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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

v.

JANET YELLEN, in her official capacity as Secretary of the Treasury et al.;

Defendants.

No. 2:21-cv-00514-DJH

REPLY BRIEF IN SUPPORT OF ARIZONA'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' (the "Secretary's") opposition appears to rest principally on two untenable bases: (1) a justiciability argument, under which the greatest potential encroachment upon States' sovereign taxing powers ever attempted by Congress—which renders rational budgeting effectively impossible *now*—somehow fails to inflict cognizable injury of any sort, and (2) an attempt to surrender their way to victory: capitulating away virtually all effect of the Tax Mandate, such that what little is left (in their view) is so inconsequential that it cannot possibly violate the Constitution because it effectively does nothing at all. Neither can withstand scrutiny.

As to standing and ripeness, the Secretary's argument first violates the basic principle that jurisdiction is evaluated independently from the merits, such that "a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. D.C*, 478 F.3d 370, 377 (D.C. Cir. 2007)*, aff'd District of Columbia v. Heller*, 554 U.S. 570 (2008). But the Secretary's justiciability arguments are largely premised on her extremely narrow reading of the Tax Mandate (hereinafter, "Minimalist Interpretation"), and thus improperly relies on her merits arguments to bootstrap her standing contentions. Moreover, if Congress presents the States with ambiguous conditions through its Spending Clause powers, those conditions violate the Constitution. But any such injury is an accomplished fact when the conditions are *signed into law*: the State's injuries were thus complete and fully ripened on March 11 upon President Biden signature. The State thus need not enact tax cuts that potentially violate the Tax Mandate to have standing—although it has now actually done so, removing any conceivable justiciability doubts.

As to the merits, the Secretary essentially tries to "defend" the Tax Mandate by reading it out of existence. Under her instant Minimalist Interpretation, the Tax Mandate is purportedly an *unambiguous* limitation that merely prevents states from *directly* using ARPA funds to offset tax revenue decreases—and nevermind ARPA's use of "directly *or indirectly,*" or that several other ARPA provisions use far-less expansive language. In the Secretary's telling, the Tax Mandate creates little more than a "Don't Ask, Don't Tell"

policy: as long as the States do not explicitly *say* that they are using ARPA funds for tax relief, Treasury will not ask and the Tax Mandate will have no other effect at all.

But the language Congress actually used, combined with the conceded fungibility of money, preclude such a narrow reading as being unambiguous. Indeed, as a matter of plain language, an entirely plausible reading of the Tax Mandate's language is one that it actually carries out the clear intent of its sponsor, Senator Manchin. Under that view, the Tax Mandate actually does what it was intended to do: broadly prohibiting States from cutting taxes (hereinafter, "Manchin Interpretation"). But the Secretary will not even acknowledge Senator Manchin's pellucid intent. Under this reading of the language—which its sponsor concededly intended—the Tax Mandate is plainly unconstitutional as it: (1) seeks to collapse our system of separate sovereigns with independent taxing power, (2) is not reasonably related to ARPA's purposes, and (3) illegally coerces the States.

Ultimately, the question of the Tax Mandate's best reading is now essentially academic. The Supreme Court has repeatedly held that if Congress intends to impose conditions under the Spending Clause, the Constitution demands that "the conditions must be set out 'unambiguously.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). That standard is plainly violated here given the wild divergence between the eminently plausible Manchin Interpretation, the Minimalist Interpretation presently proffered by the Secretary, and the somewhat intermediary interpretation that she offered to Congress—which conceded that the Tax Mandate raised "a host of thorny questions," Makar Decl. Ex. Y ("Yellen Testimony Interpretation"). Because "unambiguous" conditions do not raise "a host of thorny questions," the Tax Mandate is unconstitutional even as characterized by the Secretary herself.

ARGUMENT

I. The Secretary's Attack On This Court's Jurisdiction Lacks Merit

A. The State Has Article III Standing

To establish Article III standing, the State must demonstrate (1) "an injury in fact," that is (2) "fairly traceable" to the defendant's conduct and (3) "likely to be

redressed by a favorable" ruling. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Secretary does not challenge the latter two requirements, and contests only injury. These contentions lack merit for five reasons.

First, the Secretary's standing arguments rely heavily—and improperly—on her *merits* arguments. The Secretary, for example, contends (at 6) that the State lacks standing because the Tax Mandate "only restricts using Rescue Plan funds to offset a reduction in net tax revenue resulting from a change in law, not any tax change on its own." But this Court "must assume *arguendo* the merits of [the State's] legal claim" when evaluating its standing. *Parker*, 478 F.3d at 377. The Secretary cannot avoid adjudication of the merits here by positing that her view of them is correct.

