No. 21-16227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

JANET L. YELLEN,
in her official capacity as Secretary of the Treasury, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Case No. 2:21-cv-00514-DJH, Hon. Diane J. Humetewa, presiding

BRIEF *AMICUS CURIAE* OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the National Taxpayers Union Foundation, a nonprofit tax-exempt organization incorporated in the District of Columbia, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF INTEREST

The National Taxpayers Union Foundation was founded in 1973, and is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Amici requested the consent of all parties to the filing of this brief; Appellant consented and Appellee stated that it would defer to the Court as to the untimely filing of *amicus* briefs.[1]

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *Amicus* authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *Amicus* contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. THE CLAWBACK PROVISION IS UNCONSTITUTIONALLY AMBIGUOUS AND COERCIVE.

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA) into law, and Subtitle M, Section 9901 amends 42 U.S.C. § 602(c)(2)(A) to read:

> In general.—A State or territory shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) 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. § 602(c)(2)(A). States which violate the provision "shall be required to repay to the Secretary an amount equal to the amount of funds used in violation" calculated as the "lesser of (1) the amount of the applicable reduction to net tax revenue attributable to such violation; and (2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made [to local governments]." 42 U.S.C. § 602(e).

The provision is capable of multiple meanings, such that an honest person (or state government) attempting to abide by its terms is necessarily guessing at its meaning. This has result in paralyzing state legislative action for fear of violating

the provision, undermining ARPA's purpose of action to provide pandemic relief. This chilling effect of the ARPA provision, coupled with the lack of legislative history and the limitations of any future Treasury guidance, means one of two things. Either the provision is so capable of multiple meanings that it is void for vagueness, or is an exercise of such great power by Congress as to deprive states of independent action on their tax policies for five years. The broad sweep of the term "indirectly," coupled with the inherent fungibility of money in state budgets, means that any state that accepts ARPA aid (and the funds are of such size that no state will be to explain why its citizens must take on the debt to pay for ARPA but say no to their share of the allocations) is effectively surrendering the ability to cut taxes. Because the former result violates the Due Process Clause and the latter result violates the Tenth Amendment, this Court should hold the ARPA provision to be unconstitutional.

A. The Provision is So Ambiguous That Its Enforcement Will Be Arbitrary.

The ARPA provision is capable of at least three reasonable readings.

Some read it as achieving a complete ban on state tax cuts through 2024. For example, the *New York Times* reported Senator Joe Manchin (D-WV) as pushing for the language because he believes "states should not be cutting taxes at a time when they need more money to combat the virus. He urged states to postpone their plans

to cut taxes." Alan Rappeport, "A Last Minute Add to Stimulus Bill Could Restrict State Tax Cuts," *New York Times* (Mar. 12, 2021), https://tinyurl.com/yy95b9n4.

Some read it as allowing states to cut taxes but only on condition of surrendering aid dollar-for-dollar. For example, Nicholas Johnson of the Center on Budget & Policy Priorities (CBPP) writes, "It says they can't use federal dollars to do that, either directly or indirectly. If a state chooses to enact a net tax cut, it will forgo the equivalent amount of federal aid provided through the Act's Coronavirus State Fiscal Recovery Fund." Nicholas Johnson, "Rescue Plan Protects Against Using Federal Dollars to Cut State Taxes," CBPP (Mar. 11, 2021), https://tinyurl.com/32ns53rd.

A third reading is that states can cut taxes and not have to surrender federal aid so long as revenue is replaced by other means. *See* Letter from U.S. Treasury Department to Arizona Attorney General Mark Brnovich (Mar. 23, 2021), https://home.treasury.gov/news/press-releases/jy0075 (stating that the provision "simply provides that funding received under the Act may not be used to offset a reduction in net tax revenue resulting from certain changes in state law. If States lower certain taxes but do not use funds under the Act to offset those cuts—for example, by replacing the lost revenue through other means—the limitation in the Act is not implicated.").

