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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The COVID-19 pandemic devastated the American economy. In response, Congress passed the American Rescue Plan Act of 2021, which offered $195 billion in aid to the States. Pub. L. No. 117-2, 135 Stat. 4. The States had no choice but to accept; refusing the money would have given other States and their citizens a significant competitive edge in emerging from the pandemic. Ohio accepted around $5.4 billion. But accepting the money meant agreeing to the Rescue Plan's "Tax Mandate," which bars States from using Rescue Plan funds to "directly or indirectly offset a reduction in … net tax revenue … resulting from a change in law, regulation, or administrative interpretation." 42 U.S.C. §802(c)(2)(A).

This case presents two questions, the first of which has divided the circuits and the second of which is of immense importance to the States and the Treasury.

1. Do courts have jurisdiction over the States' constitutional challenges to the Tax Mandate?

2. Is the Tax Mandate unconstitutional?

LIST OF PARTIES

The Petitioner is the State of Ohio.

The Respondents are Janet L. Yellen, in her official capacity as Secretary of the Treasury; Richard Delmar, in his official capacity as acting inspector general of the Department of the Treasury; and the United States Department of the Treasury.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Ohio v. Yellen, et al.*, No. 1:21-cv-181-DRC (S.D. Ohio) (judgment entered July 1, 2021).

2. *Ohio v. Yellen, et al.*, No. 21-3787 (6th Cir.) (judgment entered November 18, 2021).

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INTRODUCTION

Congress enacted the American Rescue Plan Act of 2021 to spur the States' recovery from the COVID-19 pandemic. The Rescue Plan, among other things, offers the States money—a lot of it. Ohio, for its part, was offered more than $5 billion, which is a sizeable portion of the State's yearly budget. But the money comes with strings attached. One such string, the "Tax Mandate," prohibits States from using Rescue Plan funds to "directly or indirectly offset" any "reduction in [their] net tax revenue" caused by a tax cut. 42 U.S.C. §802(c)(2)(A). Congress enacted the Mandate in hopes of pressuring States not to cut taxes. The Mandate thus codifies the view, held by at least one legislative proponent, that it is irresponsible to "cut your revenue during a pandemic [when you] still need dollars." Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts*, N.Y. Times (Mar. 13, 2021), https://archive.is/oKQxG.

This case presents the question whether Congress lawfully enacted the Tax Mandate. The answer is "no."

The Constitution's Spending Clause puts Congress in control of the federal purse. U.S. Const. art. I, §8, cl.1. Congress can use that power to offer States federal money with conditions attached. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). But those conditions must be clear, and the offers must be non-coercive. *Id.* at 207–08, 211.

The Tax Mandate is unconstitutional both because it is hopelessly ambiguous and because Congress coerced the States into accepting its terms.

Start with the ambiguity. The Mandate forbids States from using Rescue Plan funds to "indirectly

offset" losses in "net tax revenue" attributable to tax cuts. But money is fungible. Thus *every dollar* gained can be fairly described as indirectly offsetting *every dollar* lost. As a result, there is no principled way to tell whether money a State receives through the Act indirectly offsets any tax reduction the State might choose to pursue. To make matters worse, the Tax Mandate provides no guidance on how to identify reductions in "net tax revenue." In particular, it sets no baseline by which to test for reductions; it does not say whether a tax cut's effect on revenue should be determined relative to what revenue would have been without the tax reduction, what it was the year before, what it was pre-pandemic, or something else.

Moreover, Congress coerced the States into accepting the Mandate. Had Ohio turned down the billions of dollars Congress offered, it would have hampered the State's economic recovery and put Ohioans at a competitive disadvantage relative to citizens of sister States that accepted the money. Ohio, like every other State, had no realistic choice but to take the money and the strings attached to it.

The District Court deemed the Tax Mandate unconstitutionally ambiguous. And it enjoined the United States from enforcing the Mandate against Ohio. The Sixth Circuit reversed, but not on the merits. In fact, the Sixth Circuit held the Mandate unconstitutional in a companion case brought by Kentucky and Tennessee. But the court held that Ohio's case was mooted by a regulation Treasury promulgated months after Ohio filed suit. *See* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338-01 (Jan. 27, 2022); 31 C.F.R. §35.1 *et seq.* This regulation purported to cure the unconstitutional ambiguity, in part by announcing a complex framework for

identifying indirect offsets. And the Sixth Circuit held that this framework, by providing guidance regarding the manner in which Treasury might enforce the Mandate, eliminated any likelihood of a future enforcement action. That, the court believed, fully redressed Ohio's injuries.

The Sixth Circuit erred. Even with Treasury's guidance, the States "continue to experience" a "sovereign injury." *West Virginia v. Treasury*, 59 F.4th 1124, 1136 (11th Cir. 2023). In particular, the Mandate "continues to limit how the States may use federal funds." *Id.* at 1139. So, if the States are right that Congress illegally enacted the Mandate—and thus illegally imposed on the States the Mandate's tax restrictions—the States are suffering an ongoing constitutional injury from which they are entitled to seek relief. *Id.*

What is more, Treasury's regulation does not actually cure the Tax Mandate's ambiguity. For one thing, administrative agencies cannot provide the clarity the Spending Clause requires—only Congress can. *Id.* at 1147; *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560–61, 567 (4th Cir. 1997) (*en banc*); *id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment); *Kentucky v. Yellen*, 54 F.4th 325, 363 (6th Cir. 2022) (Nalbandian, J., concurring in part and dissenting in part). Regardless, the regulation fails to cure the Mandate's "lack of explanation on how to (1) calculate a 'reduction' in net tax revenue, (2) determine whether such a reduction resulted from a tax cut, and (3) tell what particular conduct constitutes an 'indirect' offset." *Kentucky*, 54 F.4th at 363 (Nalbandian, J., concurring in part and dissenting in part). As a result, state

legislators "still face an unlawfully-imposed quandary" when exercising state taxing power—a quandary that may cause legislators to "delay, second guess, or abandon parts of tax policies." *Id.* (quotation marks omitted).

The Court should grant review to address two important questions.

