No. 22-880

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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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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?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation the Institute litigates cases, and files amicus briefs when it or its clients' objectives are directly implicated.

Among the Institute's priorities are the promotion of federalism and responsible tax policy. Federalism enables states to pursue their own policies within constitutional boundaries and with minimal federal oversight, while a responsible tax policy imposes a minimal burden on the citizenry, and, as Thomas Jefferson once said, "leave[s] them otherwise free to regulate their own pursuits of industry and improvement." First Inaugural Address, *in Jefferson: Writings* 494 (M. Peterson ed., 1984).

To that end, the Institute helped write the flat tax recently adopted in Arizona. *See New Year, New Tax Rate: Goldwater's Flat Tax Reform Takes Effect to Kick*

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[1] Amicus curiae gave counsel of record for all parties notice of its intention to file this brief at least ten days before the brief's due date. Counsel for amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Off 2023, Goldwater Institute Blog, Jan. 3, 2023.[2] The Institute has also participated as amicus curiae in this and other cases challenging the prohibition on tax cuts in the American Rescue Plan Act, *see Texas v. Yellen*, 597 F. Supp.3d 1005 (N.D. Tex. 2022); *Arizona v. Yellen*, 34 F.4th 841 (9th Cir. 2022), and has often appeared before this Court as amicus on a wide variety of subjects. *See*, *e.g.*, *Brackeen v. Haaland* (No. 21-376) (pending); *Savas v. California State Law Enforcement Ass'n*, No. 22-212 (pending); *Wilkins v. United States*, No. 21-1164, 2023 WL 2655449 (U.S. Mar. 28, 2023).

SUMMARY OF REASONS FOR GRANTING THE PETITION

This and the other cases challenging the provision in the American Rescue Plan Act ("ARPA")'s provision that bans states from reducing taxes—which the court below called the "Tax Mandate"—involve a disturbing new notion in the law of federalism: the idea that Congress can adopt a federal law that essentially takes over one of the states' core sovereign functions (tax policy), but, by leaving federal administrative agencies free to define vague statutory terms, also deprives states of the capacity to challenge that law in court.

Simply put, the standing theory adopted by the Sixth Circuit here would empower Congress to dragoon states with respect to a wide range of policies,

[2] https://www.goldwaterinstitute.org/new-year-new-tax-rate-goldwaters-flat-tax-reform-takes-effect-to-kick-off-2023/.

including those that are utterly central to the states' constitutional sovereign status, and then to effectively hand over that policy authority to unelected bureaucracies. And that very delegation would itself block states from obtaining a judicial determination respecting the legality of the arrangement. A device more directly contrary to "our federalism" can hardly be imagined.

REASONS FOR GRANTING THE PETITION

I. "Our Federalism" contemplates states, not federal agencies, being in the driver's seat.

ARPA bars states that accept funding under it from implementing tax cuts. Tax policy is, of course, a central sovereign function. *Texas v. Yellen*, 597 F. Supp.3d 1005, 1014 (N.D. Tex. 2022) ("Of all the powers the Constitution reserves to the States, there is no power more central to state sovereignty than the power to tax."). And the Constitution's federalist scheme contemplates states being free to set taxes in more or less the manner they deem fit. Federal restrictions on state tax policy are constitutionally dubious because they risk transforming "Our Federalism"—"in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States," *Younger v. Harris*, 401 U.S. 37, 44 (1971)—into a single, consolidated system in which

all significant policy decisions are made in Washington, D.C.

That's problematic for many reasons, including the fact that state tax competition is a *feature*, not a bug of federalism, and imposing a one-size-fits-all rule as ARPA does, weakens it.

The "solution" the federal government offers here—a regulation that purports to disavow ARPA's prohibition on tax cuts—is insufficient to resolve these concerns because that proposition essentially empowers federal bureaucracies to set the metes and bounds of state autonomy. This Court has made clear that Congress can attach conditions to its grants to states, including rather severe ones, but that it can only do so in clear and unambiguous language. Such a clear statement requirement rule is plainly inconsistent with a statute whose terms are broad enough that they can be filled in by regulatory agencies. To permit the latter is to effectively place those agencies in charge of drawing the limits of state policy, and that not only offends federalism, but it undermines democratic accountability as well.

