*, 42 U.S.C. § 802(c)(1)(A)–(D). Additionally, Ohio never waged the uphill battle that the Offset Provision and reporting requirement are

inseverable, so that an injunction against the Offset Provision brings down the reporting requirement as well. *Cf. Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020); *Free Enter. Fund v. Pub. Co. Acc. Oversight Bd.*, 561 U.S. 477, 508 (2010). To the contrary, Ohio was adamant that its challenge is *only* to the Offset Provision; it makes no claim that the reporting requirement itself is void or unenforceable. *See, e.g.*, Mot. for Prelim. Injunction at 18, R. 3 ("Ohio seeks to enjoin *only* the Tax Mandate[.]"). Thus, to establish a compliance-costs injury from the reporting requirement redressable by enjoining enforcement of the separate Offset Provision, Ohio would have needed evidence about why the reporting-costs burden would have been lowered from the injunction even if the reporting requirement itself were left operable. Yet Ohio furnished no such evidence to the district court. So we have no evidentiary basis to conclude that an injunction against the *Offset Provision* is somehow redressing a compliance-costs injury traceable to the separate and unchallenged reporting requirement.

That leaves us with Ohio's vague claim about how it has been "forced to reallocate resources to ensuring compliance with the Mandate." Appellee's Br. at 46. Ohio never made this allegation in its complaint, *see* Recording of Oral Arg. at 12:20–12:40; *cf. Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004) ("Standing is to be determined as of the time the complaint is filed." (cleaned up)), and it has provided no insight about the alleged resources it is referring to. Moreover, Ohio had the burden to establish whatever such costs have ensued with *evidence*; conclusory allegations about them in its briefing could not suffice. Yet Ohio put forth no "specific facts" by "affidavit or other evidence"

about what, if any, particular resources it has reallocated to ensure compliance with the Offset Provision. *Lujan*, 504 U.S. at 561.[6] As to the resource-reallocation claim, therefore, we lack the requisite basis to conclude that Ohio established a concrete and particularized injury in fact.

IV.

As Treasury itself acknowledges, our decision today does not permanently deprive Ohio of the opportunity to challenge any of ARPA's funding conditions. Appellants' Br. at 10–11; Reply Br. at 7–8. Rather, should a future, justiciable dispute arise, Ohio may reassert its merits arguments therein. *Id.* But Ohio did not establish that *this* challenge is justiciable. Accordingly, we reverse the district court's determination otherwise and vacate the permanent injunction.

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[6] That the Supreme Court was speaking here in the context of the showing required to illustrate justiciability at a summary-judgment proceeding only underscores the deficiency of Ohio's showing. For "the proof required for the plaintiff to obtain a [permanent] injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000); *see also McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:21-cv-181

JUDGE DOUGLAS R. COLE

STATE OF OHIO,

Plaintiff,

v.

JANET YELLEN, SECRETARY OF THE TREASURY, et al., [1]

Defendants.

OPINION AND ORDER

Through the American Rescue Plan Act ("ARPA"), Congress has exercised its power under the Spending Clause to make nearly $200 billion available to the States to assist with their COVID-19-ravaged state coffers. But that money comes at a price. To receive its share, a State must agree to be bound by certain conditions. In this action, Ohio sues the Secretary of the Treasury (who is charged with enforcing aspects of ARPA) claiming that one of those conditions—which it calls the "Tax Mandate"—exceeds Congress's

[1] The Defendants to this lawsuit are 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 Treasury; and the United States Department of the Treasury. The Court refers to the Defendants collectively throughout this opinion as "Secretary."

authority. Ohio argues that this overstep threatens to undermine the federalist system our Constitution enacts.

Before accepting the funds ARPA made available, and thereby subjecting itself to ARPA's conditions, Ohio sought a preliminary injunction to prohibit the Secretary from enforcing the Tax Mandate while this suit is ongoing. The Court denied that request. Now, having opted in to ARPA, Ohio seeks a permanent injunction to prevent the Secretary from enforcing the Tax Mandate against the State.

Ohio's action raises fundamental constitutional concerns. The Constitution incorporates strong separation-of-powers principles. That is true both as between the federal government and the States, which the Constitution makes dual sovereigns, and within the federal government itself, where the Constitution allocates separate powers to the Legislature, the Executive, and the Judiciary. And this is not division for division's sake. At its founding, the country had just escaped a system that concentrated vast governmental power in a single person—the monarch. The Framers adopted a system of checks and balances meant to prevent that coalescence from reemerging here—a structural mechanism to promote the underlying goal of individual liberty.

Ohio's arguments here, and the Secretary's response, require the Court to consider both federal/state (sometimes called "vertical") and intra-federal (sometimes called "horizontal") separation-of-powers principles. In particular, Ohio claims that the Tax Mandate is ambiguous, and that this ambiguity violates settled Spending Clause jurisprudence that

requires Congress to clearly state any conditions it imposes on federal grants offered to the States. And here, Ohio says, that violation results in an impermissible federal intrusion on the States' sovereign authority to tax, a power that the Supreme Court has long recognized as "indispensable" to the States' very "existence." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).

The Secretary's efforts to refute these ambiguity concerns, meanwhile, implicate horizontal separation-of-powers concerns. That is so because, according to the Secretary, even if the Tax Mandate were unconstitutionally ambiguous (which the Secretary disputes), recently issued Treasury Department regulations clarify the Tax Mandate's contours, and thus cure any potential constitutional defect. But that argument raises questions about the extent to which Congress can delegate to an agency the power to "fix" shortcomings in legislative enactments that make conditional grants to the States under the spending power, a thorny issue in its own right.

Separately, the Secretary also raises a jurisdictional challenge to this Court's power to hear the case, which is itself another aspect of the horizontal separation-of-powers framework. Under the Constitution, the judicial power extends only to "live" disputes. Here, the Secretary notes that the original harm that Ohio claimed in filing suit—the difficulty that the Tax Mandate's ambiguity created for Ohio in deciding whether to accept the funding—ended when, ambiguity notwithstanding, Ohio filed its certification with the Secretary, which bound Ohio to ARPA's terms. And the Tax Mandate's alleged

ambiguity cannot harm Ohio going forward, the Secretary says, as the Treasury Department regulations have now clarified the Tax Mandate's terms.

None of these are easy questions. As to many parts of the necessary analysis, case law is sparse or itself somewhat ambiguous. Ultimately, though, the Court concludes that Ohio has articulated an ongoing harm arising from the alleged ambiguity in the Tax Mandate, thus creating jurisdiction for this Court to hear Ohio's challenge. On the merits, the Court concludes that the Tax Mandate, as written, falls short of the clarity that Supreme Court precedent requires for Spending Clause legislation that provides conditional grants to the States. And the Court also rejects the Secretary's argument that the Treasury Department regulations cure that ambiguity. In that regard, the Court stops short of holding that Congress can *never* authorize an agency to supply the requisite clarity, but instead holds that, under ARPA, Congress did not do so here.

Accordingly, the Court finds that the Tax Mandate exceeds Congress's power under the Constitution. The Court further finds that Ohio has met the conditions for injunctive relief to prevent the ongoing harm that this constitutional violation is causing. Thus, the Court **PERMANENTLY ENJOINS** the Secretary from enforcing the Tax Mandate against Ohio. But, because the permanent injunction suffices to remedy

Ohio's ongoing harm, the Court **DENIES** Ohio's requested declaratory relief.[2]

BACKGROUND

A. The COVID-19 Pandemic.

As the Court explained in its previous Opinion,[3] the COVID-19 pandemic has inflicted far-reaching, unprecedented consequences on nearly every aspect of life, not only in the United States, but around the world. While the United States appears to be emerging from the worst of the pandemic, at least in terms of ongoing public health and economic impacts, the lingering economic consequences of earlier pandemic-related disruptions continue to present challenges for state budgets, including Ohio's.

B. The America Rescue Plan Act.

On March 11, 2021, President Biden signed ARPA into law. ARPA represents Congress's latest effort to address the harms, including economic harms, that COVID-19 caused. It is a wide-ranging law that commits the federal government to spending up to roughly $1.9 trillion on a host of goods, services, and other forms of governmental assistance.

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[2] Consistent with the above, the Court also **DENIES** the Secretary's Motion to Dismiss.

[3] The Court issued a previous Opinion (Doc. 36) in this matter on May 12, 2021, denying Ohio's request for a preliminary injunction. In that Opinion, the Court covered many of the same background facts, and many of the same legal issues, that this Opinion addresses. To prevent the need to read both Opinions together, the Court endeavors to make this Opinion a standalone document, although that necessarily involves some repetition of the materials presented in the earlier Opinion.

Central to this case, ARPA appropriates approximately $195.3 billion in funding designed to assist the States with their COVID-19-related financial woes. *See* 42 U.S.C. § 802(b)(3)(A). Ohio's share of that funding amounts to $5.4 billion. (Murnieks Decl., Doc. 48-1, #778). Ohio argues, and the Secretary does not dispute, that this amount reflects roughly 7.4% of the State's total spending last year. (Mot. for Prelim. Inj., Doc. 3, #33).

As is often the case with federal dollars, ARPA money comes with strings attached. In particular, to qualify for the funding, a State must "provide the Secretary [of the Treasury] with a certification, signed by an authorized officer of such State … that such State … requires the payment … to carry out the activities specified in subsection (c) … and will use any payment under this section … in compliance with subsection (c)." 42 U.S.C. § 802(d)(1). The Secretary is to "make the payment required for the State … not later than 60 days after the date on which th[at] certification … is provided to the Secretary." *Id.* § 802(b)(6)(A)(i).

As the above language suggests, the conditions themselves are set forth in subsection (c). That subsection provides that a State shall only use the funds to cover the following types of costs incurred by the State:

> (A) to respond to the public health emergency with respect to [COVID-19] or its negative economic impacts …

> (B) to respond to workers performing essential work during the COVID-19 public health emergency …
>
> (C) for the provision of government services to the extent of the reduction in revenue of such State … due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State … prior to the [pandemic] … or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1)(A)–(D). And the State must use the funds for those purposes by December 31, 2024. *Id.* § 802(c)(1).

Ohio does not dispute the validity of any of the above conditions. But ARPA also imposes certain other terms. As relevant here, in a section labeled "Further Restriction On Use Of Funds," ARPA provides that:

> (A) IN GENERAL.—A State or territory shall not use the funds provided under this section … to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

Id. § 802(c)(2)(A). Ohio refers to this provision as the Tax Mandate, and that provision forms the gist of the dispute here.

C. Ohio Sues The Secretary And Seeks A Preliminary Injunction.

On March 17, 2021, Ohio filed this suit claiming that the Tax Mandate is unconstitutional. This is so, Ohio says, for two reasons. First, the Tax Mandate allegedly violates the Spending Clause in two ways—it is both unconstitutionally coercive and unconstitutionally ambiguous. (Compl., Doc. 1, #9–10). And second, Ohio claims that the Tax Mandate violates the Tenth Amendment, in that it unconstitutionally commandeers state taxing authority. (*Id.* at #11).

On the same day it sued, Ohio moved for a preliminary injunction preventing the Secretary from enforcing the Tax Mandate during this litigation's pendency. (Doc. 3). The Court heard argument on that motion on April 30, 2021. During that argument, the parties focused on the Spending Clause, and particularly the ambiguity issue. The Secretary largely conceded that the Tax Mandate was at least somewhat unclear as written, but offered a few arguments as to why that ambiguity did not amount to a Spending Clause problem this Court could redress. As a threshold matter, the Secretary said, Ohio lacked standing. That was so, the argument went, because the State was not currently suffering an injury in fact absent an imminent threat of recoupment. On the merits, the Secretary pressed two arguments. First, the Secretary argued that a statute need only make clear that there *is* a condition on the federal grant, not provide clarity as to what *the terms* of that condition are. Second, the Secretary argued, while the statutory text may not be clear as written,

help was on the way in the form of upcoming Treasury Department regulations to provide further guidance about the Tax Mandate's meaning.

True to its word, on May 10, 2021, the Treasury Department issued an Interim Final Rule ("IFR") expounding on how the Department would assess compliance with the Tax Mandate. The Secretary provided this Court a Notice of that rule. (Doc. 33). The IFR is further described below, as relevant.

D. The Court Denies Ohio's Request For A Preliminary Injunction.

Two days after the Department issued the IFR, on May 12, 2021, the Court denied Ohio's motion for a preliminary injunction. The Court started by addressing the jurisdictional question. On that front, the Court held that the Spending Clause entitled Ohio to clarity regarding the "terms of the deal," so that Ohio could exercise its sovereign prerogative of electing whether to accept the federal government's offer, or not. (Op. and Order, Doc. 36, #554). Depriving Ohio of the constitutionally-mandated clarity regarding that decision, the Court said, was a sufficient injury for Article III standing purposes, if "barely." (*Id.*, #553).

As for the appropriateness of a preliminary injunction, the Court began by finding that Ohio had shown a likelihood of success on the merits of its constitutional claim. More specifically, the Court concluded that the Tax Mandate's language fell well short of the clarity threshold that Spending Clause jurisprudence imposes. (*Id.*, #556). While acknowledging the IFR, the Court noted that the regulation's impact on the Spending Clause analysis

was, at the time, uncertain and unbriefed. (*Id.*, #558). And, given that Ohio needed only to show that it had a likelihood of success, not a certainty of it, the Court concluded that Ohio had met this requirement. (*Id.*, #560).

The Court also found that Ohio was suffering ongoing irreparable harm. In particular, the Court concluded that the same harm that sufficed to show standing—that Ohio was forced to contemplate accepting a "deal" while in the dark as to its terms—also constituted irreparable harm for preliminary injunction purposes. (*Id.*, #567).

But notwithstanding these findings, the Court denied the requested preliminary relief. The Court concluded that the preliminary injunction that Ohio sought would not prevent Ohio from incurring the ongoing irreparable harm that Ohio asserted. (*Id.*, #568). That was so because a preliminary injunction would last only during the pendency of the action. This type of interim relief could not provide Ohio the clarity it sought in terms of deciding whether to accept the deal. And, as a practical matter, enjoining the Secretary from enforcing the Tax Mandate during the pendency of the suit was meaningless, as it was unlikely (indeed virtually impossible) that the Secretary would seek recoupment during that time.

E. Ohio Seeks A Permanent Injunction, And Requests Expedited Briefing.

Ohio responded by requesting a permanent injunction and final declaratory relief. It also sought an expedited briefing schedule. According to Ohio, speed was of the essence, as the Tax Mandate's validity and enforceability against Ohio might have

an impact on the Ohio General Assembly's consideration of the budget for the then-upcoming biennium, which the General Assembly was required to enact by June 30, 2021.[4] To accommodate that concern, the parties agreed to a briefing schedule that resulted in the federal government filing the final brief on June 11, 2021.