The first is the subject of an acknowledged circuit split: In light of the Final Rule, do federal courts still have jurisdiction to adjudicate the States' challenges to the Tax Mandate? *Compare* Pet. App.1a, *and Missouri v. Yellen*, 39 F.4th 1063, 1069–70 (8th Cir. 2022), *with West Virginia*, 59 F.4th at 1135; *cf. Arizona v. Yellen*, 34 F.4th 841, 853 (9th Cir. 2022). In answering this question, the Court can answer subsidiary questions that have also divided the circuits. For example, can challenges to ambiguous Spending Clause conditions be mooted by clarifying regulations?

The second question presented asks whether the Tax Mandate is unconstitutional. Two circuits have already held that it is. *West Virginia*, 59 F.4th at 1140–48; *Kentucky*, 54 F.4th at 346–57. Every State, and the Treasury too, would benefit from a speedy resolution of this immensely important question.

OPINIONS BELOW

The District Court's opinion denying a preliminary injunction is published at *Ohio v. Yellen*, 539 F.Supp.3d 802 (S.D. Ohio 2021), and reproduced at Pet.App.79a. The District Court's opinion granting a permanent injunction is published at *Ohio v. Yellen*, 547 F.Supp.3d 713 (S.D. Ohio 2021), and reproduced at Pet.App.25a. The Sixth Circuit's decision is

published at *Ohio v. Yellen*, 53 F.4th 983 (6th Cir. 2022), and is reproduced at Pet.App.1a.

JURISDICTIONAL STATEMENT

This case concerns the constitutionality of a federal statute. The District Court had jurisdiction over this dispute under 28 U.S.C. §1331. After the District Court entered judgment for the State of Ohio, the defendants timely appealed to the Sixth Circuit, which had jurisdiction under 28 U.S.C. §1291. The Sixth Circuit issued its judgment on November 18, 2022. On January 20, 2023, Justice Kavanaugh granted the State's application for an extension of time in which to file a petition for a writ of certiorari. His order gave Ohio until April 17, 2023 to file its petition. *See* Order, *Ohio v. Yellen*, No. 22A652 (U.S. Jan. 20, 2023). This petition timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 1 of the Constitution provides:

> 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; but all Duties, Imposts and Excises shall be uniform throughout the United States;

42 U.S.C. §802(c) provides, in relevant part:

> (c) Requirements
>
> (1) Use of funds

Subject to paragraph (2), and except as provided in paragraph (3), a State, territory, or Tribal government shall only use the funds provided under a payment made under this section, or transferred pursuant to section 803(c)(4) of this title, to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024--

(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.

(2) Further restriction on use of funds

(A) In general

A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

(B) Pension funds

No State or territory may use funds made available under this section for deposit into any pension fund.

STATEMENT

1. The COVID-19 pandemic devastated the American economy. With consumers staying home—either by choice or by edict—demand for goods and services plummeted. In response, some businesses closed. Others scaled back operations. Employees lost jobs, wages, and hours. This plunge in economic activity dramatically reduced the States' tax hauls. Consider, for example, Ohio. In the 2020 fiscal year, its tax revenues came in $1.1 billion below estimates. Pet.App. 118a. As revenues plummeted, the need for state services "ballooned." Pet.App.82a.

Congress responded by passing the American Rescue Plan Act of 2021. The Rescue Plan offered $195 *billion* in aid to the States and the District of Columbia. Pet.App.2a. Congress made $5.4 billion available for Ohio. Pet.App.30a. That was (and is) a lot of money. It equals about 7.2 percent of Ohio's last pre-pandemic budget. Pet.App.118a–119a.

To obtain the money, Ohio and other States had to accept conditions. This case concerns one such condition, the "Tax Mandate." It says:

> A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

42 U.S.C. §802(c)(2)(A). In simpler terms, if a State cuts taxes, causing "net tax revenue" to fall, it cannot use Rescue Plan funds to "directly *or indirectly* offset" the loss. Treasury can initiate recoupment proceedings against States that violate the Mandate, recovering funds equal in size to the reduction in net tax revenue. §802(e).

Given the billions of dollars at stake, every State accepted Rescue Plan funding. Having accepted the offer, they must now comply with the Tax Mandate until they spend or return the funds, which will remain available until 2025. §802(a)(1), (g)(1)(B); 31 C.F.R. §35.5. Further, States must *prove* their compliance with the Tax Mandate. In particular, the Rescue Plan requires States that accept the offer to periodically submit a "detailed accounting" to the federal government regarding their use of Rescue Plan funds. §802(d)(2). That accounting must include "all modifications" to "tax revenue sources." §802(d)(2)(A).

2. Six days after President Biden signed the Rescue Plan into law, Ohio filed suit against the Secretary of the Treasury, Treasury's Inspector General, and the Department of the Treasury. (Collectively, "the Secretary.") Ohio also moved for a preliminary injunction.

The State made two constitutional arguments relevant here. First, it argued that the Tax Mandate violated the constitutional prohibition on ambiguous conditions in Spending Clause legislation. *See South Dakota v. Dole,* 483 U.S. 203, 207 (1987). Second, Ohio argued that Congress unconstitutionally coerced the State into accepting the Mandate's terms. *See id.* at 211.

The District Court determined that the Mandate was ambiguous and that Ohio would likely prevail on the merits. *See* Pet.App.116a. It nonetheless denied a preliminary injunction because it determined that preliminary relief would do Ohio no good. Ohio, the court concluded, needed a *permanent* injunction to redress its constitutional injuries. Pet.App.115a–116a.

3. Two important developments occurred while the parties briefed the permanent-injunction issue.

First, Ohio accepted the Rescue Plan funds. Pet. App.118a.

Second, the Treasury Department published an interim rule purporting to implement portions of the Rescue Plan. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26786-01, 26807–10 (May 17, 2021).