A. Tax competition is an important part of federalism, which ARPA infringes upon.

One benefit of federalism is that it lets states compete by, among other things, structuring their tax policies in ways that strike the right balance between businesses' need for a return on investment and the government's revenue needs. Tax competition, like

policy competition, empowers Americans to vote with their feet. *See*, *e.g.*, *Bond v. United States*, 564 U.S. 211, 221 (2011) ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation' . . . and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Restricting such competition—by imposing a nationwide limit or by barring states from lowering taxes if they see fit—therefore harms not only the states individually, but also the country, whose people will consequently find fewer options available to them as places to work or live.

Obviously Congress can have legitimate reasons for setting conditions on the acceptance of federal funds, which can include provisions intended to prevent the diversion of funds from their intended use. But ARPA's prohibition on tax cuts does not serve such an anti-diversion interest. Under the Tax Mandate, **a state can be deemed to have diverted ARPA funds even if it accurately reports spending all such funds for ARPA purposes**. Indeed, by its terms, the prohibition on tax cuts does *not* concern whether a state spends its full funds amount on ARPA purposes; it concerns whether a state "directly or indirectly" uses funds to "offset" revenue lost from a tax cut. 42 U.S.C. § 802(c)(2)(A).

Put another way, ARPA seeks to ensure that States do not use funds to "pay for" (subsidize) a tax cut, which supposedly would be unrelated to ARPA's

purposes. But ARPA does not otherwise prohibit States from using funds to indirectly subsidize activities that are unrelated to ARPA's permissible uses of funds. Instead, it arbitrarily singles out and effectively prohibits just *one* thing a state might do if it finds itself with a windfall: cutting taxes. *See Texas*, 597 F. Supp.3d at 1015 ("A State . . . remains free to supplant state spending with ARPA funds and spend the resulting surplus of state funds in another area—even if that area is unrelated to COVID-19 relief.").

The Tax Mandate would make sense if ARPA were otherwise designed to deny funds to states that could afford to pay for their own COVID relief without help (if they put other policy priorities aside). But, with one possible exception, ARPA does not do that; it leaves states free to spend money other than ARPA funds on whatever they want, regardless of how wasteful, frivolous, or otherwise unrelated to COVID relief that spending might be.

As for that possible exception, ARPA purports to prohibit states from using funds "for deposit into any pension fund," 42 U.S.C. § 802(c)(2)(B), which might at first appear to be a restriction on state spending—and states with large, unfunded pension liabilities, such as California and Illinois. This spending restriction, objectionable to certain "blue states," ostensibly "balances" the prohibition on tax cuts, objectionable to certain "red states." But the pension-deposit restriction actually means little because, in contrast with the ban on tax cuts, it does not prohibit states from "indirectly" using funds to subsidize pension deposits. The pension-deposit restriction simply means that, when a

state reports its uses of funds to the Secretary, it may not include pension deposits. The Act does not otherwise require states to report pension deposits (as they must report "modifications to . . . tax revenue sources," *id*. § 802(d)(2)(A)), and it does not allow the Secretary to recoup money spent on pension deposits if a state does not include that expenditure among its reported uses of funds (as the Secretary may recover amounts equal to state tax revenues lost. *Id*. § 802(e)).

Thus, ARPA's prohibition on tax cutting is not a rule ensuring that funds are spent as intended. It is a co-optation of the states' capacity to set their own tax policies. As the Eleventh Circuit put it, this provision "restricts the ways in which states may reduce tax receipts or change tax rates," which obviously infringes upon "state sovereignty." *W. Virginia by & through Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1136 (11th Cir. 2023).

B. The Eleventh and Ninth Circuits were right—and the Sixth Circuit wrong here—to hold that states suffer legal injury when federal law casts a "pall" on their policy options.