Two other factual developments merit mention. On May 13, 2021, the day after the Court issued its Opinion denying Ohio's requested preliminary injunction, and three days after the Treasury Department issued its IFR, Ohio submitted its certification stating that it would participate under ARPA. As required, Ohio represented that it would "use any payment under this section … in compliance with subsection (c) of" 42 U.S.C. § 802. (*See* Murnieks Decl., Doc. 38-1, #603). Second, on May 18, 2021, Ohio received its first tranche of funds under the Act. (*Id.*, #604).

With briefing now complete, the matter is before the Court.

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[4] "Required" is a bit of an overstatement. To be sure, the current budget and its accompanying appropriations lapse at the end of a biennium, which is June 30, but the General Assembly can adopt "budget extensions" if no new budget is in place at that time. For example, the General Assembly enacted the budget bill for the previous biennium on July 17, 2019, and the Governor signed it the next day. That said, it appears from news reports that Ohio's General Assembly passed a budget bill for the upcoming biennium on June 28, 2021, and that Governor DeWine has now signed that bill, albeit with some line-item vetoes.

LAW AND ANALYSIS

As was true at the preliminary injunction stage, resolving Ohio's request for a permanent injunction and declaratory relief requires the Court to address difficult issues as to both jurisdiction and the merits. Because the former go to the extent of the Court's power, the Court starts there. The Court concludes, though, that it continues to have jurisdiction over this action. Accordingly, the Court then turns its consideration to the merits of Ohio's Spending Clause challenge.

A. The Court Has Jurisdiction Over This Case.

"Time and again," the Supreme Court has "reaffirmed the importance in our constitutional scheme of the separation of [federal] governmental power into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (citing cases). Those separation-of-powers principles constrain the judicial branch, just as they do the other two branches. "[U]nder our constitutional system, courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585 (2020) (cleaned up) (Thomas, J., concurring) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610–611 (1973)). Rather, "[t]he Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.'" *California v. Texas*, 539 U.S. ___, No. 19-840, slip op. at 4 (June 17, 2021) (quoting U.S. CONST. art. III, § 2); *see also, e.g., Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) ("Article III restricts federal courts to the resolution of cases and controversies.").

The case-or-controversy requirement takes effect through the doctrines of standing, ripeness, and mootness. A plaintiff seeking federal court review must show at the outset that he has standing, and that the dispute is ripe for review. Moreover, even when those requirements are met, the judicial power extends only so long as the dispute remains live (i.e., non-moot). Here, the federal government claims that (1) Ohio lacks standing, and (2) that, even if Ohio once had standing, the matter is now moot given events that have occurred since Ohio filed suit.

Start with standing. It is well settled that "[t]he plaintiff bears the burden of establishing standing." *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). "To satisfy the 'irreducible constitutional minimum of standing,' the plaintiff must establish that: (1) he has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) that there is a causal connection between the injury and the defendant's alleged wrongdoing; and (3) that the injury can likely be redressed." *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Or as the Supreme Court put it recently, "[a] plaintiff has standing only 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*, slip op. at 4 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)).

Importantly, those elements are assessed as of the time the plaintiff filed suit. *Davis*, 554 U.S. at 732

(describing standing as "the 'personal interest that must exist at the commencement of the litigation'") (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Or, as the Court put it in *Lujan*, "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." 504 U.S. at 569, n.4 (emphasis in original) (quoting *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 830 (1989)). *But see Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6141, 2021 WL 2547052, at *4 (6th Cir. June 22, 2021) (noting that the Supreme Court "has implied that in certain cases a plaintiff may have to maintain standing throughout the lawsuit," but that the "Supreme Court … has not explicitly overruled past precedent that confined the standing inquiry to the moment when the lawsuit was filed").

The principal dispute between the parties as to standing here centers on the question of injury in fact. In its previous Opinion, this Court found that Ohio had sufficiently established such an injury. In particular, the Court noted that Spending Clause jurisprudence requires Congress to state clearly the terms upon which it extends an offer of conditional funding to the States. Stated differently, when presented with a federal grant that has strings attached, States are entitled to clarity regarding those strings. And, as the Court also observed, that clarity is critical to a State's ability to exercise its sovereign prerogative of deciding whether to accept that offer. Thus, the Court concluded, Ohio suffered an injury in fact when it was presented an unconstitutionally ambiguous deal.

In reaching that result, the Court conceded in its prior Opinion that that legitimate questions could be raised as to whether such an injury was "concrete and particularized," as opposed to intangible or amorphous. Still, it concluded that Ohio's injury cleared the standing hurdle, if barely. This Court noted for example, that in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), the Supreme Court had not raised any standing concerns with a State's pre-enforcement challenge under the Spending Clause to a provision in the Affordable Care Act. (*See* Op. and Order, Doc. 36, #556). That matters because federal courts bear an independent obligation to dismiss suits containing a jurisdictional defect, even if the parties do not raise that issue. *Summers*, 555 U.S. at 499. So, the Supreme Court's silence on jurisdiction in *NFIB* provides at least an implicit recognition that this type of injury creates standing. And, although the Court did not mention it at the time, the "special solicitude" to which States are entitled in the standing analysis, at least when "protecting … quasi-sovereign interests," *see Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), lends further credence to this result.

The Secretary presses two arguments seeking a different result now. Neither changes the Court's earlier determination.

First, noting that this Court characterized Ohio's injury as "barely" sufficient, the Secretary stresses that the evidentiary showing is greater at this stage of the litigation (where final relief is sought) than it was at the earlier stage. (Mot. to Dismiss, Doc. 45, #725–26 (citing *Vonderhaar v. Vill. of Evendale*, 906

F.3d 397, 401 (6th Cir. 2018))). Thus, the Secretary argues, what was barely sufficient then is insufficient now.

To be sure, Ohio bears a stronger evidentiary burden now (i.e., when seeking final relief) as compared to when it sought a preliminary injunction. *Lujan*, 504 U.S. at 561 (observing the increased "burden of proof" applying to "the manner and degree of evidence required at the successive stages of the litigation"). But that applies to factual showings, not legal questions. In relying on that increased burden, the Secretary misunderstands the sense in which this Court was using the term "barely" in its earlier decision. The Court was not suggesting that, as an evidentiary matter, Ohio had barely cleared the hurdle in terms of demonstrating the *fact* of injury. Rather, the point was that the nature of the injury—the harm that arises when a State must ponder accepting an ambiguous deal—made the injury-in-fact question a close call as a *legal* matter. In other words, there was no doubt that Ohio in fact had suffered the injury on which the Court relied. Instead, the question—a purely legal question—was whether an injury of that nature satisfied the injury-in-fact requirement. Thus, while the Secretary may well be correct that the evidentiary burden on standing is now higher, *see Vonderhaar*, 906 F.3d at 401, that does not impact the Court's earlier legal conclusion about Ohio's injury.

The Secretary's other argument is that the harm on which the Court relied to support standing—the injury Ohio was suffering in facing an unconstitutionally ambiguous offer—is now gone, as

Ohio has agreed to accept the deal, ambiguity and all. But that argument, while it may be germane to mootness (a topic to which the Court turns next) does not affect standing. As already noted, standing is measured at the time the suit is filed, rendering any later factual developments wholly irrelevant to that inquiry. *See Lujan*, 504 U.S. at 569, n.4. Thus, on the standing front, this argument is a non-starter.

That still leaves mootness. And in fairness to the Secretary, mootness appears to be the principal thrust of her current argument against ongoing jurisdiction. (*See* Mot. to Dismiss, Doc. 45, #725–26).

The mootness argument starts on firm legal footing. The Secretary is undoubtedly correct that "'when the issues presented [in a case] are no longer "live" or the parties lack a legally cognizable interest in the outcome' the case is moot and must be dismissed." (*Id.*, #726 (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019))). But some important qualifiers apply to that statement. First, as this Court observed in its previous Opinion, "[t]he 'heavy burden' of demonstrating mootness falls on the party asserting it." (Op. and Order, Doc. 36, #557 (quoting *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021)). Second, the original injury is not the only injury that a court can consider in determining mootness. *See Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) ("'[A] court will not dismiss a case as moot,' even if the nature of the injury changes during the lawsuit, if 'secondary or "collateral" injuries survive after resolution of the primary injury.'") (quoting *Chong v. Dist. Dir., I.N.S.*,

264 F.3d 378, 384 (3d Cir. 2001)). Rather, assuming that there was jurisdiction at the outset of the case, *any* related harm arising from the challenged conduct will suffice to keep that case alive. *Id.*; *accord Spencer v. Kemna*, 523 U.S. 1, 7–8 (1998).

The combination of those two principles dooms the Secretary's mootness argument here. First, the Secretary appears to believe that Ohio, rather than the Secretary, bears the burden of proof on this issue. That is wrong, as the Sixth Circuit confirmed once again just recently. *Hargett*, 2021 WL 2547052, at *4 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 531 (6th Cir. 2001)). Any failure of evidence on the question of ongoing harm, then, cuts against the Secretary, not against Ohio.

In any event, on the facts here, there is little doubt that Ohio continues to suffer ongoing harm, at least on Ohio's version of what the Spending Clause requires when Congress makes conditional grants to the States. To be sure, the precise harm on which the Court relied in its previous decision—the harm a State incurs in contemplating whether to accept an ambiguous deal—is now gone. But as the Court *also* noted, a similar type of harm (i.e., harm to a State's ability to exercise its sovereign prerogatives) arises from that same ambiguity when the State is bound to such a deal, as Ohio is now. (Op. and Order, Doc. 36, #550). To expand on that a bit, Ohio has now committed itself to complying with the Tax Mandate, and the State has received funding based on that commitment. Thus if, as Ohio claims, the Tax Mandate is unconstitutionally ambiguous, Ohio now faces an unlawfully-imposed quandary in determining

how to exercise its sovereign taxing power. Ohio legislators considering tax changes will have unconstitutionally insufficient information (assuming Ohio is right about what the Spending Clause requires) to determine the impact that such changes will have on Ohio's ability to retain the federal grant money that the State has begun to receive. That ambiguity, in turn, will cast a pall over legislators' abilities to contemplate such tax changes.

The State argues that this is particularly meaningful *now*, as Ohio was in the throes of enacting its budget for the next biennium at the time it filed its brief, a task that must be completed on or about June 30, 2021. But the Court's analysis of the ongoing harm is not tied to that date. As a practical matter, the General Assembly's contemplation of taxation and spending changes for the upcoming biennium started many months ago. It is thus unlikely that any decision by this Court, which could have occurred at the earliest only after briefing was completed in mid-June, would have a meaningful impact on the legislature's taxation decisions for the 2022–23 budget. And it now appears that the General Assembly has completed its work on that topic by enacting a budget bill, further undercutting any theory of ongoing harm inextricably linked to the biennium's end date.

At the same time, though, those same considerations serve to illustrate more broadly the type of ongoing harm that Ohio will continue to suffer, even now, with the budget bill in the rearview mirror. To start, the General Assembly can, and sometimes does, make changes to taxation *during* a biennium.

Indeed, in an example perhaps particularly apropos here, Governor DeWine announced last year that, due to revenue shortfalls associated with the COVID-19 pandemic and the State's response to that pandemic, the legislature may need to consider mid-biennium tax changes for the second year of the previous biennium. *See, e.g.,* Randy Ludlow, *Coronavirus in Ohio: $775 Million in Budget Cuts Due to Pandemic Include $300 Million Reduction to Schools*, COLUMBUS DISPATCH (May 5, 2020), https://www.dispatch.com/news/20200505/coronavirus-in-ohio-775-million-in-budget-cuts-due-to-pandemic-include-300-million-reduction-to-schools. The economic uncertainty surrounding the State's emergence from the pandemic could well lead to just such considerations again.

And more generally, issues regarding taxation are never completely removed from legislative consideration. With a two-year budget cycle and a balanced-budget requirement, planning, at least informal planning, regarding taxation and expenditures will start anew as a practical matter, almost immediately. Exactly when may be difficult to say, but that just underscores the point—one cannot reliably conclude that the ambiguity surrounding Ohio's use of its taxing powers is not harming Ohio in the exercise of its sovereign prerogatives now. Given the burden of proof on mootness, *Thomas*, 996 F.3d at 324, that is enough.

Nor is it any answer to say that it would be more appropriate to wait and see what *specific* tax changes Ohio adopted in its recently-enacted budget, or may have in mind for the future, before addressing

whether the Tax Mandate is ambiguous. (*See* Mot. to Dismiss, Doc. 45, #729). The Secretary notes, for example, that Ohio will have a right to challenge any recoupment action. A challenge at that time, the Secretary argues, would have the benefit of a specific set of tax changes against which to consider the ambiguity question, suggesting that consideration of that issue is not ripe now. (*Id.*). But, as the Court described in its previous decision, the question of whether the Tax Mandate is unconstitutionally ambiguous turns on the statute's language,[5] and more specifically on whether that language provides sufficient semantic content on the topic of permissible tax changes *in general* to satisfy the clarity requirement articulated in Spending Clause jurisprudence. Showing that the Tax Mandate may be clear as to some subset of specific types of potential state tax changes does not address that problem.

With that in mind, the problem with a wait-and-see approach becomes apparent. As noted, it is not merely the recoupment that harms Ohio. Rather, if the Tax Mandate is ambiguous as to a broad range of potential tax changes, then that ambiguity will have consequences of its own. The uncertainty itself, uncertainty that exists now that Ohio has tendered its certification, will continue to exert pressure on state legislators not to consider any tax change, or set of tax changes, as to which the Tax Mandate implications cannot be assessed. As further described below, that

[5] Or, possibly, the statute's language as supplemented by the IFR. The Court discusses that issue when addressing the merits of the Spending Clause challenge.

essentially means that Ohio's legislature may be disinclined to consider *any* rate reduction, as to *any* state tax, because the Secretary could interpret that reduction as triggering a right to recoupment. Or, at the very least, Ohio legislators will have incentives to minimize the *size* of any such reductions in hopes of reducing the magnitude of any associated recoupment.

That type of thumb on the legislative scale is a current and ongoing injury to Ohio in its sovereign capacity. To be sure, it may be a different injury from the one that gave Ohio standing at the time it filed suit. But the claimed harm strikes the same constitutional chord—a harm to Ohio's ability to exercise its sovereign powers—and it arises from the same source—the allegedly unconstitutional ambiguity in the Tax Mandate. That is enough to prevent mootness. In sum, in light of the ongoing injury caused by the allegedly unconstitutional ambiguity, especially when coupled with the billions of dollars that are at risk based on that ambiguity, the Secretary falls short of the "heavy burden" she bears in showing that this case is moot. *Thomas*, 996 F.3d at 324; *Hargett*, 2021 WL 2547052, at *4.

