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17

18 **UNITED STATES DISTRICT COURT**  
19 **FOR THE DISTRICT OF ARIZONA**

20 State of Arizona,  
21 Plaintiff,  
22 v.  
23 Janet Yellen, in her official capacity as  
Secretary of the Treasury; Richard  
24 Delmar, in his official capacity as acting  
Inspector General of the Department of  
25 Treasury; U.S. Department of the  
26 Treasury,  
27 Defendants.

No. 2:21-CV-00514-DJH  
**BRIEF FOR *AMICI CURIAE***  
**CHAMBER OF COMMERCE OF**  
**THE UNITED STATES OF**  
**AMERICA AND NATIONAL**  
**FEDERATION OF INDEPENDENT**  
**BUSINESS SMALL BUSINESS**  
**LEGAL CENTER**

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**CORPORATE DISCLOSURE STATEMENT**

The Chamber of Commerce of the United States of America is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The National Federation of Independent Business Small Business Legal Center is a 501(c)(3) public interest law firm and is affiliated with the National Federation of Independent Business, a 501(c)(6) business association. Neither the Chamber of Commerce of the United States of America nor the National Federation of Independent Business has a parent corporation, nor does any publicly held corporation own 10% or more of their stock. No publicly held corporation or its affiliate that is not a party to this case or appearing as amici curiae has a substantial financial interest in the outcome of this litigation by reason of insurance, a franchise agreement, or an indemnity agreement.

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1 **STATEMENT OF INTEREST**

2 The Chamber of Commerce of the United States of America is the world’s largest  
3 business federation, representing approximately 300,000 members and indirectly  
4 representing the interests of more than 3 million companies and professional organizations  
5 of every size, in every economic sector, and from every region of the country. The National  
6 Federation of Independent Business is the Nation’s leading small business association. Its  
7 membership spans the spectrum of business operations, from sole proprietor enterprises to  
8 firms with hundreds of employees. The NFIB Small Business Legal Center is a nonprofit,  
9 public interest law firm established to provide legal resources and represent small  
10 businesses on issues of public interest affecting them. *Amici* frequently file *amicus curiae*  
11 briefs in cases that will impact businesses, such as this one. *Amici* are concerned that the  
12 tax mandate will hobble States that seek to ease tax burdens on businesses that have been  
13 substantially harmed due to the pandemic. For these reasons and others described below,  
14 *amici* respectfully ask this Court to grant Arizona’s request for a preliminary injunction.<sup>1</sup>  
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19 **INTRODUCTION**

20 The novel tax mandate at the heart of this case is unprecedented and  
21 unconstitutional. Never in the history of the Republic has the federal government  
22 conditioned the receipt of federal funds on a State’s surrender of its power to control its  
23 own tax policies. It is beyond question that Congress cannot dictate state tax policy  
24 directly, and such an intrusion into core matters of state sovereignty is ultra vires, even as  
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27 <sup>1</sup> No counsel for any party authored this brief in whole or in part, and no entity or person, aside  
28 from *amici curiae*, their members, and their counsel, made any monetary contribution toward  
the preparation or submission of this brief.

1 a condition on federal funds. Congress has resisted the temptation to impose such a  
2 condition for over two centuries not out of self-restraint, but because it lacks the power to  
3 do so. And at a bare minimum, Congress cannot coerce States into surrendering such a  
4 core aspect of sovereignty with an offer they cannot refuse—a massive federal relief  
5 package ultimately funded by taxpayers.  
6

7 The unprecedented tax mandate is already eroding state sovereignty and will  
8 continue to do so unless this Court enjoins it. In the meantime, state lawmakers are left  
9 with little choice but to halt critical public policy measures out of fear that those measures  
10 may jeopardize their federal relief, inflicting irreparable injury on the States and their  
11 citizens right now. Any contrary federal interest is minimal, if not entirely ultra vires. The  
12 Court should promptly enjoin this unprecedented and patently unconstitutional prohibition.  
13  
14

### 15 ARGUMENT

16 The American Rescue Plan Act of 2021 (ARPA) offers approximately \$195 billion  
17 to States to aid the States' and their residents' financial recovery from the COVID-19  
18 pandemic. In addition to enumerating the purposes to which States may put ARPA funds,  
19 Pub. L. No. 117-2, §9901(c)(1)(A)-(D), ARPA provides that the funds cannot be used:  
20

21 [T]o either directly or indirectly offset a reduction in the net tax revenue of  
22 such State or territory resulting from a change in law, regulation, or  
23 administrative interpretation ... that reduces any tax (by providing for a  
24 reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the  
25 imposition of any tax or tax increase.