The *West Virginia* and *Arizona* courts were right to hold that for the federal government to limit the policy options available to a state inflicts an injury on those states. *Id*.; *Arizona*, 34 F.4th at 853. Under the Constitution, states enjoy "numerous and indefinite" powers, which "extend to all the objects, which, in the

ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *The Federalist* No. 45 at 313 (J. Cooke, ed., 1961) (James Madison). For Congress to constrict the circle of state autonomy to narrow their discretion with respect to such objects necessarily contradicts federalist principles.

Moreover, the very indefiniteness of the restriction on state power contradicts the Tenth Amendment's promise that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That proposition only makes sense if the lines between state and federal power are clearly drawn; a federal law that empowered the President to, say, veto any state law he considered "contrary to the national interest" or "excessively burdensome in relation to its goals" would be unconstitutional *precisely* because it is so indefinite that it would cast a pall on state policymaking.

The court below, however, dismissed "this 'pall' theory," App. 15a, likening it to the "subjective chill" theory of First Amendment law, *id.* at 16a (citing *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)), and concluding that a state lacks standing unless it "show[s] why there is some realistic, likely risk of an enforcement proceeding if it were to engage in its desired behavior." *Id.*

But that cannot be the standard. For one thing, state policies change frequently, for many reasons, including turnovers in political leadership. For another,

the very question of whether Ohio is free or not free, as a matter of federal law, to pursue a course of action will obviously influence public discourse about whether the state should pursue that course of action.[3] The fact that a state's autonomy is arguably narrowed by ARPA will restrict its legislative deliberation over policy-making—and that should be enough for standing purposes. ARPA's Tax Mandate thus throws, so to speak, a "cloud" over Ohio's "title" to the power to cut taxes—and just as the traditional quiet-title lawsuit is available whenever facts exist "which may throw a cloud or suspicion over [the owner's] title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law," *Martin v. Graves*, 87 Mass. 601, 602 (1863), so Ohio should be free to seek judicial clarification of its rights and obligations without having adopted some specific plan of action which the federal law obstructs.

To require Ohio to prove that it wants to take some specific action, and that the federal government will punish it for doing so, before it can challenge ARPA's constitutionality (a) requires a degree of definiteness that is unrealistic, and is not even required in First Amendment law, and (b) places a burden on states that should be borne by the federal government.

First, requiring such specificity means requiring evidence that is unlikely to exist much of the time.

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[3] This is sometimes called Goodhart's Law, which states that when a measurement becomes a target of behavior, it ceases to be a good measurement. *See* Caryn Devins, et al., *Against Design*, 47 Ariz. St. L.J. 609, 671 (2015).

Consider how states make policy: an idea circulates in the community for a while before a legislator introduces a bill; during that time, it is the subject of debate and deliberation between stakeholders, who add and subtract from the proposal; after it is drafted and introduced, it goes through various committees and floor amendments before being presented to the governor. The bill that emerges at the end is virtually never the same as when it began. To demand a specific showing *today* of what the legislature would like to do *next year* is therefore unrealistic.

That is even more true when talking about such a complex, even abstract, question as whether a bill will result in a "reduction in the net tax revenue." Predicting whether a law will lead to a "reduction in net tax revenue" is so complicated that courts typically refuse even to try. *See*, *e.g.*, *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (refusing to make Origination Clause depend on whether bill "raises" revenue because "the same revenue bill may well have varying effects upon the total taxes assessed in different years."); *Ariz. Free Enter. Club v. Hobbs*, 515 P.3d 664, 673 ¶ 31 (Ariz. 2022) (because "[t]he net revenue impact of a bill in the short term may invariably differ from its long-term effect," it would be "a fool's errand" to try to determine whether something reduces revenue). To require a state to make a specific showing that it intends to pursue a policy which will reduce state revenue, and thereby incur a specific federal penalty, is simply setting the standing bar so high that states could probably never reach it.