This "Interim Rule" announced Treasury's approach to enforcing the Tax Mandate. The rule confirmed that, because "money is fungible," and because the Mandate prohibits using Rescue Plan funds to "*indirectly*" offset revenue lost through tax cuts, States may violate the Mandate even without "explicitly or directly" using Rescue Plan funds to "cover the costs of [tax-law] changes that reduce net tax revenue." *Id.* at 26807. But the rule denied that *all* expenditures or uses of Rescue Plan funds indirectly offset *all* losses of tax revenue. It announced a complex, atextual framework for identifying impermissible, indirect offsets. For example, the rule said States will not be deemed to have sustained a reduction in "net tax revenue"—even if their tax revenue drops relative to the prior year—as long as they bring in more tax revenue than they did in 2019, adjusting for inflation. *Id.* at 26807–09. The Interim Rule also attempted to explain the

meaning of "indirectly offset." On the one hand, the Interim Rule assured States that they *will not* be deemed to have used Rescue Plan funds to indirectly offset the revenue lost from a tax-rate reduction if changes to other laws, "organic growth," or spending cuts fully counterbalance the losses. *Id.* at 26807, 26809–10, 26823. But the rule included a catch-all that empowered the Secretary to initiate recoupment proceedings if, at any point during the Rescue Plan's coverage, she concludes in her sole discretion that a State used Rescue Plan funds to "indirectly offset a reduction in net tax revenue." *Id.* at 26810. The rule thus tautologically defined "indirectly offsetting" to mean "indirectly offsetting."

The Interim Rule also established a detailed "step-by-step framework" by which States must prove their compliance with (among other things) the Tax Mandate. *Id.* at 26809; *see id.* at 26807–10.

4. The District Court permanently enjoined the Tax Mandate in its application to Ohio. Pet.App.28a–29a. It first confirmed its jurisdiction to decide the case. The court determined that Ohio sustained a sovereign injury when Congress denied the State the unambiguous offer to which it was constitutionally entitled. Pet.App.38a–41a. An order enjoining enforcement of the unconstitutionally ambiguous term would redress that injury. *Id.* Further, the dispute remained live even after Ohio accepted the funds: an injunction would benefit Ohio by freeing its legislators from having to enact tax policy under the "pall" cast by an ambiguous limit on the State's taxing power. Pet.App.41a–46a.

The court then deemed the Mandate unconstitutionally ambiguous. The Mandate, the court

explained, provides "no mechanism for determining whether a State's net tax revenues are 'reduced'" because of a tax cut. Pet.App.58a. Moreover, because every tax cut that reduces revenue relative to what revenue would otherwise have been *could be* described as reducing net tax revenue, the lack of statutory guidance caused a great deal of ambiguity. Pet.App. 58a–59a. The phrase "indirectly offset" made the ambiguity even worse. Given money's fungibility, *any* Rescue Plan funds received could be described as "indirectly offset[ting]" *any* loss of revenue from tax cuts. Pet.App.59a–61a. Yet the statute gives no principled basis for identifying impermissible "indirect" offsets. Taken together, the Tax Mandate gave the States no guidance regarding which tax policies were forbidden.

The Interim Rule did not alter the court's analysis. The court doubted whether "an administrative regulation" could *ever* "provide the clarity needed for a conditional grant to comply with Spending Clause strictures." Pet.App.63a, 67a. Regardless, nothing in the Rescue Plan empowered Treasury to provide the needed clarity. In reaching this conclusion, the court explained that, when "Congress intends for an agency to answer major questions relating to a statute—i.e., a question of deep economic and political significance that is central to the statutory scheme—then Congress must clearly say so." Pet.App.71a (quotation marks and citations omitted). Given the billions of dollars at stake and the potential effect on tax policy, the meaning of the Tax Mandate qualified as a question of "deep economic and political significance." Pet. App.72a. Because nothing in the Rescue Plan *clearly* delegated to Treasury the power to resolve this major question, the law was best interpreted to give Treasury no such power.

5. The Secretary appealed. On appeal, she argued that Ohio lacked standing to sue. Ohio responded by advancing three theories of standing relevant here.

First, Ohio asserted an "imminent-recoupment" injury. Again, the Tax Mandate could be read to prohibit *any* expenditure of funds by a State that reduced taxes, as Ohio had. *See, e.g.*, *See* Sub. S.B. 18, 134th Gen. Assemb. §§1, 5, 6 (Ohio, enrolled Mar.29, 2021), https://perma.cc/4Q5F-ZWYT. Ohio thus invoked the rule that plaintiffs sustain an injury in fact—and have standing to bring a pre-enforcement challenge—when a statute "arguably proscribe[s]" their actual or planned conduct. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014).

Second, Ohio asserted "sovereign-authority" injuries: the Mandate interfered with Ohio's sovereign prerogatives both pre-acceptance and post-acceptance. Pre-acceptance, the Mandate denied Ohio the unambiguous and noncoercive terms to which it was entitled, thus hindering the State's ability to meaningfully decide whether to accept Congress's conditions. Post-acceptance, the Mandate continues to injure the State in two respects. Ohio continues to be injured by having to comply with a condition it was unconstitutionally coerced into accepting. Further, the Mandate's vague requirements cast a pall over Ohio's sovereign prerogatives by forcing the state legislature to exercise its taxing and spending powers under the cloud of ambiguous restrictions.

Third, Ohio asserted a "compliance-cost" injury. Under this theory, the State is injured by having to devote resources to proving its compliance with the Tax Mandate. An order enjoining the Mandate would redress that injury.

6. Shortly before oral argument, Treasury finalized the Interim Rule. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022); 31 C.F.R. §35.1 *et seq.* This "Final Rule" is identical to the Interim Rule in all material respects. For example, it preserves the Secretary's virtually limitless authority to enforce the Mandate by taking whatever actions she deems "necessary to prevent evasions" of the Mandate. *See* 31 C.F.R. §35.4(a). It also requires States to provide a "detailed accounting of the uses of funds," and gives the Secretary broad discretion to request "other additional information as may be necessary or appropriate … to prevent evasions." §35.4(c); §35.8(b). Among other things, States must make specific "reports" to Treasury geared toward the Tax Mandate's requirements. *See* §35.8(b)(3).

The Final Rule promised "additional guidance" regarding the reporting requirements linked to the Tax Mandate. 87 Fed. Reg. at 4428–29. True to its word, Treasury issued guidance requiring States to "report certain items related to the" Tax Mandate each year. U.S. Dep't of Treasury, *Compliance & Reporting Guidance: State and Local Fiscal Recovery Funds* at 23 (Sept. 20, 2022). States are advised to "maintain records to support their compliance." *Id.* at 23.