26 *Id.* §9901(c)(2)(A). If a State violates that prohibition, it must repay the funds in “an  
27 amount equal to the amount of funds used in violation” of the Act. *Id.* §9901(e).  
28



1 This mandate is breathtakingly broad. By prohibiting funds from “indirectly”  
2 offsetting a decrease in state revenue, the provision appears to reach *any* action that effects  
3 a reduction in rate, rebate, deduction, or credit, regardless of whether any federal funds  
4 were used to finance that tax measure. It appears to also preclude any state official from  
5 adopting any pro-taxpayer interpretation of a disputed provision. The mandate goes so far  
6 as to forbid a State to delay the imposition of a tax or tax increase, even as a hardship  
7 allowance for the pandemic’s crippling financial consequences.  
8

9  
10 The federal government now claims that the prohibition may reach only tax cuts  
11 that are specifically paid for with relief funds.<sup>2</sup> But those one-off (and nonbinding)  
12 statements are in tension with ARPA’s plain text (and the fungible nature of money), and  
13 they provide cold comfort to the state lawmakers who are in the middle of time-limited  
14 legislative sessions now. Moreover, the only thing worse than an unprecedented intrusion  
15 into state sovereignty is confusion over the extent of the federal intrusion. This Court  
16 should enjoin the provision.  
17

### 18 **I. The Tax Mandate Is Unconstitutional.**

19 The taxing power lies at the absolute core of sovereignty. Misguided taxes spurred  
20 the revolution that produced our Republic. Our founding document includes multiple  
21 specifications of what federal and state governments can and cannot tax. U.S. Const. Art.  
22 I, §8, cl. 1; *id.* Art. I, §9, cl. 1, 4, 5; *id.* Art. I, §10, cl. 2; *id.* Amend. XVI. And our earliest  
23 judicial decisions recognize that “the power to tax involves the power to destroy.”  
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27 <sup>2</sup> See Laura Davison, *Treasury Clears States to Cut Taxes – But Not With Stimulus*, Bloomberg  
28 (March 18, 2021), <https://bloom.bg/3wFsTpH>; Ltr. from Janet L. Yellen to Hon. Mark  
Brnovich, Att’y Gen. (Mar. 23, 2021); Opp. to PI Mot. at 23, *Ohio v. Yellen*, No. 1:21-cv-  
00181 (S.D. Ohio filed Apr. 16, 2021).

1 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). It is no surprise, then, that  
2 the Supreme Court recognizes that the tax power is “central to state sovereignty,” *Dep’t of*  
3 *Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994), and that the “power of self  
4 government ... cannot exist distinct from the power of taxation,” *Providence Bank v.*  
5 *Billings*, 29 U.S. (4 Pet.) 514, 546, 548 (1830). Thus, it has been settled law from the  
6 Republic’s earliest days that a State “alone” may, “within its own jurisdiction,” “judge and  
7 determine how, in what manner, and upon what objects [the tax] power shall be exercised.”  
8 *Id.* at 544. Simply put, it is difficult to conceive of a greater threat to the “integrity, dignity,  
9 and residual sovereignty of the States,” *Bond v. United States*, 564 U.S. 211, 221 (2011),  
10 than the loss of their tax power.  
11  
12

13         The Sixteenth Amendment, which empowers the federal government to tax the  
14 income of the States’ citizenry, has made this core attribute of state sovereignty even more  
15 critical, as it serves as a check on the federal government’s taxing power. States may not  
16 be able to stop the federal government from taxing their citizens’ income. But they can  
17 alleviate the burden by reducing their own reliance on tax revenues, especially when the  
18 federal government uses the tax revenues it collects from their citizenry to insert itself into  
19 functions traditionally left to the States (or even more perversely, redistributes federal tax  
20 revenues to States to spend on matters of traditional state concern). The States’ ability to  
21 play this safety-valve role is critical to preserving the framers’ vision that a system of dual-  
22 sovereignty enhances, rather than threatens, individual liberty. *See id.* at 221.  
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26         Those bedrock tenets of federalism resolve this case. Some matters are simply too  
27 close to the core of state sovereignty for the federal government to dictate their terms.  
28