This lack of clarity has had a chilling effect on actions in state legislative sessions in 2021. *See, e.g.*, Associated Press, "California delays tax break for businesses because of COVID-19 relief bill," Mar. 19, 2021, https://tinyurl.com/7ppy77p3 ("[A] bill that would do that has been delayed because of a provision in the latest federal coronavirus relief bill that says states can't use relief money to cut taxes."); Ian Richardson, "Iowa Senate votes to shift mental health funding to state, eliminate 'backfill' payments to cities," *Des Moines Register*, Apr. 7, 2021, https://tinyurl.com/yzdhzzaz ("Iowa's legislative leaders have indicated they're still seeking clarification on what the new federal funding means for their ability to cut taxes this year."); Holly Michels, "It's unclear if federal COVID-19 aid money could affect proposed Montana tax cuts," *Helena Independent Record*, Mar. 16, 2021, https://tinyurl.com/m6252bcw ("Gianforte said his administration is still trying to get details on the language in the ARPA and what it means for his tax cut plans."); Bethany Rodgers, "Advocates urge Utah's governor to veto tax cut to make sure the state doesn't lose COVID-19 relief funds," *Salt Lake Tribune*, Mar. 12, 2021, https://tinyurl.com/3s2ww4yf ("Utah advocates are warning that new state tax cuts could put at risk millions of dollars in federal coronavirus aid and are urging Gov. Spencer Cox to veto the only tax relief proposal he hasn't yet signed.").

In early April 2021, NTUF sent a letter to Treasury Secretary Janet Yellen requesting guidance interpreting the ARPA provisions, with eight specific recommendations. *See* Joe Bishop-Henchman, "NTU Requests Clarification on State Tax Provision in American Rescue Plan," Apr. 7, 2021, https://tinyurl.com/37j5uduw. We requested (1) Treasury should make clear the baseline from which revenue reductions will be calculated, such as the pandemic revenue low point, excluding tax cuts that do not cut revenue below that; (2) Treasury should make clear who will be making the determination and how, such as by using certifications from state authorities as the mechanism of determination; (3) we urged that previously enacted, announced, or introduced state tax changes be excluded; (4) we asked that changes designed to conform to federal law be excluded; (5) we asked that state tax cuts that further ARPA objectives, such as those that address unemployment or shore up small businesses, be excluded; (6) we asked that court-ordered refunds or reductions, such as if a state tax is declared unconstitutional, be excluded; (7) we asked that Treasury allow states to receive advance OK that their tax cut is permissible, and that Treasury provide a dispute resolution mechanism; and (8) we asked Treasury to state generally that "directly or indirectly" is to be narrowly construed. On April 7, the Treasury Department issued a statement that state tax changes that conform to federal law would be excluded (essentially the fourth of the above requests). *See* U.S. Department of the Treasury,

"Statement on State Fiscal Recovery Funds and Tax Conformity," Apr. 7, 2021, https://home.treasury.gov/news/press-releases/jy0113 ("Regardless of the particular method of conformity and the effect on net tax revenue, Treasury views such changes as permissible under the offset provision."). On May 10, Treasury issued guidance that assumes any state revenue reduction has been paid for by federal funds unless a state proves otherwise; if no evidence is available or the Treasury does not accept it, funds will be recouped. *See* U.S. Department of the Treasury, "Interim Final Rule: Coronavirus State and Local Fiscal Recovery Funds," 31 CFR Part 35, RIN 1505-AC77, May 10, 2021, https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf. *See also* Joe Bishop-Henchman, "Treasury Explains What State Tax Cuts are OK Under ARPA Provision," NTUF, May 11, 2021, https://tinyurl.com/s7mmpbs2.

The ARPA provision forces people "of common intelligence [to] necessarily guess at its meaning and differ as to its application," which thereby "violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The law neither enumerates the practices that are required or prohibited, nor details the procedures to be followed by those responsible for enforcing the provision. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304 (2008). As a result, the statute deprives ordinary people of the "fair notice of the conduct a statute prescribes" and fails "to guard[] against arbitrary or discriminatory

law enforcement." *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1212 (2018). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."). Invalidating vague laws not only upholds the Due Process Clause, it upholds the separation of powers. *See, e.g.*, *Sessions*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in the judgment), *citing Jordan v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting) ("Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it."). *See also Pennhurst State School and Hospital v. Haldeman*, 451 U.S. 1, 17 (1981) ("Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

B. The Term "Indirectly" In The Statute Is An Unconstitutionally Intrusive Condition on State Governments.

What actions *indirectly* "offset a reduction of net tax revenue…or delays the

imposition of any tax or tax increase"? "Indirect" is a broad term, with "direct and indirect" together encompassing all. *See, e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 (1995) ("Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions...in the broadest possible manner to include every conceivable way in which a person can take or attempt to take….") (cleaned up); *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 827 (1983) ("[A]ll costs of the Postal Service, both 'direct' and 'indirect'."); BLACK'S LAW DICTIONARY, 10TH ED. 2014 at 423 ("Indirect cost: A cost that is not specific to the production of a particular good or service but that arises from production activity in general, such as overhead allocations for general and administrative activities."); TheLaw.com Dictionary, Indirect, https://dictionary.thelaw.com/indirect/ ("A term almost always used in law in opposition to 'direct' though not the only antithesis of the latter word….").