7. Following argument, the Sixth Circuit reversed the District Court's permanent injunction. It set aside the question whether Ohio had standing to sue at the case's outset. Pet.App.14a. Instead, the court resolved the case on mootness grounds—grounds the Secretary had not even raised on appeal. The circuit stressed that the Secretary, in her briefing and in the Final Rule, had "disavowed" a broad reading of the Mandate. Pet.App11a; 17a; 20a. The court believed

this disavowal negated the imminent-recoupment injury, as it suggested Treasury would not "initiate recoupment against any policy that Ohio has shown … it intends to pursue." Pet.App.19a. The circuit next concluded the Secretary's disavowal cured any sovereign injury that might result from the Mandate's ambiguity, as it freed the State to tax and spend without worrying about a realistic threat of enforcement. Pet. App.20a. The court failed to distinguish between the ambiguity and the coercion injuries. Pet.App.19a. Instead, it viewed both as a single injury that it thought the Final Rule extinguished. Pet.App. 19a–20a. Finally, the court determined the compliance-cost injury failed to save the case from mootness, both because it was too vague and because Ohio would need to spend money complying with the rest of the Rescue Plan even if the Mandate were enjoined. Pet.App.21a–24a.

The same day, in another case, the Sixth Circuit held that the Mandate fails to provide the clear notice the Spending Clause requires, and that Treasury *had not* cured the ambiguity with its Final Rule. *See Kentucky v. Yellen*, 54 F.4th 325, 346–54 (2022). This means that Ohio is barred from challenging an unconstitutional law that directly regulates Ohio because of assurances in a regulation that failed to cure the constitutional error Ohio sued to prevent.

REASONS FOR GRANTING THE PETITION

This case presents two questions. First, in light of the Final Rule, do courts have jurisdiction to resolve challenges to the Tax Mandate? This question gives rise to subsidiary questions, including whether executive agencies can, by issuing clarifying regulations, deprive the States of their ability to challenge unconstitutionally ambiguous and coercive Spending Clause

offers. Second, is the Tax Mandate unconstitutional? The Court should grant certiorari to decide both questions.

I. The circuits are in conflict regarding the justiciability of challenges to conditions in Spending Clause legislation.

The Tax Mandate has inflicted on all States the very same injuries that Ohio discussed already: imminent-recoupment, sovereign-authority, and compliance-cost injuries. So far, four circuits—in five cases involving eighteen States—have issued decisions addressing the justiciability of suits asserting these injuries. Their decisions, and in particular the decisions of the Sixth and Eleventh Circuits, are inconsistent. The lower courts need guidance regarding when, if ever, States may challenge unlawful conditions imposed on States through Spending Clause legislation. This case affords the Court a chance to provide that clarity.

A. Justiciability in the circuit courts.

1. Arizona, just like Ohio, challenged the Tax Mandate. Arizona, just like Ohio, asserted imminent-recoupment, sovereign-authority, and compliance-cost injuries. Arizona found a receptive audience in its home circuit: the Ninth Circuit held that Arizona had standing to sue. *See Arizona v. Yellen*, 34 F.4th 841, 853 (9th Cir. 2022).

The Ninth Circuit accepted two of Arizona's three theories of standing. Because Arizona recently enacted a $1.9 billion tax cut, the court held there was a "realistic danger" that Treasury would seek recoupment of the funds. *Id.* at 848–50. The Ninth Circuit also concluded that the Tax Mandate injured Arizona

by interfering with its sovereign authority. *Id.* at 851–53. For one thing, the Tax Mandate's allegedly "unconstitutionally ambiguous and coercive" conditions injured Arizona "at the outset" of the case. *Id.* at 852. Further, those conditions would continue to affect every tax decision that the State might make going forward. *Id.* at 852–53. Having held Arizona's challenge justiciable, the Ninth Circuit remanded the case for further proceedings.

The Ninth Circuit never addressed the significance of the Final Rule, which was promulgated after argument. It instead left for the district court the question of how the Final Rule affected the case. *Id.* at 853 n.2. And the Ninth Circuit did not consider whether the Interim Rule mooted the case, either. That said, the court's conclusion that the Mandate injured Arizona by limiting the State's sovereign taxing authority would have defeated any mootness argument resting on the Interim Rule or the Final Rule, as those rules necessarily inflict the same sovereign injury.

Though it found that Arizona had standing on other grounds, the court rejected the compliance-cost theory of injury. *Id.* at 848. Because Arizona sued before Treasury promulgated the Interim Rule, the court reasoned that any additional costs imposed by the rule came into play only *after* the case began. *Id.* Because those costs were incurred only post-filing, the Ninth Circuit held, they could not qualify as injuries for standing purposes, since standing must be established at the case's outset. *Id.*

2. Missouri also challenged the Tax Mandate. Missouri, just like Ohio and Arizona, asserted imminent-recoupment, sovereign-authority, and compliance-cost injuries. But Missouri, unlike Arizona,

failed to persuade its home circuit that it had standing to sue. *Missouri v. Yellen*, 39 F.4th 1063, 1066 (2022).

The Eighth Circuit did not address the compliance-cost injury raised by Missouri. But it did consider, and reject, Missouri's argument that the other injuries were sufficient to confer standing. With respect to the imminent-recoupment injury, the Eighth Circuit held that the Final Rule made "clear" that the Tax Mandate would be enforced only if the State "cannot account for net revenue losses through non-[Rescue Plan] sources." *Id.* at 1169. Because Missouri could not establish that it had engaged (or would engage) in conduct that would violate Treasury's *regulation*, the court concluded that Missouri's alleged injuries stemming from *the statute* were "conjectural or hypothetical," rather than "actual or imminent." *Id.* at 1070 & n.7 (quotation marks omitted).

The Eighth Circuit likewise rejected Missouri's sovereign-authority arguments. It held that, even if the funding offer was unconstitutionally ambiguous or coercive when Congress extended it to the States, that injury did not "still exist" after Missouri accepted the funds. *Missouri*, 39 F.4th at 1069 n.5. The court never considered Missouri's post-acceptance injury. That is, the court never considered whether, after Missouri took the money, the ambiguity injured Missouri by hindering its ability to make tax policy without the specter of a later recoupment action.

3. The Sixth Circuit considered twin cases—Ohio's, and another case brought by Kentucky and Tennessee—challenging the Tax Mandate. The Sixth Circuit decided both cases on the same day, reaching different (and inconsistent) results.