In fact, the bar isn't that high even in free speech cases, which is where the court below claimed to derive its theory (citing *Laird*). The *Laird* case simply said that subjective fear alone is insufficient to amount to a legally redressable injury. But where a plaintiff faces more than a purely subjective fear, he is *not* required to show an imminent prosecution before suing—just that he cannot know for certainty what he can and cannot say without incurring punishment. 408 U.S. 1.

Even a risk of punishment is not required. In *Meese v. Keene*, 481 U.S. 465 (1987), the plaintiff—a California state legislator—had standing to challenge federal regulations of films deemed "propagandistic," even though he faced no actual, imminent threat of prosecution. Instead, the law required agents of foreign governments to file certain paperwork, *id.* at 469, and he wished to show the movies without having to file that paperwork because "his personal, political, and professional reputation would suffer" if he were to display films officially labeled "propaganda." *Id*. at 473. This Court found he had standing because he "could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career." *Id*. at 475. The Court said that differentiated the case from the kind of purely subjective fear at issue in *Laird*.

In other words, even accepting the Sixth Circuit's adaptation of First Amendment standing theory to this case, Ohio would still have standing. It's not suffering a merely *subjective* "chill," but—like the plaintiff in *Meese*—is required to submit paperwork to federal

regulators to prove it has not cut taxes too much, and faces a real risk of penalty. App. 5a.[4]

C. The standing theory adopted below throws the burden of proof on the wrong side.

Worse, setting the standing bar as high as the Sixth Circuit did means effectively presuming against state independence and in favor of federal authority. To say a state may not seek to vindicate its autonomy against a federally imposed restriction unless it satisfies an unrealistically high burden of production means that the default rule is to let Congress restrict states unless and until that restriction is too severe.

But in "Our Federalism," we presume in favor of state autonomy, rather than viewing it as an exception to some general rule of federal power. *See*, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("because the States are independent sovereigns in our federal system, we have long presumed . . . 'that the historic police powers of the States were not to be superseded. . . .' " (citations omitted)); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (same). Thus the rule should be the opposite: the state is presumptively

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[4] True, the state could comply with the reporting requirement and still violate the rule against tax cuts, as the court below said, App. 22a, but that's no different than saying the plaintiff in *Meese* could still have submitted the paperwork and then gone ahead and violated the law by showing the movies without the required "propaganda" label. The possibility that a party could violate the law hardly shows lack of standing.

free to set its policy as it chooses, unless and until it crosses the federal line. That presumption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

In short, what the Sixth Circuit called "the 'pall' theory," App. 15a, is the correct way of reading the Constitution. The federalist system cannot coexist with Congressional power to cast a shadow over the actions of state legislatures to such a degree that they are effectively required to ask of federal administrative agencies, "Mother may I?" before fashioning their own tax policies.[5]

[5] The court below found it "difficult" to reconcile a state's standing to challenge the threat hanging over its constitutional autonomy with the fact that Ohio had chosen to adopt legislation reducing taxes, and observed that Ohio had not offered evidence showing that its legislators feared retaliation. App. 16a n.3. But that, again, puts the burden on Ohio to justify its exercise of its constitutional authority. What's more, this assertion begs the question, because the very fact of ARPA's unconstitutionality may very well explain why Ohio legislators chose to defy it. In any event, the standing here is not for the legislators, but for the state—and the injury is a future injury to the state, not the legislators. The state's injury is ARPA's restriction of—or future penalty against the state for—"creat[ing] and enforc[ing] [its own] legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982).

II. It is past time for clarification on the limits of federal Spending Clause power and standing to challenge Spending conditions.

More than 35 years after *South Dakota v. Dole*, 483 U.S. 203 (1987), state and federal officials—and, of course, lower courts—remain unable to discern when the federal government has gone too far under the Spending Clause. That is due to this Court's failure to explain the limits, and the Court should take this case in order to provide the guidance lower courts need.