Money is inherently fungible, especially funds in state budgets. States estimate their revenues and expenses and general funds from all sources are used to support all programs, and the allocation of expenses to particular sources is mainly a post-hoc accounting exercise. *See, e.g.*, *New York v. U.S. Department of Education*, 903 F.2d 930, 934 (2nd Cir. 1990) ("Considering this budget process and the fungible nature of money in general, it would be unreasonable to require the Secretary to identify a particular source of funds that would have supported

Promotional Gates in the absence of the supplemental Chapter 1 appropriation."). The proliferation of "maintenance of effort" conditions on federal funds recognizes this fact, setting minimum funding obligations to police the instinct to use new funds for current activities and thereby free up existing funds for other purposes. *See, e.g.*, *State of Wash. v. U.S. Dep't of Educ.*, 905 F.2d 274, 277 (9th Cir. 1990) ("If state or local spending is maintained even when some costs decline, federal funds can be used to fund new programs…."); *cf. Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 334-35 (2012) (Breyer, J., dissenting), *citing Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753 (1963) ("In any event, we have made clear in other cases that money is fungible. Whether a particular expenditure was funded by regular dues or the special assessment is 'of bookkeeping significance only rather than a matter of real substance.'").

Absent a narrowing interpretation, the ARPA provision attempts to prohibit all state tax cuts, since any state that accepts ARPA funds and cuts taxes can be said to be "directly or indirectly" using those funds to cut taxes. If the statute merely said "directly" that might be a limiting factor, prohibiting direct dollar-for-dollar or simultaneous in time acceptance of ARPA funds and cutting of taxes. "Indirectly" is no limiting factor. With the size of the federal aid so massive[2] that no state will be

[2] ARPA provides $195 billion in aid to state governments and $130 billion in aid to local governments. The state portion amounts to 22 percent of all states' annual

able to turn it down (given that their citizens are also federal taxpayers who will bear the burden of paying for the future debt, making it politically difficult to not take advantage of the immediate benefits), the condition attached to the federal aid—cede to Congress your power to cut taxes for five years—is unconstitutionally coercive. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). As the U.S. Supreme Court explained, "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166.

While Congress may under some circumstances condition the receipt of new federal funds, *See id.* at 167, restricting past and future actions that "indirectly" use federal funds amounts to "Congress directly command[ing] a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own" in violation

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general fund budgets ($892.9 billion in Fiscal 2021) and 9 percent of all states' total fund budgets ($2.26 trillion); the combined state and local aid amounts to 36 percent of general fund budgets and 14 percent of all funds budgets. *See* National Association of State Budget Officers, *The Fiscal Survey of States Fall 2020* at 13, https://www.nasbo.org/reports-data/fiscal-survey-of-states. *Cf. Sebelius*, 567 U.S. at 582 ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

of the Tenth Amendment. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 578 (2012). The anticommandeering principle inherent in the Tenth Amendment curbs the encroachment of either federal or state government, promotes political accountability by clearly delineating who is responsible for political decisions, and discourages Congress from adopting programs where the costs will be shifted to the states. *See Murphy v. NCAA*, 584 U.S. ____, 138 S. Ct. 1461, 1477 (2018); *see also Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute.") (internal quotations omitted). Restricting states from "indirectly" using federal funds to cut taxes is to restrict them from using their own funds to cut taxes, and amounts to the Congress impermissibly "direct[ing] the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders." *Murphy*, 138 S. Ct. at 1479.

II. DISMISSING THIS CASE ON STANDING OR RIPENESS GROUNDS IS UNSUPPORTED BY PRECEDENT AND WILL CHILL PERMISSIBLE CONDUCT BY STATE GOVERNMENTS.

The court below analyzed the statute under a reading favorable to the federal government's position, and upon concluding that it would not harm Arizona under

that reading, concluded that Arizona lacked standing to bring the suit at all. *See* Op. at 9. This was backwards in two ways: analyzing standing is separate from analyzing merits, and standing should be evaluated by assuming a reading favorable to the plaintiff.