1 Just as the federal government may not decide the location of a State capitol, *Coyle v.*  
2 *Smith*, 221 U.S. 559, 577 (1911), the federal government may not decide whether a State  
3 should lower or raise taxes. That Congress purports to do so here as a condition on the  
4 receipt of federal funds (or, more aptly, federal tax revenues collected from the States’  
5 citizens) makes no difference. As *Coyle* recognizes, some conditions reach so deeply  
6 into the core of state sovereignty that they are per se ultra vires.  
7

8 That is clearly true of this unprecedented effort to dictate state tax policy. If the  
9 power to tax is indeed the power to destroy, then the federal government has no more  
10 business dictating what state governments may and may not tax than States have in taxing  
11 federal instrumentalities. Indeed, where the Constitution puts certain revenue sources off-  
12 limits to States, it does so directly, as with Article I, Section 10’s express prohibition on  
13 state taxes on imports and exports without Congress’ consent. The idea that Congress can  
14 add to Article I, Section 10 as a condition of federal funding should be a non-starter. That  
15 likely explains why Congress has never taken this extraordinary step. *Cf. Free Enter. Fund*  
16 *v. PCAOB*, 561 U.S. 477, 505 (2010) (“Perhaps the most telling indication of the severe  
17 constitutional problem ... is the lack of historical precedent.”).  
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21 The mandate suffers from the additional infirmity of being impermissibly coercive.  
22 Congress may attach conditions to federal funds only if the offer is voluntary not just in  
23 theory, but in fact. *Nat’l Fed’n of Indep. Bus. v. Sebelius* (“*NFIB*”), 567 U.S. 519, 577  
24 (2012). Efforts to use the power of the federal purse to coerce States to do Congress’  
25 bidding “undermine the status of the States as independent sovereigns.” *Id.* at 577. Federal  
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1 “pressure turns into compulsion” when States lack a “legitimate choice whether to accept  
2 the federal conditions in exchange for federal funds.” *Id.* at 577, 643.

3 ARPA is plainly coercive. In *NFIB*, the threatened “loss of over 10 percent of a  
4 State’s overall budget” was “surely beyond” the constitutional line. *Id.* at 582, 585.  
5 ARPA’s \$195 billion eclipses that by any measure, as it equates to a whopping 20% of the  
6 annual state tax collections of state governments.<sup>3</sup> For some States, the impact is even  
7 greater, equivalent to about 40% of Arizona’s general fund budget, Compl. ¶11, and nearly  
8 30% of Mississippi’s 2021 budget.<sup>4</sup> As in *NFIB*, the sheer amount of money at issue  
9 “leaves the States with no real option but to acquiesce.” *Id.* at 582.

12 And numbers alone do not tell the whole story. COVID-19 forced entire industries  
13 to shut down for months, while others operated with reduced hours and customer  
14 capacities, all under supply chain constraints. Small businesses in particular have faced  
15 unprecedented hardship.<sup>5</sup> The hospitality industry was ravaged, with nearly a third of  
16 workers losing their jobs.<sup>6</sup> And more than 100,000 businesses have permanently closed.<sup>7</sup>

18 These economic hardships also directly impact States’ budgets, many of which face  
19 dwindling tax revenues alongside rising healthcare costs and record unemployment  
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23 <sup>3</sup> Jared Walczak, *Four Questions Treasury Must Answer About the State Tax Cut Prohibition in  
the American Rescue Plan Act*, Tax Found. (Mar. 18, 2021), <https://bit.ly/3cYu0YB>.

24 <sup>4</sup> *How the COVID-19 Pandemic is Transforming State Budgets*, Urb. Inst. (Apr. 2, 2021),  
<https://urbn.is/3cAJrj>.

25 <sup>5</sup> NFIB Res. Ctr., *Small Business Survey (16)* at 9 (Mar. 16, 2021), <https://bit.ly/3dv5COz>.

26 <sup>6</sup> Erin Huffer & Aravind Boddupalli, *The Leisure & Hospitality Sector Has an Employment  
Crisis—and It Might Be Getting Worse*, Urb. Wire (July 20, 2020), <https://urbn.is/397ptlz>.