Second, the Secretary's standing arguments ignore that presenting ambiguous conditions to the States *alone* violates the Constitution by infringing upon the States' sovereignty. Mot. at 8-12. The Tax Mandate's constitutional violation, and resulting injury, became an accomplished fact the moment that ARPA was signed into law and the States were presented with an unconstitutional choice. That is particularly true as statutes must give the states "clear notice" of what they are agreeing to. *Arlington*, 548 U.S. at 296. But the Tax Mandate does not. Moreover, the State is "entitled to special solicitude" as to standing, which the Secretary's arguments flout. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

It would make a mockery of the Supreme Court's Spending Clause precedents to mandate that the States make a choice when the conditions are unclear and then deny them any opportunity for judicial review—*i.e.*, any chance to understand what the conditions actually are—until *after* they have agreed to them and the federal government then brings an enforcement action. The Secretary does not cite a *single* case that has ever required a state to do so, and there is no reason for this to be the first.

Third, and similarly, the State has alleged that ARPA unconstitutionally coerces the States into accepting the Tax Mandate. That coercive force is felt when the State must make a coerced choice, not when a subsequent enforcement action is brought. For that

reason, the federal government did not even contest Florida's standing to bring its coercion challenge to the Medicaid expansion in *NFIB*. *See Florida v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) *aff'd in part NFIB v. Sebelius*, 567 U.S. 519 (2012). And while it technically does so here, its standing argument never addresses coercion, or indeed even uses the word "coercion" or "coerce" even once. Opp. at 4-7.

The government's implicit coercion argument is also deeply counter-intuitive. When a mugger threatens "Your wallet or your life," the actionable injury occurs *then*, and the victim need not wait to see if the mugger actually shoots. So too here: ARPA puts a financial gun to the States' fiscal heads. And the States may reasonably ask courts whether that gun is loaded before waiting for the federal government to pull the trigger (and discover the hard way).

Fourth, and more generally, the Supreme Court has repeatedly held that when a party can only participate in a program by subjecting itself to an unconstitutional condition, it suffers cognizable injury. *See*, *e.g.*, *Northeast Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998). That is precisely so here.

Fifth, the Tax Mandate is causing injury to the State's management of its fiscal affairs stemming from the Mandate's inherent ambiguity. Compl. ¶ 22. This injury is ongoing, notwithstanding whether the Secretary ultimately brings an enforcement action. At the very least, evaluating whether or not a particular policy may cause the State to lose ARPA funds will divert resources and undermine the State's ability to promulgate effective policy. The Ninth Circuit has repeatedly confirmed that this alone is sufficient for standing. *See East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (holding that "'a diversion-of-resources injury is sufficient to establish … standing'") (citation omitted); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) ("[I]f [plaintiffs'] interpretation of the Executive Order is correct, they will be forced to either change their policies or suffer serious consequences").

In any event, even if Arizona could only assert injury based on the threat of

enforcement, Arizona has easily demonstrated a "realistic danger of sustaining a direct injury as a result of the statute's operation." *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). While the State has not specifically laid out each and every planned tax cut which it planned to enact, the State has more than adequately alleged how the Tax Mandate casts a pall over a suite of potential policy changes the legislature may wish to enact. Complaint ¶¶38-39.

In particular, the Legislature must finalize a budget before it adjourns for the year and before the State's new fiscal year begins on July 1, 2021. Compl. ¶38. This budgetary process is likely to produce a number of other policy changes which could fairly be characterized as falling within the Tax Mandate. In such circumstances, Arizona faces an imminent and real danger of losing promised funds, which is sufficient to satisfy Article III. *See San Francisco*, 897 F.3d at 1235 ("A loss of funds promised under federal law satisfies Article III's standing requirement." (cleaned up)). In essence, absent adjudication by this Court now, the Arizona Legislature will be forced to engage in Russian-Roulette-style budgeting, with a meaningful chance that the Tax Mandate will deliver a fatal shot to its budget at some future date.

In any event, the State has now enacted tax cuts that potentially violate the Tax Mandate. For example, on April 14, the Arizona Legislature passed S.B. 1752. *See* 2d Makar Decl. Ex. AA. The law has been expressly characterized as a "tax cut" and the governor has argued that it could save Arizona taxpayers as much as $600 million. *See*, *e.g.*, 2d Makar Decl. Ex. BB.[1]

B. This Case Is Ripe

Courts evaluating ripeness look primarily at two issues: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). A case is typically ripe where the

[1] The Treasury Department has stated that conforming to federal definition of income does not trigger the Tax Mandate, but has yet to provide any textual basis for distinguishing this type of decrease in net tax revenues from any others and could change its mind at any time. *See* https://home.treasury.gov/news/press-releases/jy0113.

"issue presented … is purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985).

That is just so here: the bulk of the State's claims are purely legal, turning on the words of the statute alone and do not require any factual development.[2] And the hardship of delaying adjudication is substantial: absent knowing what the effect of the Tax Mandate is, enacting a budget and setting tax policy are enormously harder. *Supra* at 3-5. Nor will the Secretary suffer meaningful hardship from litigating these issues now. Indeed, resolution now may ease her own burden of answering her "host of thorny questions."[3] Moreover, ripeness is further underscored here by the Arizona Legislature's enactment of a tax measure that potentially violates the Tax Mandate. *Supra* at 5.

II. Arizona Is Likely To Succeed On The Merits

The State's motion asserted that the Tax Mandate is unconstitutional in at least four independent ways: (1) it is ambiguous, (2) it impermissibly attempts to subvert the fundamental federal character of the Constitution, (3) it is not reasonably related to Congress's legitimate purposes in ARPA, and (4) it unconstitutionally coerces states. Mot. at 8-16. The Secretary only meaningfully addresses the first and fourth points and provides scant response to the other two.