Separately, while Ohio need not rely on the prospect of future recoupment to avoid mootness, that prospect may nonetheless provide an alternative basis for jurisdiction here. At the time Ohio originally sued, it was not bound by the Tax Mandate's terms, as it had not accepted the ARPA deal. But now Ohio has filed its certification, and thus any decisions it makes (or has made) on taxes are subject to ARPA's terms. That in turn means that Ohio faces a real prospect of

enforcement if the Treasury Secretary were to conclude that Ohio had violated the terms of the Tax Mandate. And, if anything, that prospect is now even greater, as Ohio's General Assembly has passed a budget bill that reportedly includes a $1.64 billion income tax cut. Given the ambiguity, as described below, in the Tax Mandate's language, the Secretary certainly *could* conclude that this tax cut gives rise to a right to recoupment under the statute. Thus, Ohio now has an even more concrete example of an "injury that is the result of the statute's actual or threatened enforcement, whether today or in the future," than it did before. *California*, slip op. at 6. Moreover, "the likelihood of [such] future enforcement" is, if anything, more substantial now than it was then, *id.*, and, as noted, such enforcement raises the prospect of billions of dollars in potential recoupment.

The contrast between the current case and the Supreme Court's recent decision in *California v. Texas* further illustrates why jurisdiction is appropriate here. In *California*, the parties sought to attack an aspect of the Affordable Care Act that created a duty on the part of individuals to maintain a minimum level of insurance. At one time, that duty was enforced by a penalty, but "[i]n 2017, Congress effectively nullified the penalty be setting its amount at $0." *Id.*, slip op. at 1. The parties attacking that provision nonetheless asserted standing based on various arguments about alleged financial consequences that the now-nullified provision continued to have on people's behavior (and the resulting financial impacts on the States). In finding no jurisdiction to consider that challenge, the Supreme Court emphasized that the lack of any prospect that the provision would be

enforced meant that the alleged current harms did not count for standing purposes. Here, by contrast, the current harms on which the Court relies to support jurisdiction grow directly out of the prospect of future enforcement of the Tax Mandate. In other words, absent the prospect of enforcement (as was the case in *California*), the Tax Mandate's alleged ambiguity would not in any way impact Ohio legislators' consideration of proposed tax changes. But, unlike in *California*, here the Secretary admits that the Tax Mandate is enforceable. That makes all the difference.

In sum, if the Tax Mandate is indeed unconstitutionally ambiguous, as Ohio asserts, then Ohio was suffering an injury in fact at the time it sued, and it continues to suffer an injury in fact after binding itself to that deal. To be sure, both then and now, Ohio faces a unique *form* of injury. But that is not surprising, as the injury here ties directly to a State's unique role as a sovereign under the Constitution. Moreover, both the original and ongoing injuries arise directly from, and thus are traceable to, the prospect of future enforcement of the allegedly ambiguous—and therefore allegedly unconstitutional—Tax Mandate. Nor, as a final point, can there be any real question regarding redressability as to the ongoing harm. Enjoining the Secretary from enforcing the Tax Mandate against Ohio, or declaring that the provision is unconstitutional as applied to the State, would remedy the uncertainty surrounding Ohio's legislative efforts relating to taxation, which is the harm that Ohio is currently suffering. Accordingly, the Court finds that it had—and still has—jurisdiction to consider Ohio's Spending Clause challenge to the Tax

Mandate, although the Court acknowledges, once again, that this is a close call.

B. The Statutory Language Of The Tax Mandate Violates The Spending Clause Requirement Of Clarity As To The Terms Of A Conditional Grant Offered To The States.

Having concluded that it has jurisdiction, the Court must consider the merits of Ohio's constitutional challenge. *Mata v. Lynch*, 576 U.S. 143, 150 (2015) ("[W]hen a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority.") (quotation omitted). Here, that inquiry proceeds in two parts. First, the Court considers whether the Tax Mandate, as written, satisfies the clarity requirement the Spending Clause imposes. As the Court's previous Opinion previewed, the Court concludes that the Tax Mandate does not meet that bar. Second, the Court considers the impact, if any, that the IFR has on the Tax Mandate's failure, as enacted, to meet those clarity requirements. That inquiry, the Court concludes, turns less on Spending Clause jurisprudence, and more on delegation principles (and the strictures that typically apply to such delegations).

1. As Drafted, The Tax Mandate Falls Short Of The Clarity Required For Spending Clause Legislation.

As this Court recently observed in denying Ohio's motion for a preliminary injunction, the Supreme Court's jurisprudence relating to conditional grants under the Spending Clause rests on federalism concerns. It is an outgrowth of the fact that "[i]n our

federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *NFIB*, 567 U.S. at 533. Stated differently, the "Federal Government 'is acknowledged by all to be one of enumerated powers,'" and "[t]he Constitution's express conferral of some powers makes clear that it does not grant others." *Id.* at 534. The States, by contrast, retain a "general power of governing," typically called the "police power." *Id.* at 536. That power is, of course, subject to federal constitutional limitations—such as those imposed by the Equal Protection Clause—but beyond that, "state governments do not need constitutional authorization to act." *Id.* at 535.

Importantly, the Supreme Court has also explained that this division of power is not about preserving state power, so much as it is about promoting individual liberty. *Id.* at 536 ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."). As the Court put it in *Murphy v. National Collegiate Athletic Association*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

138 S. Ct. 1461, 1477 (2018) (quotations and citations omitted).

This protection for individual liberty arises from two sources. First, under this dual-sovereign design,

"the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *NFIB*, 567 U.S. at 536. Second, the division "den[ies] any one government complete jurisdiction over the concerns of public life, [thereby] protect[ing] the liberty of the individual from arbitrary power." *Id.* (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). In that sense, the "separation of the two spheres is one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.*; *accord Murphy*, 138 S. Ct. at 1477. In short, limiting Congress to its enumerated powers, thereby reserving certain functions to the States, plays an important role in our constitutional design.

One of Congress's enumerated powers, though, is the power to spend:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

U.S. CONST., art. I, § 8, cl. 1 (the "Spending Clause"). And "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). That is, the federal government can seek to purchase from the States their acquiescence in the exercise of the States'

sovereign powers, acquiescence that the federal government otherwise could not command.

The Supreme Court has recognized that unfettered use of this power, especially when coupled with Congress's power to tax, could quickly alter the balance of powers between the federal government and the States. In *NFIB*, for example, seven Justices, spread across two different opinions, articulated versions of that very point. Four Justices described it this way: "This formidable power [i.e., the spending power], if not checked in any way, would present a grave threat to the system of federalism created by our Constitution." 567 U.S. at 675 (Scalia, J., dissenting). Indeed, they went on, if the power is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *Id.* (quotation omitted). Three other Justices framed it slightly differently, but the thrust is the same: "Respecting this limitation [on the Spending Clause] is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. ... 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 577 (opinion of Roberts, C.J.). In short, unbridled use of the spending power would allow Congress to expand beyond its otherwise enumerated powers.

Consistent with such concerns, the Supreme Court has repeatedly held that "[t]he spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases." *Dole*, 483 U.S. at 207 (citation omitted). These limitations admittedly do not arise from the text of the Spending Clause. But they are nonetheless animated by the structural concerns—in this case, federalism—that the Constitution reflects and embodies.

In particular, Spending Clause jurisprudence has recognized three limitations on Congress's ability to induce States to bargain away their sovereign powers. First, "Congress may not impose conditions 'unrelated to the federal interest' in enacting spending legislation." *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (quoting *Dole*, 483 U.S. at 207–08). Second, it may not "'coerce' the States into accepting funds and the regulations that come with them." *Id.* (citing *Dole*, 483 U.S. at 211). Third, "given [Congress's] authority under the Spending Clause to regulate the States beyond the limited and enumerated powers the Constitution otherwise gives it and given that the States are not represented in the Halls of Congress, the federal courts have required Congress to state those conditions 'unambiguously' in

the text of the statute." *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).[6, 7]

Although Ohio raises both coercion and ambiguity in support of its Spending Clause challenge, the Court's resolution of this case rests on ambiguity concerns. Thus, a few more words regarding that limitation are in order. As at least twelve Sixth Circuit judges observed in *City of Pontiac* (albeit across two separate opinions), this limitation derives largely from analogy to contract law. *See id.* at 276–77 (citing *Pennhurst*, 451 U.S. at 17) (opinion of Cole, J.); and *id.* at 284–85 (Sutton, J., concurring) (also citing *Pennhurst*, 451 U.S. at 17). "Viewing the Spending Clause relationship between a State and the federal government as a contract, the Supreme Court has

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[6] In his concurrence in *Pontiac*, Judge Sutton described this third limitation as "statutory," *see City of Pontiac*, 584 F.3d at 283, which it is in the sense that it imposes a requirement on how Congress goes about drafting statutes. That is, the limitation is not directed at the substance of the conditions, but rather at ensuring, as a drafting matter, that the conditions are clearly expressed. But, while describing the limitation as statutory, Judge Sutton acknowledged that it has "constitutional roots." *Id.* at 284.

[7] The four dissenting Justices in *NFIB* described a fourth limitation: Congress cannot use a conditional grant to "induce the States to engage in activities that would themselves be unconstitutional." *NFIB*, 567 U.S. at 676 (Scalia, J., dissenting) (quoting *Dole*, 483 U.S. at 210). For present purposes this Court need not decide whether that limitation is better understood as arising under the Spending Clause, or instead merely as reflecting the notion that accepting federal grants made under the Spending Clause does not free States from other constitutional obligations. That is because no party has argued that this limitation, if that is what it is, is implicated here.

stated that the legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] contract." *Id.* at 276–77 (opinion of Cole, J.) (citing *Pennhurst*, 451 U.S. at 17) (cleaned up). True, the Supreme Court has been "careful not to imply that *all* contract-law rules apply to Spending Clause legislation," but it has also "regularly applied a contract-law analogy in cases" involving receipt of federal funds. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).

Under those principles, it is not sufficient that the State receives funds merely knowing that some kind of strings are attached. Rather, the question is "whether such a state official would clearly understand *the obligations*" attendant in accepting the grant. *City of Pontiac*, 584 F.3d at 277 (opinion of Cole, J.) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006)) (cleaned up) (emphasis added). And "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* at 268 (quoting *Arlington*, 548 U.S. at 296) (in turn quoting *Pennhurst*, 451 U.S. at 17). Thus, "'[b]y insisting that Congress speak with a clear voice,' the Supreme Court enables States 'to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17). So, not only does the Constitution require Congress to tell States that there *are* conditions, but Congress must also tell States *what* those conditions are.

Beyond formulations such as "clear understanding" or "clear voice" like those noted above,

however, case law is somewhat sparse on describing the exact level of clarity that the Spending Clause requires. That said, one thing is certain—exactitude is not necessary. For example, the Supreme Court has observed that Congress need not "prospectively resolve every possible ambiguity concerning particular applications of [a program's] requirements." *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Rather, it is only when a state official is "unable to ascertain" the obligations that a conditional grant imposes, that constitutional problems arise. *Arlington*, 548 U.S. at 296. And a standard akin to "unable to ascertain" seems consistent with the analogy to contract law that drives much of Spending Clause jurisprudence. That is because contractual indefiniteness likewise involves something like an "impossible to understand" standard. *See, e.g., Shell's Disposal & Recycling, Inc. v. City of Lancaster*, 504 F. App'x 194, 202 (3d Cir. 2012) ("[A] contract fails for indefiniteness when it is 'impossible to understand' what the parties agreed to because the essential terms are ambiguous or poorly defined."). Importantly, though, in determining whether ARPA clears whatever the exact hurdle the Spending Clause imposes, the Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pennhurst*, 451 U.S. at 18 (citations and quotations omitted).

Even though divining the exact standard for unconstitutional ambiguity under the Spending Clause may be difficult, that matters little here. That is because the Tax Mandate, even when read in context, fails to put the State on "clear notice" of its

obligations, *see Arlington*, 548 U.S. at 296, under any reasonable definition of "clear."

Start with the text:

> (A) IN GENERAL.—A State or territory shall not use the funds provided under this section … 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). As the Court observed in its previous Opinion, parts of that language are clear. "Change in law," for example, refers to new laws. Likewise, the definition of "reduc[ing] any tax," is sufficiently clear—it includes reducing the tax rate, or providing a rebate, deduction, credit, or any other mechanism for reducing that tax.

But, as the Court also observed, beyond that is where things get tricky. That is particularly true when it comes to "indirectly offset[ting] a reduction in the net tax revenue." That phrase raises a host of interpretive problems. Start with this—the notion of "reducing net tax revenue" necessarily assumes some baseline. The IFR expressly provides that missing baseline (i.e., 2019, the last full fiscal year before the onset of the COVID-19 pandemic), *see* 86 Fed. Reg. 26,807 (May 17, 2021), or at least provides that fiscal year 2019 revenues will serve as a safe harbor for calculating the baseline for net revenue reductions, *id.*

But, putting aside that regulatory guidance, the statutory language itself provides no mechanism for determining whether a State's net tax revenues are "reduced" or not. For example, imagine that the only change Ohio made to its taxes was to reduce its tax rate on gasoline. But further imagine that the total amount of gasoline purchased in FY 2022 (which starts on July 1, 2021) is higher than in FY 2021, given, for example, the impact that the pandemic had on commuting or travel in the earlier fiscal year. Are Ohio's tax revenues "reduced" under the Tax Mandate? Arguably, they are "reduced" from what Ohio would have collected at the higher tax rate (although, depending on the elasticity of demand for gasoline, that may not be the case). But gas tax revenues may still be higher in FY 2022 than they were in FY 2021 because of the change in demand for gasoline as Ohio emerges from the pandemic. In that sense, there would be an "increase," not a "reduction," in Ohio's net tax revenues. The Tax Mandate's language does not select between those two competing views.

Relatedly, the statutory language does not explain whether the prohibition applies to *expected* tax revenues, or *actual* tax revenues. In other words, when Ohio legislators enact a lower *rate* on a given tax, they may do so based on a belief that actual tax collections will *go up* (for example, because more transactions will occur, given the lower tax rate). Or, even more likely, the Ohio legislature may enact a package of tax changes, with an anticipation that the changes, overall, will be revenue neutral or revenue enhancing. But plans are one thing, and actual tax receipts are another. Especially as Ohio emerges from

a nationwide pandemic, with the accompanying economic dislocations, the tax revenues that Ohio actually receives based on a set of changes in its taxes may differ significantly from the State's initial estimate. Again, the IFR provides rules for how to "score" tax changes, but that strikes the Court as an essential aspect of ensuring that "a state official would clearly understand the obligations" that ARPA imposes, *see City of Pontiac*, 584 F.3d at 277 (opinion of Cole, J.) (quoting *Arlington,* 548 U.S. at 296) (cleaned up), and one on which the Tax Mandate itself says nothing.