Arizona has submitted its application for ARPA funds and now faces harm from the promised Treasury Department enforcement of a statute that Arizona considers to be unconstitutional. In evaluating standing, the court below should have taken these allegations to be true to determine if Arizona has demonstrated a concrete and particularized injury. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (" For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). Under the Treasury's framework, each of these states, including Arizona, must now provide evidence in the form of a report to the Treasury Department that the tax cuts were "paid for" by other than federal funds; if persuasive evidence does not exist or is not presented, Treasury says they will recoup the funds. In contemplating these state-level enactments, Arizona and these other states had to and has to consider this pending federal intervention and the lack of clarity as to what is permissible and what is impermissible, and this in turn has had a chilling effect in deterring support

for state tax cuts or reducing their size. Taxpayers deserve better, and the court below was in error in concluding that it could not consider the question.

It is realistic that the Treasury Department will enforce the provision against Arizona, and without judicial relief, Arizona's only choices are recoupment or to avoid taking certain tax policy actions that Congress and the U.S. Treasury Department do not approve. *See, e.g.*, Jared Walczak, "State Aid in American Rescue Plan Act is 116 Times States' Revenue Losses," Tax Foundation (Mar. 3, 2021), https://tinyurl.com/3jak578k (estimating Arizona's share of ARPA funds is $4.18 billion in state aid and $2.64 billion in local aid, for a total of $6.82 billion, compared to a state budget surplus of $359 million); Jonathan Cooper, "Arizona governor signs $12.8 billion budget with big tax cut," Associated Press (Jun. 30, 2021), https://tinyurl.com/d4snm389 (describing Arizona's enactment of $1.9 billion in annual tax cuts). Arizona is making this choice now, and is consequently being harmed now.

The court below erred in combining the analysis of the merits with the analysis of standing. As this Court has observed:

> It is, of course, incumbent upon the courts to apply standing doctrine neutrally, so that it does not become a vehicle for allowing claims by favored litigants and disallowing disfavored claimants from even getting their claims considered. Without neutrality, the courts themselves can become accessories to unconstitutional endorsement or disparagement. Standing is emphatically not a doctrine for shutting the courthouse door to those whose causes we do

> not like. Nor can standing analysis, which prevents a claim from being adjudicated for lack of jurisdiction, be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true.

Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc). In past U.S. Supreme Court cases involving state allegations of unconstitutional conditions, not even dissenting justices have suggested a lack of standing to dismiss the action. Indeed, the dissenters in the Affordable Care Act case specifically rejected a standing-based argument as unsound. *See NFIB v. Sebelius*, 567 U.S. at 696-97 (Scalia, J., dissenting) (holding that declining to hear the case on standing grounds "would be particularly destructive of sound government [because i]t would take years, perhaps decades, for each of its provisions to be adjudicated separately—and for some of them (those simply expending federal funds) no one may have separate standing. The Federal Government, the States, and private parties ought to know at once whether the entire legislation fails."). *See also id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (rejecting the state challenge to the federal statute on grounds other than standing); *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (Brennan, J., dissenting) (dissenting on the ground that the 21st Amendment reserves to the states the power to set alcohol policy and that a condition on a federal grant abridges that right); *Id.* (O'Connor, J., dissenting) (dissenting on the ground that drinking age is not reasonably related to transportation

policy); *New York v. United States*, 505 U.S. at 188 (White, J., concurring in part and dissenting in part) (disagreeing with the majority on the grounds that New York consented to the requirements); *Id.* at 310 (Stevens, J., concurring in part and dissenting in part) (disagreeing with the anti-commandeering doctrine); *South Carolina v. Baker*, 485 U.S. 505 (1988) (upholding a federal statute of taxing state bonds with no justice raising standing as an issue). In the one state challenge to a federal spending program that was dismissed on standing grounds, the challenge was to the constitutionality of the spending program itself on behalf of the citizens of the state, and not a challenge to a condition Congress placed on the grant of funds to the state. *See Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (denying standing to Massachusetts but also stating "[w]e need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here.").

Congressional conditions on state use of federal funds are not insulated from judicial review; indeed, whether a condition is legitimate or not "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" which is judicially cognizable. *Pennhurst*, 451 U.S. at 17. Arizona, which must accept the term of the contract for the condition to be valid, is here before this court saying it does not. It has demonstrated standing.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the district court's dismissal and direct the granting of the injunction as requested by the plaintiff-appellant.

Respectfully Submitted,

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Dated: October 1, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 32, that it is written in a 14-point proportional typeface, and that it contains 3,890 words as determined by the word-count feature of Microsoft Word.

Pursuant to Fed. R. App. P. 28, I further certify that the brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Joseph D. Henchman
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