A. *Dole*'s presumption that states can say "no" is unrealistic in many cases.

Dole says Congress has greater leeway when it comes to making demands upon the states under the Spending Clause than under, say, the Commerce Clause—because the states are free to say no if they think the conditions on such spending are excessive. *See id.* at 210 ("the State could . . . adopt 'the "simple expedient" of not yielding." (citation omitted)). Yet the *Dole* decision itself recognized that there must be more meaningful limits on Congress than that—for example the conditions imposed on the receipt of federal funds must be related to the federal interest in that federal program, *see id.* at 207–08—lest Congress use its grants as an excuse to make exorbitant or arbitrary demands on states.

Of course, as *NFIB v. Sebelius*, 567 U.S. 519, 575–85 (2012) (plurality), recognized, when the amount in question is so large that a state has no realistic option

of saying no, Congress is in the position of making a "your money or your life" type of demand on the states. *Id.* at 582 n.12. Moreover, the theory that states can freely choose to reject federal offers of funds is naïve because a state that did so would still be forced to send its tax dollars to Washington, D.C. As Professor Epstein puts it:

> Let Massachusetts refuse to participate in [the federal program at issue], and citizens remain subject to the taxes in question, which are now directed elsewhere. The [federal program] not only uses tax revenues from the states that participate in the program, but it uses tax revenues from states that refuse to participate in the program. The coercion comes from the linking of the benefit offered to the prior tax. In principle every state could prefer an outcome of no tax/no benefit, but so long as no state can undermine the power to tax, the dominant strategy for each state is to take the benefit. With the tax firmly in place, the fact of consent only allows the state to choose between its second and third choices: participate or don't participate, but by all means pay. Each state knows moreover that once it opts out the deal becomes ever sweeter for the states that remain.

Richard A. Epstein, *Standing and Spending—the Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1, 32 (2001).

The fact that even a state that says no is still forced to subsidize those that say yes not only makes

the simplistic "choose it or refuse it" theory behind *Dole* untenable, but also suggests the need for a broader conception of *standing* in cases involving spending conditions.

As Epstein observes, "no state has any way to obtain its first alternative—stop the program in its tracks because its scope lies outside the spending clause—unless it can sue to dismantle the program." *Id*. Yet the doctrine of *Massachusetts v. Mellon*, 262 U.S. 447 (1923), bars a state from vindicating its financial stake. So, to also bar the state from vindicating its sovereign interests in a lawsuit means turning a blind eye to one of federalism's most crucial elements. Nothing in the actual language in the Constitution requires that; on the contrary, that language gives federal courts power to decide "*all* cases in law and equity arising under this Constitution," U.S. Const. art. III § 2 (emphasis added), without any exception for cases involving conditions on the receipt of federal funds.

The upshot of the decision below is that if Congress were to *forbid* Ohio from legislating on a subject beyond Congress's preemption authority, Ohio could sue,[6] and if Congress were to *compel* Ohio to legislate on a subject, Ohio could sue,[7] but if Congress says to Ohio, "We will not tell you whether or not you may legislate on such-and-such a matter; that decision will be made later by an unelected federal administrative official; but you face vast financial penalties in the event

[6] *See*, *e.g.*, *Maine v. Taylor*, 477 U.S. 131, 137 (1986).

[7] *See*, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992).

that the official decides against you," Ohio *cannot* seek a judicial clarification of its rights and responsibilities.

That makes no sense. "The constitutional scheme assigns certain responsibilities to states. . . . Interference by the federal government in a state's ability to fulfill these responsibilities imposes an 'injury' on the state's functional role within the constitutional structure and should also meet the 'injury in fact' requirement." Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 Nw. U. L. Rev. 201, 231 (2017).

It has always been proper to ask courts for clarification of rights and responsibilities, and in a case where the plaintiff faces a likelihood of punishment, she is not required to actually break the law and be punished before seeking redress. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Yet, just as a private party is "not require[d], as a prerequisite to testing the validity of the law in a suit for injunction, [to] . . . bet the farm, so to speak, by taking the violative action," *id*. at 129, so Ohio may seek to vindicate its authority to establish its own tax policy against a federal statute that enables an administrative agency to determine that the state has cut taxes too much and must be penalized.