27 <sup>7</sup> Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments That Temporarily Shut Down  
Are Now Out of Business*, Fortune (Sept. 28, 2020), <https://bit.ly/3t6dpci>.

1 claims.<sup>8</sup> Indeed, the pandemic is projected to slash state revenues by \$200 billion—nearly  
2 the exact amount of money offered under ARPA.<sup>9</sup> Under normal circumstances, to refuse  
3 such a massive influx of tax dollars would be unthinkable; in these extraordinary times, to  
4 do so would border on unconscionable. The tax mandate thus should be seen—and  
5 rejected—as exactly what it is: an unconstitutional effort to strip States of their core  
6 sovereign right to determine their own tax policy.  
7

## 8 **II. Left Standing, The Tax Mandate Will Have Dire Consequences.**

9  
10 The tax mandate also threatens immediate and drastic consequences that readily  
11 justify a preliminary injunction. The mandate’s ostensible ban on *any* tax measure that  
12 reduces a State’s net revenues puts at risk countless critical tax policies that state  
13 lawmakers are seeking to pass right now. The Supreme Court has long recognized that any  
14 “delay” in a State’s ability to enforce its tax policies “may derange the operations of  
15 government,” causing “serious detriment to the public.” *Dows v. City of Chicago*, 78 U.S.  
16 108, 110 (1870). If anything, that threat is even more pronounced at this critical juncture,  
17 because many of the State policies are designed to reduce the pandemic’s financial strain.  
18

19  
20 Many State tax measures would directly reduce the tax burden on businesses,  
21 particularly on those that have suffered substantial harm because of government-mandated  
22 closures and restrictions. This is a critical tool in the States’ efforts to restore their  
23 economies. For example, New Mexico recently established a gross receipts tax deduction  
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26 <sup>8</sup> See Anshu Siripurapu et al., *How COVID-19 Is Harming State and City Budgets*, Coun. on  
Foreign Rel’ns (Mar. 19, 2021), <https://on.cfr.org/3f9vjqm>.

27 <sup>9</sup> See Lucy Dadayan, *COVID-19 Pandemic Could Slash 2020-21 State Revenues by \$200*  
28 *Billion*, Tax Pol’y Ctr. (Jul. 1, 2020), <https://tpc.io/2NKE8M5>.

1 for food and beverage establishments, which were hit particularly hard by the pandemic.<sup>10</sup>  
2 Maryland recently passed a sweeping COVID-19 relief bill that supports small businesses  
3 with a sales tax credit of up to \$3,000 per month—a nearly \$200 million commitment.<sup>11</sup>  
4  
5 Kansas is considering reimbursing the property tax owed by businesses impacted by  
6 closure orders,<sup>12</sup> which will save myriad businesses whose property tax obligations might  
7 otherwise drive them out of business.<sup>13</sup>

8         The States' efforts also provide critical aid to individuals. Tennessee is considering  
9 exempting groceries from sales tax for six months.<sup>14</sup> And Maryland's relief law provides  
10 \$178 million in direct stimulus relief to 400,000 low-income residents.<sup>15</sup> Many States are  
11 also considering tax measures that do not provide COVID-19 relief, but are clearly in the  
12 public interest. Georgia recently passed tax credits for families adopting a child from foster  
13 care.<sup>16</sup> Alabama is considering tax deductions for citizens to purchase storm shelters to  
14 protect their families from tornadoes.<sup>17</sup> And Montana is considering increasing its  
15 education tax credit for families.<sup>18</sup> The tax mandate's natural construction would implicate  
16 these measures, and more.  
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21 <sup>10</sup> S.B. 1, 55th Leg., 1st Sess. (N.M. 2021).

22 <sup>11</sup> S.B. 496, 442d Gen. Assemb., Reg. Sess. (Md. 2021).

23 <sup>12</sup> S.B. 149, 2021 Gen. Assemb., Reg. Sess. (Kan. 2021).

24 <sup>13</sup> See Holly Wade & Andrew Heritage, *Small Business Problems & Priorities 2020* at Tbl. 1, NFIB Res. Ctr. (July 2020), <https://bit.ly/3wpWt2g>.

25 <sup>14</sup> H.B. 1071, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

26 <sup>15</sup> See Office of Gov. Larry Hogan, *The RELIEF Act of 2021*, <https://bit.ly/2O6yoMG>.