That on its own would be bad enough, but ARPA then lumps "indirectly offset" on top. In its previous Opinion, the Court observed that it could not ascertain what an indirect offset may (or may not) be. And the Court was not alone in that. At oral argument on the motion for preliminary injunction, the Secretary declined to take any position on that term either. Perhaps unsurprisingly, Ohio too expressed confusion regarding the contours of the phrase.

The Secretary's more recent briefing on the permanent injunction does not resolve the Court's confusion regarding that term. Even armed with the Court's guidance as to the source of the ambiguity, the Secretary provides no workable definition of what an "indirect offset" is. Indeed, if anything, the briefing confirms that even the Secretary struggles to distinguish between a "direct" and an "indirect" offset, at least based solely on the statutory text.

Rather than offer a definition of one or both terms, the Secretary seeks to illustrate the difference by reference to an example. (*See* Mot. to Dismiss, Doc. 45,

#733). The problem is that the example the Secretary offers for a "direct offset" is substantively identical to the one the Secretary provides for an "indirect offset," if stated slightly differently. More specifically, according to the Secretary, a "direct offset" would occur if a State: (1) received $2 billion in ARPA funds, (2) "cut its income tax by an amount expected to equal $2 billion," and then (3) "use[d] the [ARPA funds] to offset the revenue loss." (*Id.*). In contrast (or at least the Secretary says it is a contrast), an "indirect offset" would arise if a State: (1) received the same $2 billion, (2) used that money to "replace $2 billion in planned state expenditures on COVID19 testing," and then (3) passed that $2 billion along to Ohio citizens in the form of a "$2 billion reduction in state income tax." (*Id.*).

That amounts to two slightly different ways of saying the same thing, albeit swapping the order in which steps 2 and 3 are presented. In both the "direct" and "indirect" examples that the Secretary provides, the State uses the conditional grant to replace (the Secretary calls it "offset" in the first example and "replace" in the second) state funding for certain current state expenditures. That in turn frees up existing state funds, which the State then uses for a tax refund. The only difference between the two examples, besides the reordering of steps 2 and 3, is that, in the "indirect offset" scenario, the Secretary identified *where* the federal-for-state dollar swap occurred (i.e., COVID-19 testing expenditures), whereas in the "direct offset" example, the Secretary left the area of the federal-for-state dollar swap unidentified. But the Secretary offers no explanation as to why those non-substantive differences would

change the "directness" of the offset, and the Court cannot see any reason why that would be the case. In short, it appears that even now the Secretary lacks a coherent theory as to what an "indirect offset" may be, as distinct from a "direct offset," further confirming the Court's suspicion that the phrase is unintelligible as used in the context of the Tax Mandate.

Nor is the problem simply that the two examples are the same. If an "indirect offset" is simply *the same as* a "direct offset," that would not make the term inherently ambiguous. The problem, though, is that, while offering identical examples, the Secretary insists that there is a *difference* between the two terms, and believes that the examples illustrate that difference. In other words, the Secretary's briefing contends that the term "indirect offset" conveys something different from the term "direct offset," yet cannot articulate what that difference is.

And there is still a broader problem. Even if the Secretary had identified an example of an "indirect offset" that was different from a "direct offset," the Secretary still has not provided any definition of the former term, let alone one that flows either from the statutory language, or from the use of that term in the context of the statute more generally. Merely providing a single example of an "indirect offset," without more, does little to establish the outer contours of the phrase. Compounding that shortcoming, providing Ohio an example of something that the Secretary says would count as an indirect offset hardly fixes Ohio's problem. It is far more important for Ohio to know what the Secretary would *not* count as such an offset.

And it bears noting that the ambiguity at issue here is a particularly troubling type of ambiguity. Based on the Tax Mandate's language, the Secretary could deem essentially *any* reduction in the rate of any one or more state taxes—even if other tax rates were increased—to be a "change in [tax] laws" that results in an "indirect[] offset [of] a reduction in [Ohio's] net tax revenues." 42 U.S.C. § 802(c)(2)(A). Combine that sweeping language with the ambiguities identified above—it is almost as though Congress had written the Tax Mandate, as follows: "Each certifying State agrees that, if a State reduces any tax rate, on any tax, the Secretary may recoup ARPA funding to the extent that the Secretary determines, in her discretion, that the 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." Without knowing more about how the Secretary is to make those decisions, that would not cut it under Spending Clause jurisprudence. Yet, given the ambiguity in the phrases "indirect offset" and "net tax revenues," the Tax Mandate arguably says just that. And that ambiguity may disincentivize Ohio's General Assembly from considering *any* reduction in rates as to *any* state tax, for fear of forfeiting the grant that Ohio received under ARPA, or at the very least, the legislature may minimize any such rate reduction, in hopes of mitigating the magnitude of the potential forfeiture. That is the type of federal invasion of state sovereignty that Spending Clause jurisprudence disfavors.

The bottom line is this—in its previous Opinion, the Court identified aspects of the Tax Mandate that were too ambiguous, at least based on a first look, to

pass Spending Clause muster. The Secretary's subsequent briefing fails to convince the Court otherwise. Accordingly, the Court finds that Tax Mandate's language, in and of itself, falls short of the clarity required when Congress exercises its powers under the Spending Clause.

2. The Interim Final Rule Does Not Change That Result.

If the Tax Mandate were the only text at issue, the Court's finding above would be the end of the matter. But here, two days before the Court issued its previous Opinion, the Secretary promulgated the IFR seeking to provide additional clarity as to the Tax Mandate's meaning. The issuance of that rule raises two additional questions. First, to what extent can an administrative regulation provide the clarity needed for a conditional grant to comply with Spending Clause strictures? Second, assuming an administrative regulation can bridge the gap, does the IFR do so? The Court's decision on the first issue, though, obviates the Court's need to consider the second. In particular, the Court concludes that, while Congress may be able to delegate authority to an agency to supply the requisite clarity, Congress must provide for such delegation in clear and unambiguous terms. And Congress did not do so here.

The question of whether regulations can provide the clarity the Spending Clause requires is, at some level, more a matter of delegation principles than Spending Clause jurisprudence. To be sure, one could argue that the Spending Clause, as an Article I power, is a power that the Constitution grants *to Congress*, and thus a court should look only to the

congressionally enacted language (i.e., the statute), in deciding whether Congress has validly exercised that power. And, as already cited above, there are Spending Clause cases that could be understood to provide at least passing support to that proposition, as they seem to tie the Spending Clause ambiguity question to whether "Congress" has provided the necessary clarity. *See, e.g., Dole*, 483 U.S. at 206 ("Congress may attach conditions on the receipt of federal funds."); *Pennhurst*, 451 U.S. at 17 (requiring that "Congress speak with a clear voice"); *Bennett*, 470 U.S. at 665 ("Congress must express clearly its intent to impose conditions."); *Pontiac*, 584 F.3d at 284 (Sutton, J., concurring) ("[G]iven its authority under the Spending Clause to regulate the States beyond the limited and enumerated powers the Constitution otherwise gives it and given that the States are not represented in the Halls of Congress, the federal courts have required Congress to state those conditions 'unambiguously' in the text of the statute.").

At the same time, though, those cases do not address the precise issue here—the extent to which agency regulations can provide the necessary clarity. Thus, the reference to "Congress" in such cases is perhaps merely a generic reference to the federal government, and not to Congress exclusively. And, as for any suggestion that the Constitution strictly forbids Congress from delegating any aspect of its Article I powers, that ship has sailed.

Moreover, there are also Spending Clause cases that suggest that the "conditions" that Congress imposes in connection with federal spending can

include compliance with administrative regulations. *Dole*, for example, stated that, under the Spending Clause power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory *and administrative* directives." 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)) (emphasis added). And, in *Bennett*, the Court noted that, by accepting the federal grants there, each State had "agreed to comply with … the legal requirements in place when the grants were made," which included "statutory provisions, *regulations*, and other guidelines." 470 U.S. at 670 (emphasis added).

Such cases may simply mean, however, that when Congress specifies the grant conditions, Congress must provide the requisite detail, but can do so through incorporating by reference any *then-existing* administrative regulations. In such situations, of course, the clarity would be present at the time the statute is enacted, or at the very least by the time the conditional spending is available to the States. Later-enacted regulations, by contrast, like those the Secretary relies on here, may raise different constitutional concerns, as the requisite clarity is not available at the time that Congress extends the conditional offer to the States.

As Ohio observes, it appears that the sole court to address this issue head on is the Fourth Circuit. *See Va. Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc). That court concluded that *only* the statutory

language, and not any regulatory follow-on, is what matters for Spending Clause clarity purposes. *Id.* at 567 (adopting the dissenting opinion of Judge Luttig from the panel stage). In *Riley*, the en banc court reconsidered a panel decision on the question of whether the IDEA, which is Spending Clause legislation, required States to continue to provide "educational services to handicapped students expelled for reasons unrelated to their handicap." *Id.* at 565. The Secretary of Education acknowledged the lack of explicit statutory language mandating that result but argued that the Department of Education could require that condition as a reasonable interpretation of the statute. In a 2-1 decision, the panel accepted that argument.

The en banc court reversed. Eight of the fourteen judges joined the portion of the panel dissent applicable here, holding that the court could not defer to agency interpretation, even "reasonable interpretation by the agency," to defeat a claim of unconstitutional ambiguity under the Spending Clause:

> The Department of Justice argues … that in the event of ambiguity in the IDEA provision at issue, we defer to a reasonable interpretation by the agency, as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States. We do not. *It is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in*

the manner asserted. As the Court stated in *Gregory v. Ashcroft*:

> "Inasmuch as this Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for law-making on which *Garcia* relied to protect states' interests."

Riley, 106 F.3d at 567 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991)) (cleaned up) (emphasis added).

But, while *Riley*'s language appears on point, the Court offers two observations. First, the decision does not bind this Court. Second, the cited reasoning asserts that it is "axiomatic" that regulations cannot provide the missing clarity, an axiom it locates in *Ashcroft*'s admonition that courts should be cautious about congressional ambiguity in the face of federalism concerns. But, on an issue of this importance, the Court hesitates to simply adopt *Riley* without further exploring *why* it is "axiomatic" under such principles that Congress, and Congress alone, must provide the clarity.

At some level, whether agency regulations should "count" for Spending Clause clarity purposes may depend on what motivates Spending Clause jurisprudence. One author has suggested, for example, that this jurisprudence could be characterized as animated either by concerns about

protecting state choice (a contractual autonomy notion), on the one hand, or concerns about political accountability, on the other. *See generally*, Peter J. Smith, *Pennhurst, Chevron, and the Spending Power*, 110 YALE L.J. 1187 (2001). To the extent that the former is correct, then the point is merely that the deal must be clear in order for the State (as an offeree) to accept it. Under that view, it does not matter so much what the source of that clarity is, but rather only that the clarity exists. Thus, agency clean-up of statutory ambiguity, so long as it is binding, generally would satisfy Spending Clause limitations under this view.

The accountability view of the Spending Clause, by contrast, starts from the notion that the principal protection for state sovereignty is the political process, and in particular Congress's political accountability to the States. *See id.* at 1202 (citing *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985)). Under this view, Congress must impose the condition at the requisite level of clarity, as only Congress, not unelected agency regulators, are subject to that accountability. *Id.* The Congress-only view, then, would serve that structural accountability notion.

Relatedly, the clarity requirement perhaps instead may be seen as imposing a resource constraint on Congress. Requiring Spending Clause legislation that offers conditional funds to the States to include more detail than other types of legislation makes such legislation more time-consuming to enact. That in turn limits, at least as a practical matter, how frequently Congress can do so. And, if the concern is that Congress's use of its spending powers to make conditional grants to the States may allow Congress

to expand its legislative reach beyond its otherwise enumerated powers, such a constraint serves as a structural mechanism to promote the Constitution's federalist underpinnings. That idea only works, though, if it is Congress, and not executive branch agencies, that must provide the requisite detail.

A problem in selecting among these various views, though, is that it is not at all clear that the contractual-autonomy and political-accountability/structural federalism conceptions of Spending Clause jurisprudence present an either-or choice. Certainly, the Supreme Court "has repeatedly characterized … Spending Clause legislation as 'much in the nature of a contract.'" *NFIB*, 567 U.S. at 576–77 (quoting *Barnes*, 536 U.S. at 186 (in turn quoting *Pennhurst*, 451 U.S. at 17)) (cleaned up). At the same time, much of Spending Clause jurisprudence, including many of the same cases that discuss the analogy to contract law, also makes clear that the jurisprudence reflects structural concerns about protecting federalism. *See e.g., NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.) (noting, immediately after discussing the contractual nature of Spending Clause jurisprudence, that "[r]especting 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"). It is perhaps most fair to say that *both* contract-driven-autonomy notions *and* sensitivity to structural concerns are complementary ways of promoting the federalism principles that ultimately motivate the relevant jurisprudence. But if that is so, discussions regarding such distinctions do little to answer the do-regulations-count question.

Given the lack of clarity on this issue in Spending Clause case law, the Court considers delegation principles more generally. After all, the Spending Clause is merely one of many enumerated powers afforded to Congress, and questions regarding the extent to which Congress can delegate to agency personnel the authority to complete Congress's drafting obligations often arise as to those other enumerated powers, as well.

From that delegation case law, certain principles emerge. First, in delegating to agencies the power to draft substantive requirements, Congress must, at the very least, articulate an intelligible principle, as otherwise agency discretion would be unbounded, essentially transferring Congress's Article I legislative powers to unelected agency personnel. *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) ("[W]e have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'") (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))). And when Congress fails to provide such a principle, the agency cannot "cure" the statute by doing so in its stead. *Whitman*, 531 U.S. at 472. In other words, if a statute provides an agency too much discretion, the agency cannot "cure" that delegation by unilaterally limiting its own scope of powers. *Id.* ("We have never suggested that an agency can cure an unlawful

delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

Second, even when Congress articulates an intelligible principle, if Congress intends for an agency to answer “major questions” relating to a statute, *FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000)—i.e., a question of deep “economic and political significance” that is central to the statutory scheme—then Congress must clearly say so. *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring) (“[T]he major questions doctrine … is based on the expectation that Congress speaks clearly when it delegates the power to make ‘decisions of vast economic and political significance.’”).

Third, when Congress intends to “upset federalism norms” through its enactments, it again must “legislate[] clearly.” *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) (citing *Gregory*, 501 U.S. at 460). That is, while Congress itself may have the power to displace such norms, at least when it speaks clearly, it is by no means clear that “agencies [can] upset federalism norms when Congress legislates ambiguously.” *Id.* (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73 (2001)).