Kentucky v. Yellen. Kentucky and Tennessee raised the same imminent-recoupment and sovereign-authority injuries that Ohio, Arizona, and Missouri raised. *Kentucky v. Yellen*, 54 F.4th 325, 332–33 (6th Cir. 2022). The court held that both injuries "sufficed for standing" at the time the complaint was filed. *Id.* at 336. The Court reasoned that there was a sufficiently credible and imminent threat that Treasury would pursue a recoupment action against those States, both of which enacted or planned to enact tax cuts. *Id.* And, because the States had to enact tax policy in the shadow of a potential enforcement action, the Tax Mandate intruded on their "powerful sovereign prerogative" to set their own tax policies. *Id.*

But the court held that the Final Rule *mooted* the controversy with respect to those two injuries. *Id.* at 340–41. According to the court, the rule offered a "narrowing construction" of the Tax Mandate. *Id.* at 338. That narrowing construction, the court reasoned, eliminated any threat of recoupment, allowing Kentucky and Tennessee to make tax policy free from the shadow of the ambiguity. The Sixth Circuit thus held that States challenging the Tax Mandate must, to avoid having their imminent-recoupment and sovereign-authority injuries mooted, show that they have "pursued or intend to pursue a course of conduct that would arguably violate *the Rule*" rather than *the Mandate*. *Id.* at 340. Neither Kentucky nor Tennessee made that showing.

This portion of the analysis drew a dissent. *Id.* at 358–64 (Nalbandian, J., concurring in part and dissenting in part). Judge Nalbandian agreed with the court's standing analysis, but disagreed that the Final Rule eliminated the relied-upon injuries. He expressed doubt that an agency's regulation could ever

cure an ambiguous condition in Spending Clause legislation. *Id.* at 363. Even if a regulation could provide the constitutionally required clarity, the Final Rule did not do so. *Id.* at 363–64. According to Judge Nalbandian, the rule did not eliminate the pall cast over the States' policymaking: "legislators considering tax changes may delay, second guess, or abandon parts of tax policies" because of the rule's inherent vagueness. *Id.* at 363. And the States would have to do "*something*—either raise other taxes or lower expenditures elsewhere in the budget to offset a revenue reduction"—to comply with the Mandate. The need to do "*something*" constitutes an ongoing injury. *Id.*

All three judges, however, agreed that Tennessee's challenge was *not* moot under a third theory of injury. *Id.* at 342–43. Tennessee, but not Kentucky, had alleged a compliance-cost injury. In particular, Tennessee alleged that complying with the Final Rule's requirements for reporting compliance with the Mandate would impose costs on the State. Because Tennessee submitted "uncontroverted evidence" supporting that allegation, the Sixth Circuit held that Tennessee's challenge (but not Kentucky's) remained justiciable. *Id.*

The Sixth Circuit proceeded to the merits. It held that the Tax Mandate was unconstitutionally ambiguous and affirmed the district court's injunction only as to Tennessee. *Id.* at 346–57. The courts' merits analysis largely tracked the analysis of the District Court in Ohio's case.

Ohio v. Yellen. The Sixth Circuit held that the Final Rule mooted Ohio's case. Whereas the Sixth Circuit in *Kentucky* concluded that Tennessee's compliance-cost theory saved the challenge from

mootness, the Sixth Circuit here concluded that Ohio's compliance-cost injury was too vague even to establish standing.

The court's reasoning is hard to understand, but it seems to run as follows: because Ohio must report compliance with other Rescue Plan conditions *in addition to* the Tax Mandate, its fiscal injury cannot be redressed by enjoining the Tax Mandate alone. Therefore, the argument goes, the Tax Mandate does not impose any *additional* burden on Ohio, and so does not injure it. Pet.App.21a–23a.

This argument makes little sense. While Ohio must report compliance with other conditions, enjoining the Tax Mandate would free the State from having to report compliance with *the Tax Mandate*, saving Ohio the resources needed to track and report compliance with that provision. In any event, the very same argument could have been made as to Tennessee. Yet the same court on the same day determined that Tennessee's compliance costs *saved* the case from mootness. It is thus far from clear when compliance costs are sufficient to establish an Article III injury within the Sixth Circuit.

To the extent the Sixth Circuit distinguished between Tennessee and Ohio based on the evidence, the distinction is immaterial. It is true that Tennessee submitted a declaration explaining the compliance costs the Tax Mandate would impose. *Kentucky*, 54 F.4th at 342. But the States' reporting obligations—and their link to the Tax Mandate—are judicially noticeable matters of public record. *See* 87 Fed. Reg. 4338, 4428–29 (Jan. 27, 2022); U.S. Dep't of Treasury, *Compliance & Reporting Guidance: State and Local Fiscal Recovery Funds* at 23 (Sept. 20, 2022).

4. In the Eleventh Circuit, a thirteen-state coalition raised the same constitutional challenge and advanced the same standing theories as Ohio. *West Virginia v. Treasury*, 59 F.4th 1124 (11th Cir. 2023). They fared much better.

First, the Eleventh Circuit concluded that the imminent-recoupment and sovereign-authority injuries sufficed to establish standing at the case's outset. *Id.* at 1135–38. With respect to the first theory, the States showed that the Tax Mandate "arguably proscribes" tax cuts the States enacted or planned to enact. *Id.* at 1137–38. The States also sustained a sovereign-authority injury when "they were coerced into accepting an offer with an unascertainable condition." *Id.* at 1136. They will "continue to experience" that injury as long as the "unascertainable condition"—the Mandate—remains "in force and effect," since their sovereign authority will continue to be unlawfully limited. *Id.*

After confirming the States' standing to challenge the Mandate, the Eleventh Circuit turned to mootness. It found that the States' challenge remained live notwithstanding the Final Rule. While the Final Rule "reduces" the Mandate's "effect on state sovereignty," *id.* at 1139, the Mandate's mere existence is still a "present and continuous infringement on state sovereignty," *id.* at 1136. That injury could not be cured by agency rulemaking. *Id.* at 1140 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)).