To say otherwise would fly in the face of this Court's recent pronouncements regarding the relationship between federalism and standing. In *Bond*, 564 U.S. 211, this Court held that individuals have standing to raise Tenth Amendment arguments against federal statutes, despite the lower court's theory that

states, rather than individuals, are injured by Tenth Amendment violations. This was wrong because a person who "seeks to vindicate her own constitutional interests" can nevertheless do so by arguing that a law is unconstitutional for reasons involving federalism. *Id.* at 220. Individuals cannot "vicarious[ly] assert[ ] . . . a State's constitutional interests," but a person whose own interests are injured can "object that her injury results from disregard of the federal structure of our Government." *Id*. at 224–26.

Most notably, *Bond* observed that "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id*. at 221. To allow Congress to bar states from taking an action within a broad, yet-to-be-defined realm—as in this case—takes a startling step away from that integrity and residual sovereignty.

A state obviously suffers a distinct and palpable injury when Congress seeks to use federal grants as a means of obtaining power over the states that it does not enjoy pursuant to the Constitution—and a State should have the right to make that argument in court. Whether it be in the form of a condition on funds the state *does* accept—as in *Dole*—or in the form of an offer the state declines, but must nevertheless subsidize, as in the example Prof. Epstein gives, the state is injured when Congress does such things. To categorically deny legal redress to states in such circumstances is arbitrary and encourages Congress to further abuse its powers.

B. States and lower courts need guidance on the limits of Spending Clause power.

Not only do state officials and lower courts need guidance with respect to states' standing to sue, but they need guidance on the limits of federal authority to condition grants of funds. The closest this Court has come to specifying the limits was in *NFIB*, which indulged a saving construction of the statute in question and consequently did not actually decide whether Congress's effort at "economic dragooning" was constitutional. 567 U.S. at 582. The joint dissent in that case also did not attempt to specify a precise formula for when spending conditions are coercive.

Professor Lynn Baker, the leading scholar of the subject, has observed that "Congress regularly uses fiscal redistribution among the states and conditional federal spending to impinge, intentionally or unintentionally, on the autonomy that the Framers sought to guarantee the states." *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195, 198 (2001). Worse, the refusal to implement a consistent and meaningful Spending Clause jurisprudence has caused many social and economic harms, ranging from the obvious (pork-barrel spending) to the subtle (distortions of the democratic process). *See generally* Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 Nw. U. L. Rev. 495, 519–38 (2009).

The "existing structure of representation in Congress," Baker writes, tends to cause "systematic wealth redistribution from the large-population states to the

smaller states in the absence of any judicial constraint. This means that if the Court holds the Spending Clause . . . only minimally constrains Congress's spending power, that decision benefits the states that are overrepresented in the Senate." *Id*. at 539.

Baker has suggested that the Court "reconceptualize the coercion prong" of the *Dole* precedent "as providing that a spending condition is impermissibly coercive if it presents a state with either no *rational choice* or no *fair choice* but to accept, even if it leaves the state with a *practical choice* not to." Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 Ind. L.J. 459, 520–21 (2003).

This option seems to have been anticipated in *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686–87 (1999), which said that when Congress threatens to prohibit the state from engaging in "otherwise lawful activity," the "point of coercion is automatically passed—and the voluntariness of waiver destroyed."

In the alternative, the Court could "tighten[] the relatedness prong" by requiring the condition on the receipt of funds "to require that the expenditure and the condition be so closely related that the purpose each 'directly' (or immediately) serves be the same." Baker & Berman, *supra* at 522, 516. This would mean that Congress could condition funds on a state's agreement to something that would promote the immediate

federal purpose of the grant, rather than either some distinct, different purpose, or some purpose that is attenuated from the direct goal of the grant. *Id*. at 516.

Either approach would put meaningful effect into the *Dole* decision's so-far neglected principle that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citation omitted). What is not tenable is the current twilight zone in which neither Congress nor the states know how much of an infringement on state autonomy Congress can impose as part of a condition on the receipt of federal funds. The Court should grant review to address these pressing concerns.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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