In light of these delegation principles, the Court concludes that it need not answer the question of whether the Spending Clause *allows* Congress to delegate to an agency the power to create the requisite clarity, i.e., the issue that *Riley* reached. That is

because, even assuming Congress can do so, it did not do so here.

The Court arrives at that answer based both on the Tax Mandate's statutory language and ARPA's overall structure. Start with the former. Even assuming that the Tax Mandate meets the "intelligible principle" standard, there can be little doubt that the language of that provision leaves open "major questions." The Tax Mandate "involv[es] billions of dollars in spending each year," *see Burwell*, 576 U.S. at 485, and is expressly directed at a core State function, the power to tax, that has long been recognized as "indispensable" to the States' very existence. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824) ("The power of taxation is indispensable to [the States'] existence."); *Bode v. Barrett*, 344 U.S. 583, 585 (1953) (observing that the power of a State to tax is "basic to its sovereignty"); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments.").

Given the scope of the ambiguity in the Tax Mandate's language, the choices made in deciding how to resolve that ambiguity and implement the mandate cannot help but raise "question[s] of deep 'economic and political significance.'" *Burwell*, 576 U.S. at 486 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 320, 324 (2014)). Thus, just as the Supreme Court observed in *Burwell*, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* (citing *Util. Air Regulatory Grp.*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson*, 529 U.S. at 160)). A general provision that "[t]he Secretary

shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section,"[8] 42 U.S.C. § 802(f) does not suffice—indeed, as Ohio points out, the statute at issue in *Burwell* had a similar provision.

The point is simply this—when Congress seeks to alter the constitutional design by delegating its powers to agencies on topics of such importance, Congress must do so clearly, especially when federalism concerns are at issue. *Carter*, 736 F.3d at 734; *see also Ala. Assoc. of Realtors v. Dept. of Health and Human Servs.*, 594 U.S. (June 29, 2021) (Kavanaugh, J., concurring in denial of certiorari) (explaining that "clear and specific congressional authorization (via new legislation) would be necessary" for an agency to extend an eviction mortarium after the scheduled deadline passed). Congress did not do so here.

Then consider the statutory scheme overall. The Spending Clause entitles the States to clarity regarding the strings attached to federal funding. Against that backdrop, if Congress had intended merely to sketch out in broad brushstrokes the terms of the proposed conditional spending deal, and then have an agency complete the drafting, presumably Congress would have adopted a delayed effective date, or something of the sort, so that this additional work could have been done *before* presenting the offer to the

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[8] It bears noting that "this section" is not a specific reference to the Tax Mandate, but rather to all of the Coronavirus State Fiscal Recovery Fund provisions, which include the Tax Mandate as one provision.

States. For example, Congress could have provided that the Treasury Department would have 180 days to draft the regulations necessary to implement the Tax Mandate, at which time States could then decide whether to certify their acceptance. In that way, Congress could have ensured that the requisite clarity was present at the outset of State eligibility for the conditional funding.

Under ARPA as written, though, States were authorized to send in certifications immediately upon the effective date of the Act. That is strong evidence that Congress considered the terms of the deal to be complete as of that date. At the very least, the timing here does not provide the necessary evidence that Congress meant to conscript agency drafters into completing its legislative efforts.

Further confirming this view, without something like a delayed effective date, the conditional-spending offer here—which included the Tax Mandate, but not yet the regulations—violated the Constitution when first presented to the States. It is one thing to rely on an agency's drafting efforts to avoid a constitutional violation in the first place, as may be the case with a delayed effective date. But it is another to charge an agency with curing an already-occurring constitutional violation. *See Whitman*, 531 U.S. at 472.

In sum, even assuming that Congress can outsource to an agency the obligation to provide the answers needed to meet the Spending Clause clarity requirement, Congress made no such delegation in ARPA. Accordingly, the Tax Mandate must sink or swim on its own. And, as already explained above, the

Court concludes that the Tax Mandate's language falls short of what settled law requires in terms of such clarity. Thus, the Court finds that the Tax Mandate violates the Spending Clause, the IFR notwithstanding.

C. Injunctive And Declaratory Relief Are Warranted.

Even though the Court finds that the Tax Mandate falls short of constitutional requirements, there is the separate question of the appropriate remedy. Ohio requests both (1) an injunction preventing the Secretary from enforcing the Tax Mandate against Ohio, and (2) a declaration that the Tax Mandate is unconstitutional. The Court concludes that the first is appropriate, but, in light of its decision on the injunctive-relief issue, determines that the second is not.

Start with the injunction. Both parties agree that *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), controls the analysis. (*See* Doc. 38, #597 (Ohio); Doc. 45, #742 (Secretary)). *eBay* sets forth the following four elements that Ohio must show to obtain a permanent injunction:

> (1) that it suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

547 U.S. at 391. And even then, the issue is committed to the Court's "equitable discretion." *Id.*

Here, all four elements are present. First, as described above, in being bound to an unconstitutionally ambiguous "deal," Ohio is suffering irreparable harm to the exercise of its "indispensable" sovereign power to tax. *See Ogden*, 22 U.S. (9 Wheat.) at 199. Second, the federal government has sovereign immunity against claims for money damages. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.").[9] And in any event, such damages would do nothing to cure the irreparable harm that Ohio is currently suffering. As for the balance of harms, unlike Ohio's current harm, the Secretary will endure no meaningful hardship if the Court enjoins operation of the Tax Mandate against Ohio. The Secretary remains free to enforce, through use of ARPA's recoupment powers, the *other* conditions on the grant (i.e., those statutory conditions specifying the various types of goods, services, and other uses, on which Ohio can spend the federal funds it receives under ARPA), and the Secretary has no judicially cognizable interest in enforcing a provision (like the Tax Mandate) that is unconstitutionally ambiguous. Finally, issuing the requested injunction will promote the public interest. As described above, the limitations on Congress's ability to use its

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[9] By contrast, even though this is an official-capacity suit, and thus a suit against the federal government, sovereign immunity does not bar a claim for injunctive relief to prevent an unconstitutional act. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 US. 682, 690 (1949).

Spending Clause authority to make funding offers to the States are designed to protect this country's dual-sovereign structure, which in turn is meant to promote individual liberty. Accordingly, enforcing those limitations will serve that interest, an interest that qualifies as "public." Thus, the Court concludes that an injunction is appropriate. In awarding that injunctive relief, though, the Court specifically notes that the injunction extends only to prohibiting the Secretary from enforcing a single ARPA provision—the Tax Mandate, 42 U.S.C. § 802(c)(2)(A)—and only as to a single State—Ohio.

Separately, Ohio also requests declaratory relief. As Ohio concedes, "[t]he Declaratory Judgment Act leaves federal courts with 'unique and substantial discretion in deciding whether to declare the rights of litigants.'" (Doc. 38, #598 (quoting *W. World Ins. Co. v. Hoey*, 773 F.3d 755, 758 (6th Cir. 2014) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995)))). Here, the Court's grant of injunctive relief fully protects Ohio against every aspect of the ongoing irreparable harm that Ohio is suffering. Moreover, the Court's discussion of the grounds on which it awarded such relief fully explains the Court's reasoning. Accordingly, the declaratory relief that Ohio seeks would add nothing to the Court's resolution of this matter. Thus, exercising its "unique and substantial discretion," the Court denies Ohio's request for such relief.

CONCLUSION

For the above reasons, the Court finds (1) that it has jurisdiction, (2) that Ohio has met its burden of establishing that the Tax Mandate, due to its

ambiguity, exceeds Congress's authority under the Spending Clause, and (3) that the IFR does not cure that constitutional violation. Moreover, Ohio is suffering irreparable harm due to that violation. And, unlike the case at the preliminary injunction stage, a permanent injunction will prevent that ongoing harm. Further, such an injunction is in the public interest. Accordingly, this Court **GRANTS** Ohio's Motion for a Permanent Injunction (Doc. 38), and enjoins the Secretary from seeking to enforce the Tax Mandate, 42 U.S.C. § 802(c)(2)(A), against Ohio. Given that injunction, however, the Court **DENIES** Ohio's request in that same motion for declaratory relief. (*Id.*). The Court further **DENIES** the Secretary's Motion to Dismiss (Doc. 45). The Court **DIRECTS** the Clerk to enter judgment accordingly.

SO ORDERED.

July 1, 2021
DATE

s/ DOUGLAS R. COLE
DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:21-cv-181

JUDGE DOUGLAS R. COLE

STATE OF OHIO,

Plaintiff,

v.

JANET YELLEN, SECRETARY OF THE TREASURY, et al.,[1]

Defendants.

OPINION AND ORDER

Our Constitution enacts a system of dual sovereigns—federal and state—allocating certain powers to each. Questions about that distribution of powers, though, are "perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). Answering such questions can be a daunting task. That is particularly true about constitutional limitations arising under the Spending Clause, an area in which case law is both sparse and

[1] The Defendants to this lawsuit are 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 Treasury; and the United States Department of the Treasury. The Court refers to the Defendants collectively throughout this opinion as "Secretary."

murky. And, much as in *NFIB*, "resolving the controversy this case presents "requires [this Court] to examine both the limits of the Government's power, and [the] limited role [that Article III courts play] in policing those boundaries." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) ("*NFIB*"). Here, Ohio challenges one provision in the American Rescue Plan Act of 2021 ("ARPA"). Among a host of other provisions, the ARPA makes block grants available to the States for specified purposes. But, before a State can receive those funds, it must certify to the Secretary of the Treasury (the "Secretary") that the State will comply with multiple conditions that the law imposes. Ohio claims that one of those conditions—which Ohio labels the "Tax Mandate"—exceeds Congress's power under the Spending Clause and the Tenth Amendment. (Compl., Doc. 1, #10–11). Thus, Ohio filed this action seeking a declaratory judgement and permanent injunction preventing enforcement of the allegedly unconstitutional provision. (*Id.* at #11).

The matter is currently before the Court on Ohio's Motion for a Preliminary Injunction (Doc. 3) seeking to enjoin the Secretary from enforcing the Tax Mandate against Ohio (and only Ohio, as the State made clear at oral argument) while this suit is pending. This Court can grant that relief only if the Court finds *both* that it has jurisdiction over this action, and that such relief is appropriate on the substance of Ohio's claim as presented in Ohio's Complaint. Both issues present close questions. Interestingly, that is not because the merits are particularly close—the conceded ambiguity in the Tax

Mandate, as written,[2] establishes that Ohio has a substantial likelihood of showing that the ARPA violates the Spending Clause. Rather, what makes this a close case are issues relating to timing, which impact the analysis of both justiciability generally, and the appropriateness of preliminary relief now. Ultimately, the Court determines that, although the matter is justiciable, the preliminary relief that Ohio seeks is not warranted. Accordingly, the Court **DENIES** Ohio's request for a preliminary injunction.

BACKGROUND

A. The COVID-19 Pandemic.

The COVID-19 pandemic has imposed far-reaching, unprecedented consequences on nearly every aspect of life, not only in the United States, but around the world. The pandemic has sickened, and killed, people across the globe, as well as straining (or, in some countries, nearly crippling) healthcare systems. What is more, businesses have suffered financially, and many people have found themselves in financial straits, be it from losing employment or incurring other pandemic-related expenses. And as a result of the pandemic-related disruptions and economic dislocations, the need for, and use of,

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[2] Two days ago, the Secretary filed a notice that the Treasury Department has now issued an "Interim Final Rule implementing the relevant portions of the [ARPA]." (Notice of Interim Final Rule, Doc. 33, #356). The impact of those interim regulations, if any, on Ohio's claims has yet to be addressed in full by the parties. As the Court is denying the preliminary injunction, though, the Count concludes there is no reason to delay issuing this Opinion for additional consideration of that issue at this time.

governmental services and assistance has ballooned. Not surprisingly then, in addition to inflicting human costs, the pandemic has wreaked havoc on state budgets. Ohio is no exception.

B. The America Rescue Plan Act.

On March 11, 2021, President Biden signed the ARPA into law. The ARPA is Congress's latest effort to address the harms, including economic harms, that COVID-19 has caused. It is a wide-ranging law that commits the federal government to spending up to roughly $1.9 trillion on a host of goods, services, and forms of government assistance. Included in the ARPA is a provision meant to provide aid directly to the States to assist with their budget woes. In particular, the ARPA provides some $195.3 billion in aid to the States and the District of Columbia. *See* 42 U.S.C. § 802(b)(3)(A).[3] Ohio's share of the pot, should it elect to take it, is $5.5 billion. According to Ohio's Motion, that amounts to roughly 7.4% of the State's total spending last year. (Mot. for Prelim. Inj., Doc. 3, #33).

As is sometimes the case with federal dollars, the money comes with certain strings attached. In particular, to qualify for the funding, a State must "provide the Secretary [of the Treasury] with a certification, signed by an authorized officer of such State … that such State … requires the payment … to

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[3] Section 9901 of the ARPA amends Title VI of the Social Security Act by adding a new Section 602. As Section 601 of that Act is codified at 42 U.S.C. § 801, presumably the new section will be codified at 42 U.S.C. § 802. That is where the newly enacted language appears on Westlaw, and the Court will thus cite to 42 U.S.C. § 802, rather than the Statutes at Large, in this Opinion.

carry out the activities specified in subsection (c) … and will use any payment under this section … in compliance with subsection (c).” 42 U.S.C. § 802(d)(1). The Secretary is to “make the payment required for the State … not later than 60 days after the date on which th[at] certification … is provided to the Secretary.” *Id.* § 802(b)(6)(A)(i).

As the above language suggests, the conditions themselves are set forth in subsection (c). That subsection provides that a State shall only use the funds to cover costs incurred by the State:

(A) to respond to the public health emergency with respect to [COVID-19] or its negative economic impacts …

(B) to respond to workers performing essential work during the COVID-19 public health emergency …

(C) for the provision of government services to the extent of the reduction in revenue of such State … relative to revenues collected in the most recent full fiscal year of the State … prior to the [pandemic] … or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1)(A)–(D). And the State must use the funds by December 31, 2024. *Id.* § 802(c)(1). Ohio does not dispute the validity of any of those conditions. But the ARPA also imposes one more term. In particular, in a section labeled “Further Restriction On Use Of Funds,” the ARPA provides that:

> "(A) IN GENERAL.—A State or territory shall not use the funds provided under this section … to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

Id. § 802(c)(2)(A). Ohio refers to this provision as the Tax Mandate, and that provision forms the gist of the dispute here.