The Eleventh Circuit expressly "disagree[d]" with the Sixth Circuit's mootness analysis. *Id.* at 1139. A case becomes moot, the Eleventh Circuit explained, only when it is no longer possible for a court to grant the plaintiff meaningful relief. *Id.* But injunctive

relief *would* be meaningful to the States, the Final Rule notwithstanding. The Secretary had not completely "disclaimed an intent to enforce" the Mandate, meaning its terms still limited the States' taxing authority. *Id.* Thus, an order enjoining the Mandate's enforcement would redress an ongoing sovereign injury. Said another way, the Secretary could not moot the States' challenges by providing "a lesser remedy (a narrower construction) to address … the States' request for a more substantial remedy (facial invalidation)." *Id.*

Turning to the merits, the Eleventh Circuit deemed the Tax Mandate unconstitutionally ambiguous.

B. The circuits are split.

As the preceding discussion shows, the circuits are split. First and foremost, they are split regarding whether federal courts, after the Final Rule's promulgation, have Article III jurisdiction to adjudicate constitutional challenges to the Tax Mandate. Courts in the Eleventh Circuit (and perhaps the Ninth) have jurisdiction to hear these cases. Courts in the Eighth Circuit do not. Courts in the Sixth Circuit do sometimes, though it is unclear precisely when. The Eleventh Circuit acknowledged that its decision created a split with the Sixth Circuit, *see West Virginia*, 59 F.4th at 1139, and the Court should grant review to resolve that split.

The circuits are also divided on two subsidiary questions.

First, when can *post hoc* agency rulemaking moot States' challenges to ambiguous conditions in Spending Clause legislation? In the Sixth Circuit, the

sovereign injury that States sustain by being subjected to an unconstitutionally ambiguous condition is fully redressed whenever an agency's *post hoc* rule provides clarity sufficient to give the States guidance and reduce the chances of enforcement proceedings. Pet.App.17–18a. The Eleventh Circuit "disagree[d]" with this analysis, concluding that *post hoc* rules will not moot already-underway challenges as long as the unlawfully imposed condition can still be enforced. *West Virginia*, 59 F.4th at 1139. Provided the unconstitutional condition continues to limit the States' sovereign authority, the States "continue to experience" a "sovereign injury" sufficient to satisfy justiciability requirements. *Id.* at 1136.

Second, assuming that clarifying regulations can be relevant, should they be considered through a standing or a mootness rubric? The Sixth Circuit (correctly) thought about the issue in terms of mootness. *See* Pet.App.15a–21a. But the Eighth Circuit viewed the issue through a standing lens. *See Missouri*, 39 F.4th at 1069–70 & n.5. The label comes with significant consequences because "initial standing to bring suit" and "post-commencement mootness" are different inquiries that should not be "conflated." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 174 (2000). On the one hand, the *plaintiff* has the burden to establish standing at the outset of litigation. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). But once a case has commenced, there is a strong presumption that it will continue. Thus, *defendants* bear a heavy burden in establishing mootness—they must show that it is "impossible" for the Court to grant meaningful relief. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotation marks omitted).

The Sixth Circuit, unlike the Eighth Circuit, purported to assess the Final Rule's relevance through a mootness lens. But the Sixth Circuit still "conflated" mootness and standing, *Friends of the Earth*, 528 U.S. at 174, in that it did not hold the Secretary to her mootness burden. Ohio had no burden to show imminent enforcement. *Contra* Pet.App.16a–17a (citing standing cases). Rather, it was the Secretary's burden to make "absolutely clear" that Ohio faced no risk of recoupment. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (quotation marks omitted).

In sum, this case presents a square circuit split, the resolution of which will shed light on important subsidiary questions relating to standing and mootness. The Court should seize the opportunity to provide clarity.

C. These conflicts typify broader confusion over state standing.

The discord among the circuits here exemplifies the general confusion about the States' standing to sue the federal government. This Court's state-standing jurisprudence is "hard to reconcile." *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 n.10 (2015) (quotation marks omitted). It presents "as many questions as answers." Grove, *Foreword: Some Puzzles of State Standing*, 94 Notre Dame L. Rev. 1883, 1883 (2019). In blunter words, "federal standing doctrine" is "under-theorized" and "notoriously unclear about the extent to which" the States may "litigate questions of governmental authority in federal courts." Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 Wash. L. Rev. 637, 639 (2016). This

Court should accept this case to provide clarity on a subject that badly needs clarification.

A return to the founding era provides some helpful context. Historically, sovereigns resolved their disputes by "diplomacy or war," not by suing each other in court. Hessick, *Quasi-Sovereign Standing*, 94 Notre Dame L. Rev. 1927, 1943 (2019). And, before "forming the Union, the States possessed separate and independent" sovereign authority. *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 69 (2016) (quotation marks omitted). The States did, at times, try to resolve disputes in state courts. Hessick, *Quasi-Sovereign Standing*, 94 Notre Dame L. Rev. at 1943. But their efforts yielded limited success, as States often refused to abide by the decisions from other States' courts. *Id.* Thus, the States frequently resorted to non-judicial means, such as diplomacy or "bloodshed," to resolve interstate conflicts. *Id.* To decrease these "hostilities" between the States, the Articles of Confederation "contained a provision for the establishment of ad hoc tribunals to resolve interstate disputes." *Id.* at 1944 (citing Articles of Confederation of 1781, art. IX). That provision, however, was "rarely used." *Id.*

Against this backdrop, the Constitution took several steps to redirect disputes over sovereignty into federal court. For one thing, it forbade the States from warring against each other. U.S. Const. art. I, §10, cl.3. For another, it created federal courts in which States could litigate their disputes. U.S. Const. art. III, §2, cl.1. Specifically, under Article III, the "judicial Power" of federal courts extends to both "Controversies between two or more States" and "Controversies to which the United States shall be a Party." *Id.*

"As every schoolchild learns," the Constitution established a "system of dual sovereignty" that confers only "limited powers" to the federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). All "powers not delegated to" the federal government "are reserved to the States." U.S. Const. amend. X. To maintain this division of power, States must be able to seek judicial recourse against the federal government. In this dual system, an unjustified claim of power by the federal government amounts to an invasion of state power. Recognizing as much, the framers anticipated that there would also be disputes between States and the federal government about the extent of their respective powers. *See, e.g.*, The Federalist No. 28, at 179 (Hamilton) (Cooke ed., 1961). Early lawmakers similarly recognized that, unless they ensured a judicial forum for resolving disputes against the federal government, States might resort to armed resistance to resolve such disputes. Hessick, *Quasi-Sovereign Standing*, 94 Notre Dame L. Rev. at 1944 (discussing debates over the Judiciary Act of 1802).