27 <sup>16</sup> H.B. 114, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

28 <sup>17</sup> H.B. 227, 2021 Leg., Reg. Sess. (Ala. 2021).

<sup>18</sup> H.B. 279, 67th Leg., Reg. Sess. (Mont. 2021).

1           The federal government now claims that States remain “free ... to cut taxes” so long  
2 as they do not “use the pandemic relief funds to pay for those tax cuts.”<sup>19</sup> But when pressed  
3 on what that means in practice, the Treasury Secretary admitted the issue is “thorny.”<sup>20</sup>  
4  
5 Given ARPA’s bar on using funds to “indirectly” effect a revenue decrease and the  
6 “fungibility of money,” the Secretary conceded that it is “hard ... to answer” exactly how  
7 much ARPA may “hamstr[i]ng” States.<sup>21</sup> That alone is a fatal problem, as Congress must  
8 impose any conditions “unambiguously[,] enabl[ing] the States to [be] cognizant of the  
9 consequences of their participation.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *see*  
10 *also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (requiring  
11 “clear notice” of conditions). Even setting this problem aside, States cannot wait for  
12 Treasury to decide if and how it may try to interpret the mandate more narrowly (if doing  
13 so is even possible). States are confronted with pressing public policy issues *now*. The  
14 overwhelming majority of States limit the length of legislative sessions, and most require  
15 the legislature to balance the budget during the prescribed time.<sup>22</sup> Alabama’s session, for  
16 example, must conclude by May 18. The legislature thus has only weeks to decide whether  
17 to pass its storm-shelter tax deduction—a critically important issue after a recent tornado  
18 devastated part of the State.<sup>23</sup> Tennessee’s general session concludes on April 30, by which  
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24 <sup>19</sup> *Supra*, note 2.

25 <sup>20</sup> Hear’g on CARES Act Quarterly Report, Sen. Banking, Hous. & Urb. Affairs Comm. (Mar.  
26 24, 2021).

27 <sup>21</sup> *Id.*

28 <sup>22</sup> *See* Nat’l Ass’n of State Budget Officers, *Budget Processes in the States* at T.1 (2015),  
<https://bit.ly/3dNTfNR>.

<sup>23</sup> *Tornadoes Pummel Alabama, Killing at Least 5*, CNBC (Mar. 25, 2021),  
<https://cnb.cx/3tF89MQ>.

1 time it must vote on its proposed grocery sales-tax exemption. These and other States  
2 cannot wait for Treasury to make up its mind, but must exercise their sovereign prerogative  
3 to set tax policy now.  
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5 It is difficult to see what legitimate interest the federal government has in prohibiting  
6 States from lowering their residents' tax burden. *See, e.g., Ariz. Dream Act Coal. v.*  
7 *Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (no government or public interest in violating  
8 the law). But even assuming such interest exists, the balance of equities plainly favors an  
9 injunction. The tax mandate was an eleventh-hour addition, with no formal legislative  
10 history.<sup>24</sup> ARPA's aim is to provide economic relief to sectors of society hit especially  
11 hard by the pandemic.<sup>25</sup> Tax relief is an obvious means of achieving that policy objective,  
12 yet Congress placed it off limits. *Cf. City of Phila. v. Sessions*, 280 F. Supp. 3d. 579, 657  
13 (E.D. Pa. 2017) (noting that forgoing funds would prevent city from addressing opioid  
14 epidemic, which the Administration had described as "a major public health crisis"). And  
15 that is to say nothing of what interest Congress could have in halting non-COVID-19-  
16 related tax measures that will benefit many Americans during a critical time. In short, even  
17 assuming there are equities on the other side of the ledger, the balance is not even close.  
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## 21 CONCLUSION

22 The Court should grant Arizona's motion for a preliminary injunction.  
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27 <sup>24</sup> *See* Patrick Gleason, *How Senator Joe Manchin's Move To Block Tax Relief in His Own State*  
*Costs All U.S. Taxpayers*, *Forbes* (Mar. 16, 2021), <https://bit.ly/31vV782>.

28 <sup>25</sup> *See, e.g., Pub. L. 117-2, §9901(c)(1)(A)*.



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April 23, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of April, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the 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/Paul D. Clement  
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