C. Ohio's Lawsuit And The Pending Motion.

In its lawsuit, Ohio claims that the Tax Mandate is unconstitutional. This is so, Ohio says, for two reasons. First, the Tax Mandate allegedly violates the Spending Clause in two ways—it is both unconstitutionally coercive, and unconstitutionally ambiguous. (Compl., Doc. 1, #9–10). And second, Ohio claims that the Tax Mandate violates the Tenth Amendment in that it unconstitutionally commandeers state taxing authority. (*Id.* at #11).

On the same day Ohio filed its Complaint, March 17, 2021, the State filed a Motion for a Preliminary Injunction and Memorandum in Support (Doc. 3). In that Motion, the State requested the Court to "enjoin the Tax Mandate." The Court established a briefing schedule for the Motion, and several amici filed briefs supporting Ohio.

The Secretary opposed Ohio's requested relief. More specifically, the Secretary first claimed that the Court does not have jurisdiction, as (1) Ohio lacks

standing, and (2) Ohio's claims are not ripe. (Resp. in Opp'n, Doc. 29, #237). Second, the Secretary asserted that Ohio has failed to show that a preliminary injunction is warranted. (*Id.* at #238). Finally, the Secretary argued that any injunctive relief should be limited solely to Ohio. (*Id.* at #263).

The parties completed briefing on April 22, 2021, and the Court heard oral argument on April 30, 2021. At the argument, Ohio clarified that the relief it is seeking through its Motion is an Order enjoining the Secretary from enforcing the Tax Mandate only as against the State of Ohio.

Two additional factual developments have occurred since argument. First, two days ago, the Secretary provided this Court a Notice of Interim Final Rule (Doc. 33), attaching the interim rule (Doc. 33–1). In the Notice, the Secretary explained that the rule "has been submitted to the Office of the Federal Register (OFR) for publication in the Federal Register." (Notice of Interim Final Rule, Doc. 33, #356). Second, yesterday Ohio filed a combined Motion for Leave to File Response to Notice and the corresponding Response to Notice.[4] (Doc. 34). With the impact of those additional filings in mind, Ohio's Motion is now pending.

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[4] As the contents of Ohio's Response do not change the outcome as to the preliminary relief sought here, the Court determines it need not await a response from the federal government to Ohio's latest filing to address the pending motion.

LAW AND ANALYSIS

Resolving the pending motion requires consideration of both jurisdictional and merits issues. Typically, when a jurisdictional challenge is raised, the Court would start its analysis there. Here, though, the two issues are inextricably intertwined. That is because the questions of (1) whether Ohio has suffered an injury in fact, and (2) whether its suit is ripe both turn to a large extent on how the injury is characterized. That in turn requires the Court to analyze the nature of the rights that the Spending Clause confers to the States when offered conditional funding. But that issue is also closely related to the likelihood of success on the merits, as well as the nature of the harm that Ohio is currently suffering, if any. And both of those inquiries go to the appropriateness of preliminary injunctive relief. The Court thus starts its discussion by considering the nature of the rights that the Spending Clause creates, and then turns to the implications of its findings on that front for the jurisdictional and preliminary injunction issues, respectively.

A. The Spending Clause Prevents Congress From Offering The States Money On Ambiguous Terms.

Under our constitutional design, the Framers "split the atom of sovereignty." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). But it was not an even split. The federal sovereign is supreme, *see* U.S. CONST., art. VI, cl. 2, but only in the exercise of its enumerated powers. That is, "[t]he States have broad

authority to enact legislation for the public good—what we have often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)). "The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it.'" *Id.* (quoting *McCulloch*, 4 Wheat. at 405).

But one of the federal government's enumerated powers creates at least some wiggle room on that front. According to Art. I, § 8, cl. 1, of the Constitution, typically called the Spending Clause:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

This provision authorizes Congress to pay money to the States. And "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). In a sense, then, Congress can leverage its spending power to "encourage" States to use their police powers in the fashion that Congress desires. That is, Congress can seek to purchase acquiescence from state governments that Congress otherwise lacks authority to order.

Perhaps recognizing that Congress's unbridled use of the Spending Clause (especially when coupled with the power to tax) could undermine the balance of powers in our dual-sovereign federalist system, the Supreme Court has held that there are limits, inherent in the Clause itself, on how Congress can deploy this power. As the Supreme Court put it in *Dole*, "[t]he spending power is of course not unlimited,

but is instead subject to several general restrictions articulated in our cases." *Id.* at 207 (citation omitted).

The recognized limitations on the Spending Clause powers are threefold. First, "Congress may not impose conditions 'unrelated to the federal interest' in enacting spending legislation." *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring) (quoting *Dole*, 483 U.S. at 207–08). Second, it may not "coerce the States into accepting funds and the regulations that come with them." *Id.* (citing *Dole*, 483 U.S. at 211). Third, "given [Congress's] authority under the Spending Clause to regulate the States beyond the limited and enumerated powers the Constitution otherwise gives it and given that the States are not represented in the Halls of Congress, the federal courts have required Congress to state those conditions 'unambiguously' in the text of the statute." *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).[5]

Ohio raises both the second and third of those limitations—coercion and ambiguity—in its Complaint and its briefing here. The Court's resolution of the Motion, however, focuses principally

[5] In his concurrence in *Pontiac*, Judge Sutton described this third limitation as "statutory," *see City of Pontiac*, 584 F.3d at 283, which it is in the sense that it imposes a requirement on how Congress goes about drafting statutes. That is, the limitation is not directed at the substance of the conditions, but rather at ensuring, as a drafting matter, that the conditions are clearly expressed. But, while describing the limitation as statutory, Judge Sutton acknowledged that it has "constitutional roots." *Id.* at 284.

on the ambiguity issue. Thus, a few more words regarding that limitation are in order. As a majority of Sixth Circuit judges observed in *City of Pontiac*, this limitation derives largely from analogy to contract law. *See id.* at 276–77 (citing *Pennhurst*, 451 U.S. at 17), 284–85 (Sutton, J., concurring) (citing *Pennhurst*, 451 U.S. at 17). "Viewing the Spending Clause relationship between a State and the federal government as a contract, the Supreme Court has stated that the legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] contract." *Id.* at 276–77 (citing *Pennhurst*, 451 U.S. at 17) (cleaned up). True, the Supreme Court has been "careful not to imply that *all* contract-law rules apply to Spending Clause legislation," but it has also "regularly applied the contract-law analogy in cases" involving receipt of federal funds. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).

Under those principles, it is not sufficient that the State receive funds merely knowing that some kind of strings are attached. Rather, the question is "whether such a state official would clearly understand *the obligations*." *City of Pontiac*, 584 F.3d at 277 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006)) (cleaned up) (emphasis added). That makes sense, as "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* at 268 (quoting *Arlington*, 548 U.S. at 296) (in turn quoting *Pennhurst*, 451 U.S. at 17). "'By insisting that Congress speak with a clear voice,' the Supreme Court enables States 'to exercise their choice knowingly,

cognizant of the consequences of their participation.'" *Id*. (quoting *Pennhurst*, 451 U.S. at 17). So, not only does the Constitution require Congress to tell States that there *are* conditions, but Congress must also tell States *what* those conditions are.

B. Ohio Has Established That It Has Standing And That At Least Its Challenge Under The Spending Clause Is Ripe.

Against that backdrop, let's consider the nature of Ohio's challenge here. Because the federal government has raised justiciability issues, the Court starts there. The federal government claims both that Ohio lacks standing, and that this matter is not ripe. As to the first, it is well settled that "[t]he plaintiff bears the burden of establishing standing." *Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). "To satisfy the 'irreducible constitutional minimum of standing,' the plaintiff must establish that: (1) he has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) that there is a causal connection between the injury and the defendant's alleged wrongdoing; and (3) that the injury can likely be redressed." *Id*. (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). The principal challenge here goes to the first of those, or the injury-in-fact requirement.

Beyond standing, "[i]t is [also] the plaintiff's burden to prove that its claim is ripe." *B&N Coal, Inc. v. Blue Racer Midstream, LLC*, 414 F. Supp. 3d 1049, 1056 (S.D. Ohio 2019) (citing *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1064 (10th Cir.

2012)); *see also Andrew v. Lohr*, 445 F. App'x 714, 715 (4th Cir. 2011) (per curiam); *Dealer Comput. Servs., Inc. v. Dub Herring Ford*, 623 F.3d 348, 354 (6th Cir. 2010). "A claim is ripe where it is 'fit for judicial decision' and where 'withholding court consideration' will cause hardship to the parties." *Hill v. Snyder*, 878 F.3d 193, 213 (6th Cir. 2017) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

Before diving into details, the Court considers the preliminary question of whether the necessary jurisdictional showings run to *the suit itself*, or instead to *the specific relief* sought through this motion. One well-established principle provides a starting point: the Supreme Court's "standing decisions make clear that 'standing is not dispensed in gross.'" *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)) (in turn quoting *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996) (alteration omitted)). Rather, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Davis*, 524 U.S. at 734).

There is Sixth Circuit case law that could perhaps be read as suggesting that a preliminary injunction is a "form of relief," and thus a plaintiff must establish Article III requirements as to that form of relief itself. In its recent decision in *Online Merchants Guild v. Cameron*, for example, that court observed that "a preliminary injunction is warranted only where the party seeking relief is likely to establish: (1) an injury in fact; (2) traceability; and (3) redressability." No. 20-5723, 2021 WL 1680265, at *4 (6th Cir. Apr. 29, 2021).

But the Sixth Circuit did not specifically say whether the plaintiff was required to make those showings as to the relief sought by the suit, or as to the requested preliminary injunction. And it appears that the Supreme Court's reference to "form of relief" for standing purposes, means form of relief "*requested in the complaint*." *Town of Chester,* 137 S. Ct. at 1651 ("At least one plaintiff must have standing to seek each form of relief *requested in the complaint*.") (emphasis added). So, for example, if a plaintiff sought both damages and a permanent injunction, the plaintiff would need to establish Article III standing for both aspects of its suit. *Id.* at 1650 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105–106, and n. 7 (1983) (finding that a plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief)).

Of course, a preliminary injunction is not a "form of relief requested in the complaint." *Id.* at 1651. Rather it is a form of temporary relief sought by way of a motion in a pending action over which the Court has jurisdiction. Thus, the Court concludes that the jurisdictional inquiry properly runs to the suit (i.e., the claims asserted, and relief sought, in the Complaint), not the relief sought by way of a motion for preliminary injunction.[6]

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[6] That is not to suggest that issues such as whether the preliminary injunction will provide the plaintiff relief are irrelevant to the issue of whether to grant the motion. To the contrary, as described below (*see infra*, Section C), the Court concludes that the question of whether the requested injunction will provide meaningful relief, which is a type of redressability inquiry, is part of the second prong of the preliminary injunction

That also makes sense based on Article III's language. The judicial power extends to "cases" or "controversies," and thus it is the "cases" or "controversies" themselves that should be the focus of the jurisdictional inquiry. During the pendency of such "cases" or "controversies," the Court may be called upon to decide a host of issues—motions to compel, motions to quash, etc. So long as a court has jurisdiction over the claim itself, this Court is not familiar with precedent that would require the party seeking relief by way of such motions to identify the "injury in fact," "causation," and "redressability," associated with that specific relief each motion seeks. Nor would that approach make sense, either as a conceptual or a practical matter.

Based on that understanding, Ohio must show that it has standing to pursue its *Complaint* against the federal government, which sets forth claims under the Spending Clause and the Tenth Amendment, and must also establish that those claims are ripe. Or more specifically, Ohio must show that both standing and ripeness existed when it filed its Complaint. *Lujan*, 504 U.S. at 606, n.4 (noting the "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed").

Start with standing. As noted, the principal question here goes to injury in fact. As is so often the case, whether an injury in fact exists turns on the

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framework, which addresses questions of irreparable harm. But that goes to whether it is appropriate for the Court to grant a preliminary injunction, not to whether the Court has the power to do so, which is the jurisdictional inquiry here.

nature of the right that is protected, and the claims as to how that right was violated. For now, let's focus on the Spending Clause ambiguity argument. As described above, Supreme Court precedent suggests that the constitutional violation occurs when the federal government offers money on ambiguous terms. It is Congress *passing* the Act, not the State *accepting* the money, that violates the Constitution. And that makes sense, of course, as the limitation at issue is a limitation on Congress's powers, not those of the States. So, if the ARPA violates the Spending Clause, that violation already has occurred.

But that does not answer the separate inquiry of whether the violation is (or was at the time suit was filed) harming Ohio (or any other State). There are at least three ways that one could conceptualize the nature of the harm that flows to the States (including Ohio) as a result of that violation. First, the States may claim that the right violated is their right to an unambiguous understanding of the deal that Congress is offering under its spending power. Understood that way, a State would start suffering harm immediately upon receipt of the offer. Ohio could say, "The State is entitled to a clear offer, and you have presented an unclear one."

Second, Ohio could claim that it is injured upon sending its certification to the Secretary. After all, it is the certification that binds Ohio to the conditions—including the Tax Mandate that Ohio maintains is unconstitutional.

Third, it may be that the harm does not arise until the Secretary invokes the allegedly ambiguous term in an effort to recoup money from the State. In some

ways, this final one tracks better with typical understandings of harm. Wrongfully taking money from another is a classic example of common law notions of injury in fact.

Here, the difference among these may matter for justiciability purposes. Under the ARPA, States apparently have been free to send in their certifications since the effective date of the Act, March 11, 2021 (that was the date that President Biden signed the law, and the ARPA appropriated funds from the current fiscal year). In other words, it appears the "deal" was available to Ohio at the time it brought this action. So, under the first theory above, Ohio was already suffering harm at that time in the form of being forced to ponder whether to accept an unconstitutionally ambiguous deal. Stated differently, forcing Ohio to determine how to respond to the offer of funding under the cloud of an ambiguous term acts as the injury in fact. Nor is it an answer to say that Ohio knows that the Tax Mandate is ambiguous, and thus can decide whether to take the risks associated with that ambiguity. The Spending Clause *prohibits* Congress from offering an ambiguous deal, precisely because the States, as sovereigns, are entitled to clarity. So, if ambiguity constitutes injury in fact, Ohio has alleged it here.

But, under either of the latter two injury-in-fact theories, it is more difficult to see that Ohio has suffered an injury in fact, or at least had suffered one as of the time it filed its Complaint. To be sure, this is in part a declaratory judgment action, which is inherently a form of prospective relief. But that "does not alter [jurisdictional] rules or otherwise enable

federal courts to deliver 'an expression of opinion' about the validity of laws." *Saginaw County v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 954 (6th Cir. 2020). Ohio still must show that, at the time it filed its Complaint, it was suffering "an actual or imminent injury." *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 515 (6th. Cir. 2019) (quoting *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 452 (6th Cir. 2017)). And Ohio did not state, for example, that it was currently prepared to send the certification, which is the harm under theory two, let alone that it had done so. As for the last theory, Ohio has not yet received any funding, and, in any event, the federal government says that much more work remains to be done in terms of shaping even how the Secretary would decide whether recoupment is warranted in a given case, before any actual recoupment attempt occurs. (Indeed, that is one of the topics that the Interim Final Rule addresses.) Under such circumstances, it is difficult to conceive that some potential, far-in-the-future recoupment efforts could rise to the level of "imminent."