Considering this history and our federalist constitutional framework, it follows that States should have broad access to federal courts to challenge federal overreach. Because States relinquished only limited sovereign power to the federal government when they entered the Union, they did so with the understanding that federal courts would provide a forum in which sovereignty disputes might be decided without bloodshed. Thus, when the federal government exercises power in an unconstitutional manner, and thus intrudes on the States' reserved powers, federal courts are the agreed-upon forum for resolving disputes. *See Id.* at 1945. "Limiting state standing to sue the

federal government interferes with this arrangement." *Id.* at 1953.

No doubt, this Court has not been clear regarding when the States have standing to sue the federal government over sovereign injuries. Some early cases—mostly original actions in this Court—use jurisdictional language to express the Court's reluctance to resolve sovereignty conflicts between the States and the federal government. *E.g.*, *Georgia v. Stanton*, 73 U.S. 50, 77 (1867); *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1923). But, during the country's early years, "federal law was less pervasive and less dependent on the collaboration of state and local actors for its implementation and enforcement." Roesler, *State Standing to Challenge Federal Authority*, 91 Wash. L. Rev. at 641. The Court's early cases thus offer little guidance as to how state standing should operate today. *See id.* at 644–53; *cf.* Woolhandler & Collins, *State Standing*, 81 Va. L. Rev. 387, 455–56, 492–93 (1995).

Today, the federal and state governments often work together—and cohabit the same area—through cooperative-federalism statutes. "By offering federal funds in exchange for state cooperation," Congress "enlists state assistance in administrative government." Roesler, *State Standing to Challenge Federal Authority*, 91 Wash. L. Rev. at 677. The Constitution's Spending Clause empowers Congress "to … provide for the … general Welfare of the United States." U.S. Const. art. I., §8 cl.1. This provision empowers Congress to spend money. And Congress may "attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Through offers of conditional funding, Congress may entice States to make particular "policy choices." *NFIB v. Sebelius*,

567 U.S. 519, 576 (2012) (op. of Roberts, C.J.) (quotation marks omitted).

Taken too far, this spending power "undermine[s] the status of the States as independent sovereigns in our federal system." *Id.* at 577; *accord* Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 124–50 (2021). Thus, Congress's Spending Clause power is "subject to several general restrictions." *Dole*, 483 U.S. at 207. Importantly, "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously …, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation'" in the federal spending program. *Id.* (brackets omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). And any such offer must be non-coercive. *NFIB*, 567 U.S. at 577–578 (op. of Roberts, C.J.).

With "the development of the administrative state," the rate of state-federal conflicts has also drastically increased. *See* Roesler, *State Standing to Challenge Federal Authority*, 91 Wash. L. Rev. at 672. To resolve these conflicts, this Court has become increasingly open to the States' litigating sovereign injuries caused by unlawful federal action. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006); *New York v. United States*, 505 U.S. 144 (1992); *South Carolina v. Regan*, 465 U.S. 367 (1984); *FERC v. Mississippi*, 456 U.S. 742 (1982); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Colorado v. Toll*, 268 U.S. 228 (1925); *Missouri v. Holland*, 252 U.S. 416 (1920). As both *Dole* and *NFIB* reflect, the States may protect themselves against illegal funding offers by bringing lawsuits in federal court. None of the various opinions in those cases

questioned the States' standing to raise such challenges.

Even though the Court accepts that a "recipient of the federal funds" has standing to challenge the legality of a funding condition, Vladeck, *States' Rights and State Standing*, 46 U. Rich. L. Rev. 845, 862–63 (2012) (discussing *Dole*), it has never expressly said as much, *see Kentucky*, 54 F.4th at 362 n.4 (Nalbandian, J., concurring in part and dissenting in part). The first question presented offers a chance to do so. The Court can expressly confirm what both history and precedent already indicate: that the States have standing to sue over direct injuries to their sovereignty, such as when Congress coercively offers federal funds with ambiguous conditions attached.

Indeed, the Court has held that States are "entitled to special solicitude" as part of "standing analysis," at least when they "assert" their own "rights under federal law." *Massachusetts v. EPA*, 549 U.S. 497, 520 & n.17 (2007). The United States, for its part, has not accepted that. In recent years, the United States has pressed several "novel" standing arguments against States "that have few precedents" or analogues "in the standing jurisprudence governing suits by private individuals." Young, *State Standing and Cooperative Federalism*, 94 Notre Dame L. Rev. 1893, 1894 (2019). The federal government has argued, for example, that state injuries stemming from federal action are "self-inflicted" or "offset by other benefits of federal policies." *Id.* (quotation marks omitted).

As the Tax Mandate challenges show, the United States has developed yet another "novel" way to deprive the States of their standing to sue over federal power grabs: *post hoc* agency rulemaking. This case

allows this Court to make clear that federal agencies cannot, through such rulemaking, deprive the States of their ability to challenge Congress's illegal funding offers. Every circuit to have addressed the issue—including the Sixth Circuit—has held agencies cannot, by regulation, provide the constitutionally required degree of clarity. Only Congress can provide that clarity. *West Virginia*, 59 F.4th at 1147; *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560–61, 567 (4th Cir. 1997) (*en banc*); *id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment); *Kentucky*, 54 F.4th at 353–54; a*ccord* Hamburger, *Purchasing Submission*, 130–31. It would be strange if the same regulations that are incapable of curing the constitutional defect in ambiguous Spending Clause legislation were nonetheless capable of mooting challenges to such conditions. After all, allowing agencies to "moot" constitutional challenges in this way effectively gives them the power to cure ambiguity in Spending Clause legislation—the very power that courts have consistently held agencies lack.

II. The Court should grant review of the purely legal, immensely important merits question.

This Court should also grant certiorari to decide whether the Tax Mandate is unconstitutional.

A. Congress's Spending Clause power is "subject to several general restrictions." *Dole*, 483 U.S. at 207. Relevant here, Congress cannot attach ambiguous conditions to funding offers, *id.*, or impose conditions through coercive offers, *id.* at 211; *NFIB*, 567 U.S. at 577–578 (op. of Roberts, C.J.). The Tax Mandate

violates both principles. It is ambiguous because it leaves entirely unclear what it means for a State to "indirectly offset a reduction in" its "net tax revenue." 42 U.S.C. §802(c)(2)(A); *see also West Virginia*, 59 F.4th at 1143–46. And it is unduly coercive because no State, in the wake of a devastating pandemic, could have declined the billions of dollars to which the Tax Mandate was attached. Every State was forced to surrender a part of its sovereign taxing authority under the Tax Mandate in exchange for the much-needed funds.