Determining which of these three theories of injury in fact Ohio asserts, and whether that supports standing here, is not straightforward. Ohio appears to be relying largely on the first one, with a nod to the latter two. In its Complaint, it alleges that the Tax Mandate "unconstitutionally intrud[ed] on the State's sovereign authority" (which seems to invoke the first theory above), and created a "risk that [Ohio] may be made to return funding to the federal government" (which could be understood as invoking one of the latter two injury theories). (Compl., Doc, 1, #3). The Court concludes that the latter stated "harm" does not

suffice. The "risk" of which Ohio complains ("returning funding") is currently too remote to satisfy the injury-in-fact requirement. And even if it could, the many contingencies that would need to occur before such recovery is sought would doom that asserted harm on ripeness grounds.

But that still leaves the first theory. Ohio's argument on this front could be labeled as a sort of affront-to-sovereignty theory. That is, Ohio asserts the right, as a co-sovereign under our constitutional structure, to have Congress "bargain" according to the constitutionally imposed strictures of "good faith," which include a requirement that Congress present the terms of a proposed Spending Clause "deal" in an unambiguous fashion at the time the offer is made. Congress has injured Ohio, the State would say, by depriving Ohio of that right.

The Court acknowledges that such an injury could be characterized as "abstract," or "intangible," rather than "concrete and particularized." But the Court ultimately disagrees with that view. If Ohio is correct on the merits of its Spending Clause claim (a topic to which the Court returns below), then Congress has fallen short in delivering the constitutionally required clarity. If so, Ohio suffered an injury in its role as sovereign. When Ohio brought this action, it had the present ability to send the statutorily-required certification (Ohio could do so upon the effective date of the ARPA), but lacked the information necessary to understand the deal. Therefore, Ohio could not exercise its sovereign prerogative, as it had no way of knowing whether accepting these funds, in exchange for agreeing to be bound by the inscrutable Tax

Mandate, represented a good deal or a bad deal for the citizens of this State—information to which it is entitled under the Constitution.

The Court acknowledges that this is perhaps an odd form of injury in fact. But that grows out of the unique nature of the constitutional guarantee at issue here (i.e., a right to clear terms), coupled with Ohio's role as a co-sovereign. When considering both of those, intruding on Ohio's sovereign right to receive a clear offer strikes the Court as a sufficient injury in fact to support Article III standing, if just barely.

The federal government might well argue, of course, that any such "harm," in addition to being ephemeral, is voluntarily incurred. After all, the State can wait to send the certification until down the road. Moreover, at argument, the federal government noted that additional clarity might soon arrive in the form of regulations. And, as noted, just two days ago the Secretary published an "Interim Final Rule" that purports to provide additional clarity as to what the Tax Mandate means.

But two responses to that. First, as noted above, standing and ripeness are measured as of the time a party files its complaint. *Lujan*, 504 U.S. at 606, n.4. At that time, waiting was its own form of harm. As Ohio noted, it is in the middle of budgeting for the next biennium *right now*, so a lack of clarity as to potential funding sources creates current hardships for that process. Moreover, as part of that budgeting process, Ohio was (and is) considering changes to its tax laws, and a lack of certainty as to the consequences, if any, that those changes would have on its currently available funding under the ARPA had (and still has)

an immediate impact on the state. Being told to wait for the federal government to act provides no relief on either front, and does nothing to avoid the injury in fact.

Second, and relatedly, the Constitution requires the federal government to express clearly the terms of the deal that it is offering to the States. Even if the Secretary's Interim Final Rule issued two days ago "cures" the ambiguity (and would be a constitutionally effective way of doing so, more on that below) that goes to mootness. Nothing that happens post-filing changes the fact that Ohio was pointing to an already-existing alleged constitutional violation at the time it filed suit. Ohio needed to know the terms of the "deal" (which it is constitutionally entitled to know), and it needed to know them at the time it filed suit, not later.

In reaching this conclusion, the Court acknowledges that it has not identified any case law directly on point as to how standing should be assessed in the context of an unconstitutionally-ambiguous-Spending-Clause claim.[7] In that regard,

[7] Ohio cites a bevy of cases in its reply brief for the following proposition: "When a plaintiff can participate in a program only by subjecting itself to unconstitutional terms, it suffers an injury in fact." (Ohio Reply Br., Doc. 30, #284–85) (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998); *Libertarian Party of Ohio v. Wilhelm*, 988 F.3d 274, 279 (6th Cir. 2021); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir. 1999)). While these cases may support Ohio's argument when read at a certain level of generality, the Court finds that they do not help Ohio much here. Each case arose in a very different factual context and couched

the Court does not intend that its decision today should be read as adopting a broad view of standing predicated on any potential ambiguity in Spending Clause legislation, involving any potential payment of funds, no matter how small. In the First Amendment context, for example, the Sixth Circuit has observed that "adverse actions [can be] so *de minimis* that they do not rise to the level of a constitutionally cognizable injury." *Maben v. Thelen*, 887 F.3d 252, 266 (6th Cir. 2018). That same type of limitation may apply to standing for Spending Clause challenges. The ambiguity still violates the Constitution (that is a question of the statute's terms, not the amount at stake), but perhaps if the ambiguity is slight, or the dollar amounts low, the resulting injury would be too insignificant to support Article III review.

Here the Court need not reach that issue, however, as the ambiguity at issue in the Tax Mandate is neither immediately dismissible as "slight," nor are the dollar amounts involved small. Indeed, Ohio notes that the grant it can accept from the federal government, if Ohio is willing to agree to the Tax Mandate, amounts to over 7% of the State's spending during the last fiscal year. (Compl., Doc. 1, #8). Thus,

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its holding in relatively fact-specific terms. The harm in most of the cases, for example, was some governmental restriction that prevented the plaintiff from participating in a governmental process on an equal footing with other participants. The plaintiffs in those cases therefore brought equal-protection claims challenging those restrictions. None of the cases involved a Spending Clause challenge to a program made available on equal terms to every potential recipient (here, the States). Thus, the Court does not rely on those cases as support for its holding on standing here.

the Court has little concern that this is an "inconsequential action[]," even though some other potential Spending Clause challenge might fit that bill. *See id.* at 266 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999)). Whatever the line for a "non-cognizably de minimis Spending Clause ambiguity" may be, the present facts are nowhere near it.

Moreover, while the Court has not identified precedent directly on point, the Court takes at least some comfort on the justiciability front from the Supreme Court's decision in *NFIB*. There, twenty-six States were challenging, in 2012, an amendment to the Medicaid funding statute that Congress enacted in 2010, and that would impose financial consequences *starting in 2014* on States that did not make certain changes to their programs by that time. *NFIB*, 567 U.S. at 538–39. The States included in their challenge to the law a Spending Clause claim. True, the Justices had various views about the merits of the underlying claim. But the important thing for present purposes is that not a single one of the Justices thought that standing provided an impediment to reaching those merits.

To be fair, it is likewise true that none of the Justices mentioned standing in the Spending Clause analysis, or explored the nature of the alleged injury in fact (there, the States were relying on a coercion theory, rather than the ambiguity theory). But that is irrelevant. Subject-matter jurisdiction is not waivable, and federal courts have an obligation to determine if it exists before ruling on the merits of a claim. *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016)

("Neither party contests our jurisdiction to review Foster's claims, but we 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.'") (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). Thus, in considering the merits of the Spending Clause claim in *NFIB*, the Supreme Court tacitly confirmed that Article III's jurisdictional requirements, including standing, were met. The Court reaches that same conclusion here.

As is readily apparent from the discussion above, the Court's resolution of the standing issue also disposes of any ripeness problem. The issue here is not that the Secretary may seek recoupment in the future—a dispute that may not be ripe. Rather, the issue is that Ohio alleges it does not have the constitutionally-required clarity at present. A claim based on the lack of that clarity, assuming that counts as an injury in fact, is thus ripe.

Post-argument events, though, add an additional jurisdictional wrinkle. As noted, two days ago the Secretary issued an Interim Final Rule regarding the ARPA. (*See* Doc. 33). That rule was directed, in part, to clarifying the Tax Mandate. Such clarification, of course, may raise potential mootness concerns. On that front, though, while the Court notes it has an independent obligation to assess the issue, "[t]he 'heavy burden' of demonstrating mootness falls on the party asserting it." *Thomas v. City of Memphis*, No. 20-6118, 2021 WL 1712264, at *3 (6th Cir. Apr. 30, 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

Here, establishing mootness is not a straightforward proposition, and the federal government has yet to actually present a mootness argument based on the Interim Final Rule. The first question is whether the Interim Final Rule even figures into the Spending Clause analysis. After all, the Spending Clause is an Article I power, so it could well be the case that it is Congress, not an executive agency, that must provide the constitutionally required clarity. *See City of Pontiac*, 584 F.3d at 284 ("[T]he federal courts have required *Congress* to state … conditions 'unambiguously' in the text of the statute.") (Sutton, J., concurring). Indeed, even in a case where the Supreme Court acknowledged the applicability of post-issuance agency guidance to clarify the nature of the condition, the Supreme Court noted that the statute itself provided the constitutionally required level of clarity. *See Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985). In other words, *Bennett* suggests that, if a statute meets the Spending Clause's clarity threshold, then an agency can resolve any remaining ambiguity. But that is different from saying that an Executive Branch agency can wholesale fix a constitutionally defective statute.

Second, even if regulations can do so, it is not (or at least not yet) clear that the Interim Final Rule does so. That is so for two reasons. First, recall that the constitutional issue here is a lack of clarity. While an Interim Final Rule has the force of law while in effect, it is expressly subject to revision after issuance. That may impact (not "necessarily impacts," but "may impact") its ability to provide the constitutionally required clarity. Second, there is the question as to

whether the Interim Final Rule, even assuming it counts, provides the necessary clarity. To the contrary, Ohio argues in its "Response" that, even with the Interim Final Rule, unconstitutional ambiguity remains. (Doc. 34). The Court has not reached a final determination on that issue yet, and will invite additional briefing from the parties. But for present purposes it is enough to say that the federal government has not yet carried its "heavy burden" of showing mootness, nor does the Court's independent inquiry compel it to find that this case is moot based on the Interim Final Rule.

Therefore, as the Court finds that standing and ripeness were present at the time the Complaint was filed, and the federal government has not (or at least not yet) carried its "heavy burden" of establishing mootness, the Court concludes it has Article III jurisdiction over Ohio's suit.[8]

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[8] The federal government did not press its original jurisdictional arguments (standing and ripeness) in a Rule 12(b)(1) motion directed exclusively at that issue. Rather, it presented the jurisdictional issues as one basis for denying the currently requested injunctive relief. The Court is cognizant of its ongoing obligation to assess justiciability and ensure that it has subject-matter jurisdiction. The Court's ruling on that issue above is based on the information and arguments that the parties have offered to date, and is without prejudice to the federal government's ability to expand on its arguments in a more full-throated motion under Rule 12(b)(1) directed at those issues, along with the mootness issues, should it so choose.

As also noted, the Court acknowledges that "standing is not dispensed in gross … [but rather] a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester*, 137 S. Ct. at 1650

C. Ohio Is Not Entitled To A Preliminary Injunction, As The Relief It Requests Will Not Avoid The Harm On Which It Relies In Its Motion.

The jurisdictional finding is not the end of the matter. There is a separate question as to whether the Court should grant Ohio's pending request for a preliminary injunction. Again, the Court concludes that it is a close call, but on balance determines that Ohio does not warrant the requested relief. That is not because Ohio has failed to show a likelihood of success on the merits of its claim (even with the Secretary's recent Interim Final Rule), but rather due to shortcomings in the Court's ability to provide preliminary relief that addresses the harm Ohio claims it would suffer absent a preliminary injunction.

The parties largely agree on the decisional framework that applies to a request for a preliminary injunction. This Court must balance "four factors ... when considering a motion for preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the

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(quotations and citations omitted). Thus, the Court's determination that jurisdiction exists for purposes of the Spending Clause challenge does not mean that the Court has concluded that it is present for the Tenth Amendment claim. As the Court does not rely on the latter claim for purposes of its instant determination, though, that is irrelevant, at least for now.

injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam) (internal quotation marks omitted). The Court will take them in that order, but ever mindful of the admonition that a "preliminary injunction is an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.'" *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 811 (4th Cir. 1991)) (bracket and internal quotation omitted).

On the first prong, the Court finds that Ohio made a substantial showing that it is likely to succeed on the merits of its Spending Clause claim, at least on the ambiguity issue. (Given the Court's ruling on the ambiguity issue, the Court need not, and thus does not, address the coercion or anticommandeering issues at this time.) As described above, the Spending Clause requires Congress to specify the terms of the deal in language that is sufficiently clear to put the State on notice "of its obligations." With that in mind, take a look again at the language here:

> "(A) IN GENERAL.—A State or territory shall not use the funds provided under this section … 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). Despite poring over this statutory language, 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 (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise)."

To be fair, the "change in law" part seems clear. Only new laws count. And presumably the cut-off date for "new" is the date on which the State sends its certification. So far, so good. And there appears to be sufficient clarity around what constitutes a reduction in *a* tax—it would be a change in the rate, or a new rebate, or something of the sort. But where things get hopelessly muddled is with regard to "indirectly" and "*net* tax revenue of such State." Start with the latter phrase. Net tax revenue as measured against the previous fiscal year? Or against what would have been collected without the change in taxes? Or what? And, in either event, how does one "score" the issue? In other words, let's say a State elects to increase its statewide sales tax, but decrease its income tax. Or a State opts to change how progressive its income tax rates are. Does that effect a reduction in "net tax revenue"? After all, the State may enact the package of tax changes (or even a single tax change) thinking that the State will collect more taxes as a result, but may simply be wrong. As Ohio notes, and the federal government concedes (rightly so), the COVID-19 pandemic has imposed major disruptions on economic activities in the State (and frankly around the world). Against that backdrop, projecting the net impacts of

any tax change, and certainly any package of tax changes, seems a Sisyphean task.[9]

That on its own would be bad enough, but the ARPA then lumps "indirectly offset" on top. The Court honestly has no idea what an "indirect offset" to net tax revenues may be. It became clear at oral argument that the federal government was largely unwilling to hazard a guess as to what it meant either. Faced with repeated questions on that front, the federal government offered two responses, neither of which explained the meaning of the term. First, the federal government claimed that the Spending Clause does not require that the *substance* of the conditions be clear, but merely that the statute make clear that conditions *exist*. Wrong. As noted above, Supreme Court and Sixth Circuit precedent directly reject that view.

Second, at oral argument, the federal government offered that, while the Tax Mandate may be ambiguous *now*, the Secretary has indicated that regulations were likely forthcoming that may provide the missing clarity *later*. To be fair, subsequent events proved the prescience of that assertion. Just two days ago, the Secretary submitted an Interim Final Rule for publication in the Federal Register expounding on

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[9] Interestingly, two of the topics that the Interim Final Rule addresses are: (1) the baseline for determining a net reduction in tax revenue; and (2) how the "scoring" of tax changes works, perhaps reflecting that the Secretary shares the view that the ARPA itself provides little direction on those topics. Whether the Interim Final Rule successfully cures that ambiguity, and is legally capable of doing so, are issues to which the Court returns below.

the ARPA, including the Tax Mandate, and provided notice to this Court of that event. (Doc. 33).

Especially given that subsequent event, the federal government's regulatory-cure theory gives the Court at least some pause on the likelihood-of-success front. But it does not change the Court's ultimate conclusion on this issue, at least now, for two reasons. (The Court acknowledges that these reasons overlap to some extent with its explanation as to why the new interim regulations do not necessarily moot the suit.) First, even if *final* regulations are a permissible way of providing the constitutionally required clarity in a Spending Clause "offer" to the States, it is far from clear that the same is true of *interim* final regulations. After all, such regulations are published without notice and comment proceedings, and are subject to revision after publication. *See, e.g.*, *Am. Transfer & Storage Co. v. Interstate Commerce Commission*, 719 F.2d 1283, 1303 (5th Cir. 1983). Accordingly, Ohio may be able to successfully argue that, if Ohio were to file its certification before those regulations became final, those new regulations would not apply to the funding Ohio receives here. *See, e.g.*, *Pennhurst*, 451 U.S. at 25. Thus, as Ohio is free to file its certification whenever it desires, it is currently an open question as to whether those regulations, either now, or if and when finalized, are even relevant to this dispute.

Second, and more fundamentally, it is not at all clear that the Secretary can *ever* cure a Spending Clause ambiguity program, even through final regulations. As noted above, it may be the case that, because the Spending Clause is an Article I power, it

is *Congress*, not *Executive* Branch officials, that must provide the requisite clarity.

To be sure, the Secretary disagrees and argues that, under *Bennett*, the Secretary *can* cure the Spending Clause ambiguity problem here. But it is not at all clear that *Bennett* offers the Secretary the refuge she seeks. True, *Bennett* rejected the argument that "ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement." 470 U.S. at 669. And, in doing so, the Court noted that the grant program there "was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." *Id.* But, more important for purposes of the motion in this case, the *Bennett* Court noted at the outset that *the statute* already had the "requisite clarity" mandated under the Spending Clause. 470 U.S. at 666. In other words, *Bennett* suggests that the Spending Clause mandates a threshold level of clarity in the statute itself, with Executive Branch officials able to provide further clarification to address residual ambiguity. But, here, Ohio claims that the constitutional threshold for statutory clarity is not met, and Ohio has shown a substantial likelihood of success on that argument based on the statutory language. *Bennett* does not make clear that the Secretary can fix *that* problem.

In sum, Ohio has shown that it has a substantial likelihood of establishing that, as written, the Tax Mandate does not meet the floor for clarity that the Spending Clause imposes on federal legislation offering money to the States. The impact of the new Treasury regulations, as an "interim" rule, or when

final, on that determination is by no means clear. As a result, the Court concludes that the publication of the new Interim Final Rule, by itself, is insufficient to overcome Ohio's showing, based on the statutory language, that is has a substantial likelihood of success on the merits.

Finally, the federal government also argues, almost in passing, that the no-set-of-circumstances test under *United States v. Salerno*, 481 U.S. 739, 745 (1987), precludes Ohio's pre-enforcement challenge here. (Resp. in Opp'n, Doc. 29, #249). As a general matter, *Salerno* holds that a party making a facial challenge "must establish that 'no set of circumstances exists under which [the law] would be valid.'" *Liberty Coins v. Goodman*, 748 F.3d 682, 690–91 (6th Cir. 2014) (quoting *Salerno*, 481 U.S. at 745). And here Ohio agrees that its pre-enforcement challenge is necessarily a facial challenge. So, *Salerno* could be read to say that, as long as the Tax Mandate would be unambiguous as to at least one potential change to Ohio's tax laws, a facial challenge will not lie. But that approach again misunderstands the nature of the claim here. Ohio argues that the Tax Mandate is unconstitutionally ambiguous. As applied to the Tax Mandate, "ambiguous" must mean something like "does not provide an answer as to a large fraction of the state tax law changes to which it would apply." Positing that the Tax Mandate would be clear as to *one* potential tax change reveals nothing about the answer to a large-fraction inquiry. But overall clarity as to the Tax Mandate's meaning is the sovereign right that Ohio asserts (and that the Spending Clause at least arguably recognizes). Given the nature of the claimed right at issue here, *Salerno*'s no-set-of-

circumstances test does not bar Ohio's ambiguity-based facial Spending Clause challenge. Ohio thus satisfies the first prong of the preliminary injunction test.

The Court next turns to the question of irreparable harm. The Sixth Circuit has noted, both recently and often, that "[i]rreparable harm is an 'indispensable' requirement for a preliminary injunction, and 'even the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'" *Mich. Educ. Ass'n Fam. Retired Staff Ass'n v. Mich. Educ. Ass'n*, No. 20-1174, 2021 WL 1546129, at *5 (6th Cir. Apr. 20, 2021) (quoting *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 392 (6th Cir. 2020) (in turn quoting *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326–27 (6th Cir. 2019))). The Court's resolution of this issue starts by piggybacking off its discussion of injury in fact in the standing context. To be sure, the two inquiries are not the same. As the federal government rightly observes, "Ohio's burden to show irreparable harm is higher than what is required to establish standing." (Resp. in Opp'n, Doc. 29, #260 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). But the problem is that the remainder of the federal government's argument on this front appears to assume that the alleged injury will not occur at least until Ohio announces an "imminent plan to cut taxes." (*Id.*).

At the risk of beating a dead horse, that assumption misunderstands the nature of the harm asserted here. Ohio argues that it is struggling to decide whether to claim the funds and what to do with its tax laws for the upcoming biennium. It also

contends that the ARPA provides no clarity on the consequences of any particular path as to the latter. In its briefing, the federal government nowhere responds to that asserted harm. And the Court finds that the (likely) unconstitutional ambiguity in the statute's language, with its resulting impact on Ohio's exercise of its sovereign powers, constitutes not only an injury in fact, but also irreparable harm.

But that is not the end of the inquiry. It is not enough for Ohio to show that it is suffering irreparable harm. Rather, to qualify for the "extraordinary remedy" of a preliminary injunction, Ohio must show that the requested injunctive relief will prevent or terminate that ongoing harm. *See, e.g., Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 279 (6th Cir. 2015) ("It is appropriate to use a preliminary injunction *to avoid* harms to goodwill and competitive position.") (emphasis added). There's the rub. The preliminary injunction that Ohio requests here is directed solely at the Secretary's exercise of her recoupment powers. But there is no reason to believe that the Secretary will exercise those powers any time soon. An Order telling the Secretary not to do that which the Secretary has no current ability—or intent—to do, and likely will not be in a position to do at any time soon (as Ohio has not even sent its certification, let alone received its funds), does not avoid any harm that the State is likely to encounter during the pendency of the preliminary injunction.

Indeed, at oral argument, Ohio largely conceded as much. When the Court inquired as to how Ohio was currently being harmed, and what purpose the injunction would serve, Ohio noted only that it

believed such an Order would provide *clarity* about the legal consequences of its decisions—for example, whether to send its certification or to enact various changes in its tax laws. But an Order announcing that the Secretary cannot rely on the ambiguous Tax Mandate for recoupment purposes while this case is pending does not—indeed cannot—provide the clarity that Ohio seeks. If anything, it is the Court's analysis of the likelihood of success on the merits that may provide some clarity on that front—and even that has become less certain given the issuance of the new Interim Final Rule. The bottom line is this—a preliminary injunction that stands no meaningful prospect of ever being enforced, as the Secretary is unlikely to be in a position to recoup funds while this suit is pending, adds nothing by way of clarity. Thus, while the Court finds that irreparable harm likely exists, the requested preliminary injunction does not avoid that harm.

Put differently, the Court has two options. It could grant Ohio's motion, which would mean Ohio has to choose whether to accept the ARPA funds knowing that the funds are subject to possible recoupment under the Tax Mandate once the Court issues a merits decision, i.e., if the Court were to conclude that the Tax Mandate is not unconstitutionally ambiguous after all (either in light of, or apart from, any Treasury Department rules), and thus were to decline to convert the preliminary injunction into a permanent injunction. Alternatively, the Court could deny Ohio's motion, which would mean Ohio has to choose whether to accept the ARPA funds knowing that the funds possibly could be recouped down the road based on the Tax Mandate (once again depending on the

outcome of this case). The only difference between those scenarios is that, should the Court deny Ohio's motion, the Secretary might then rely on the Tax Mandate to recoup funds between now and when the Court decides the ultimate issues here. But the odds of Ohio submitting a certification, receiving ARPA funds, and having those funds taken away while this case is pending strikes the Court as minimal, at best, and more likely nil.

As some avoidable irreparable harm is a necessary showing to preliminary injunctive relief, *see Mich. Educ. Ass'n*, 2021 WL 1546129, at *5, the Court determines that Ohio is not entitled to such relief at this time. That is particularly true in that the relief that Ohio seeks here is an order from an Article III court enjoining an Executive Branch official from exercising her statutorily assigned powers. The Court must be mindful of the separation of powers issues that inhere in that setting, and will not lightly enter such an Order—even though (or maybe especially because) that Order would almost certainly have no immediate application on the facts here. Of course, if this litigation were to linger to a point when the Secretary sought to recoup funds based on the Tax Mandate, or such an attempt on the Secretary's part was at least imminent, that may well change the analysis. But, at this time, the Court concludes that preliminary injunctive relief will not lie.

Because the Court concludes that the second element of the four-prong analysis is not met, the Court need not consider prongs three and four.

CONCLUSION

In sum, the Court finds that it currently has jurisdiction, that Ohio has established a substantial likelihood (although by no means a certainty) of success on at least an aspect of its Spending Clause claim, and that Ohio is currently suffering irreparable harm. But the Court also finds that the relief that Ohio requests does not prevent the irreparable harm that Ohio asserts as the basis for its request. Accordingly, this Court **DENIES** Ohio's request for a preliminary injunction, without prejudice to Ohio's ability to later raise the issue should efforts at recoupment under the Tax Mandate become a meaningful possibility.

SO ORDERED.

May 12, 2021
DATE

s/ DOUGLAS R. COLE
DOUGLAS R. COLE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

Case No. 1:21-cv-181

Judge Douglas R. Cole

STATE OF OHIO,

Plaintiff,

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 Treasury; and U.S. DEPARTMENT OF THE TREASURY,

Defendants.

DECLARATION OF KIMBERLY MURNIEKS

I, Kimberly Murnieks, make the following Declaration pursuant to 28 U.S.C. §1746, and state that under the penalty of perjury the following is true and correct to the best of my knowledge and belief.

1. I am the Director at the Ohio Office of Budget and Management.

2. The Ohio Office of Budget and Management monitors agency operating and capital budgets, including by monitoring agency spending to ensure expenditures are made pursuant to appropriations authorized by the Ohio General Assembly.

3. It is my understanding that, under Section 9901 of the American Rescue Plan Act, the State of

Ohio is expected to receive approximately $5.4 billion in aid. The State has already received $2.7 billion of such aid.

4. As indicated in the July 10, 2020, monthly financial report prepared by my office under § 126.05 of the Ohio Revised Code, tax revenue for the State of Ohio fell approximately $1.1 billion below estimate in state fiscal year 2020 (July 1, 2019, though June 30, 2020) due to fiscal conditions caused by the COVID-19 pandemic.

5. The State of Ohio operates primarily through a two-year operating budget cycle, where main operating appropriations including appropriations for general government, highway purposes, workers compensation, and the industrial commission are authorized by the Ohio General Assembly. The Ohio General Assembly also authorizes two-year capital appropriations to support capital improvements in the State on years alternating with the operating budget cycle.

6. Through my role as Director of the Ohio Office of Budget and Management, I have direct knowledge that for state fiscal year 2019 (July 1, 2018, through June 30, 2019), the State of Ohio had final appropriations totaling approximately $75 billion, and had expenditures totaling approximately $71 billion. This includes operating and capital appropriations and expenditures across all funds in the state treasury.

7. I have direct knowledge that for state fiscal year 2020, the State of Ohio had final appropriations totaling approximately $81.1 billion, and the State's expenditure totaled approximately $74.6 billion,

inclusive of operating and capital appropriations and expenditures across all funds in the state treasury.

8. I have direct knowledge that for state fiscal year 2021 (July 1, 2020, through June 30, 2021), the State of Ohio has current appropriations totaling approximately $96.7. billion, inclusive of operating and capital appropriations across all funds in the state treasury.

I have read the following, and it is all true and correct.

6-7-2021
Dated

s/ Kimberly A. Murnieks
Kimberly A. Murnieks
Director
Office of Budget and Management

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Case No. 1:21-cv-181

Judge Douglas R. Cole

STATE OF OHIO,

Plaintiff,

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 Treasury; and U.S. DEPARTMENT OF THE TREASURY,

Defendants.

DECLARATION OF KIMBERLY MURNIEKS

I, Kimberly Murnieks, make the following Declaration pursuant to 28 U.S.C. §1746, and state that under the penalty of perjury the following is true and correct to the best of my knowledge and belief.

1. I am the Director at the Ohio Office of Budget and Management.

2. It is my understanding that, under Section 9901 of the American Rescue Plan Act, a State may receive Rescue Plan funds by providing the Secretary of the Treasury "with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of [42 U.S.C. §802(c)] and will use any payment under this

section, or transfer of funds under [42 U.S.C. §803(c)(4)], in compliance with subsection (c) of" 42 U.S.C. §802.

3. On May 13, 2021, I signed and submitted the certification for Ohio.

4. A true and correct copy of an email confirming the Treasury Department's receipt is attached as Exhibit 1.

5. A true and correct copy of the confirmation form, which was signed electronically and submitted, is attached as Exhibit 2.

I have read the following, and it is all true and correct.

5-19-2021
Dated

s/ Kimberly A. Murnieks
Kimberly A. Murnieks
Director
Ohio Office of Budget and Management