The Final Rule does not cure these problems. The rule does not even arguably bear on the coerciveness of Congress's offer to the States. And for three reasons, the rule also has no effect on the question whether the Tax Mandate is unconstitutionally ambiguous. *First*, agency rulemaking cannot cure an ambiguous spending offer. *See West Virginia*, 59 F.4th at 1147; *Tex. Educ. Agency*, 992 F.3d at 361–62; *Riley*, 106 F.3d at 560–61, 567; *id.* at 572 (Niemeyer, J., concurring in part); *id.* (Hamilton, J., concurring in the judgment). *Second*, Congress did not delegate to Treasury the power to say what the Tax Mandate means. *See* Pet.App. 63a–75a; *West Virginia*, 59 F.4th at 1146–47. *Third*, the Final Rule does not clarify the Mandate's requirements. Though the Final Rule announces an atextual formula that the Secretary will use in assessing Tax Mandate compliance, 31 C.F.R. §35.8(b), it also gives Secretary broad authority to act on any "evasions" of the Tax Mandate she perceives in hindsight, 31 C.F.R. §35.4(a); *see Kentucky*, 54 F.4th at 363–64 (Nalbandian, J., concurring in part and dissenting in part). The States are thus forced to make tax policy without being able to discern which

exercises of taxing authority will trigger an enforcement action.

The Tax Mandate's constitutionality presents an "important question of federal law" that should be "settled by this Court." Sup. Ct. R. 10(c). Every State accepted Rescue Plan funds. So every State without an injunction is bound by the Tax Mandate's terms. And any perceived violation of the Mandate will subject an offending State to a double penalty: the State will lose money through recoupment equal to the amount of money the State already lost by cutting taxes.

Any federal law that intrudes on the States' authority to set tax policy implicates an issue of great importance. "States' sovereign authority to tax" is one of the most vital powers the States retain. *See* Pet. App. 27a. It is "'indispensable' to the States' very 'existence.'" *Id.* (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824)). The founders recognized that the States "possess an independent *and uncontrollable* authority to raise their own revenues for the supply of their own wants," and that "an attempt on the part of the national Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of its Constitution." The Federalist No. 32, p.199 (Hamilton) (Cooke, ed., 1961) (emphasis added). The question whether the Tax Mandate unconstitutionally interferes with this power thus presents a question of exceptional importance.

B. The Court can and should address the Mandate's constitutionality even though the Sixth Circuit never reached the issue. To be sure, this Court is a court "of review, not of first view." *Cutter v.*

Wilkinson, 544 U.S. 709, 718 n.7 (2005). But the Court can, and does, make exceptions to that rule when it is prudent to do so. *See*, *e.g.*, *Buck v. Davis*, 580 U.S. 100, 118 (2017); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 378–79 (2016); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *Yates v. Evatt*, 500 U.S. 391, 407 (1991). Considering what "would serve judicial economy best," *Yates*, 500 U.S. at 407, this case is a proper vehicle for reaching the merits. And the Court should do so now.

For one thing, States must spend all of their Rescue Plan funds by 2025. *See* §802(a)(1); *see also* 31 C.F.R. §35.5. Thus, putting off a decision on the Mandate's constitutionality would deprive States of needed clarity regarding their duty to comply with the Mandate's terms.

Further, the constitutionality of the Tax Mandate is a legal question that substantially overlaps with justiciability. Standing and the merits are distinct inquiries. *See Ariz. State Legis.*, 576 U.S. at 800. But in some cases, such as this one, they "are inextricably intertwined." *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (quotation marks omitted). Here, justiciability and the merits both turn on the Tax Mandate's meaning. The same ambiguity that makes the Mandate unconstitutional inflicts the imminent-recoupment and sovereign-authority injuries on Ohio. And Treasury's effort to extinguish that ambiguity through rulemaking only deepened the injury by imposing additional compliance costs on the State.

In any event, the Court is not being asked to take a "first view" of the merits. *See Cutter*, 544 U.S. at 718 n.7. Two circuits have already reached the merits question and held the Mandate unconstitutional. *See*

Kentucky, 54 F.4th at 346–58; *West Virginia*, 59 F.4th at 1140–48. And the parties to this case have "briefed and argued the underlying merits at length." *Buck*, 580 U.S. at 118. Especially given the high likelihood that the Secretary will seek and obtain a writ of certiorari in either *Kentucky* or *West Virginia*—more on that in the next section—the Court can reach the merits confident that the legal questions presented have been fully developed.

All told, putting off merits review would "do nothing more than prolong [the] suit" and waste judicial resources. *Fisher*, 579 U.S. at 379. The Court should take the more efficient approach and answer this important question now. *Accord id.*; *Yates*, 500 U.S. at 407.

III. The Court should grant certiorari in this case even if it grants certiorari in *Kentucky* or *West Virginia*.

The Court is likely to decide the questions presented in this case sooner rather than later. For one thing, the Secretary herself will almost certainly seek review in either *Kentucky*, 54 F.4th 325, or *West Virginia*, 59 F.4th 1124, both of which held that the Tax Mandate is unconstitutionally ambiguous. This Court will likely grant the Secretary's petition for a writ of certiorari, since the Court considers decisions holding federal laws unconstitutional to be especially worthy of review. *See* Narechania, *Certiorari in Important Cases*, 122 Colum. L. Rev. 923, 928–29 (2022); Shapiro, et al., *Supreme Court Practice* §4.12 at 264 (10th ed. 2013).

Even if the Court grants review in *Kentucky* or *West Virginia*, it should grant review in this case as well. Doing so would allow the Court to address the

novel mootness arguments the Sixth Circuit advanced below. And by granting review in this case—in addition to *West Virginia* or *Kentucky*—the Court can ensure that no hitherto unnoticed jurisdictional flaw in one case blocks the Court's consideration of the important issues presented.

At minimum, the Court should hold this case pending the disposition of *Kentucky* or *West Virginia*.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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