A. The Manchin Interpretation Is At Least Plausible

The Secretary's current arguments depend almost exclusively on her Minimalist Interpretation being the *only* plausible interpretation of the Tax Mandate—in her words it provides "clear notice of the funding condition[s]." Opp. at 11 (cleaned up). But the broad Manchin Interpretation, or other readings broader than the Minimalist Interpretation, are at least plausible interpretations of the Tax Mandate for four reasons.

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[2] The State's coercion argument does involve some factual components beyond ARPA's text alone. But the Secretary has answered that claim solely with legal contentions and no factual development is required to resolve them.

[3] As discussed *infra* at 10, Defendants cannot "cure" the constitutional infirmities in the Tax Mandate's text through regulation. There is thus no basis for delaying adjudication of the constitutional issues presented here since they do not—and cannot—turn on forthcoming regulations.

First, the Secretary's proffered interpretation violates the "'cardinal principle' … that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). But the Secretary's argument simply gives no effect to the crucial modifier "indirectly"—effectively conceding as much (at 9). An interpretation that avoids violating this "cardinal principal" is at least plausible.

Second, and similarly, the Secretary's contention (at 9) that "'directly' and 'indirectly' are adverbs [and as such] cannot 'alter the meaning of the word' that they modify (here, 'offset')" is, quite frankly, bizarre. An adverb's *only purpose and function* is to modify verbs, adjectives, and other adverbs. Indeed, what do adverbs *do* other than "alter the meaning of word[s]"? True, adverbs/adjectives cannot stretch words beyond their outermost definitional limits—in *Rimini St., Inc. v. Oracle USA, Inc.* (cited at Opp. 9), for example, the use of the adjective "full" before "costs" could not transform items explicitly not "costs" under the definition provided by Congress into "costs," "full" or otherwise. 139 S. Ct. 873, 878-79 (2019). But the Secretary never proves that "offset" is incapable of bearing a meaning akin to the Manchin Interpretation.[4]

Moreover, the Supreme Court has expressly rejected the proposition that Congress cannot modify purportedly immutable words with adverbs/adjectives, and instead made clear that Congress's use of modifiers demonstrates that the words are *not*, in fact, immutable/absolute. Respondents in *Entergy Corp. v. Riverkeeper, Inc.*, for example, argued that the use of the word "minimize" in the Clean Water Act ("CWA") was absolute and incapable of modification—*i.e.*, it "mean[t] reducing to the smallest amount possible." 556 U.S. 208, 219 (2009). But the CWA elsewhere modified "minimization"

[4] The Secretary (at 9) also suggests that the word "use" "connotes 'volitional' 'active employment' of federal funds." But there is no such thing as involuntary budgeting, so it is doubtful that a putative "volitional" requirement would add anything here. In any event, "directly and indirectly" also modifies "use," and that capacious phrasing fails to preclude unambiguously the Manchin Interpretation.

with "drastic," and the Court recognized that "[i]f respondents' definition of the term 'minimize' [were] correct, the statute's use of the modifier 'drastic' is superfluous," and therefore rejected that reading. *Id.* So too here: Congress's use of the modifiers "directly or indirectly" is not surplusage incapable of modifying an immutably defined "offset." Instead, it demonstrates that the Secretary's characterization of "offset" as immutable is simply wrong, and the reading that she previously offered to Congress under oath (but ignores here) was correct. And that is particularly true as Congress elsewhere in the statute pointedly declined to use the "directly or indirectly" language.

A simple example further underscores the implausibility of the Secretary's interpretation. Suppose Congress provides enhanced unemployment benefits to "offset, directly and indirectly, losses in employment income." Suppose further that a family: (1) deposits the benefits in their checking account, (2) pays their mortgage and electricity bills from their savings account the same day, and (3) transfers the enhanced benefits from their checking to savings account the next day. Would anyone say that Congress had utterly failed to accomplish its purposes in that example? Of course not—except, *necessarily*, for the Secretary in her brief to this Court now.

Third, the Secretary's arguments violate the Court's admonition that "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Notably, *the very next provision* in ARPA provides only "No State or territory may use funds made available under this section for deposit into any pension fund"—*i.e.*, does not modify "use" with "directly or indirectly." ARPA § 9901. That distinction is critical as the Court has "often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—*this Court 'presumes' that Congress intended a difference in meaning*." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23

(1983)) (cleaned up) (emphasis added); *accord Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 454 (2002) ("'We refrain from concluding here that the differing language in the two subsections has the same meaning in each.'") (citation omitted).

Fourth, the Secretary's arguments simply ignore the legislative history and do not even attempt to articulate a colorable explanation for the purpose or intent of the Tax Mandate. As the State has explained, that history establishes quite clearly that Senator Manchin intended the broad interpretation that the Secretary now disavows. *See* Mot. at 11-12. Nor does the Secretary identify any contrary legislative history. Because there is a plausible reading that overlaps perfectly with the unanimous legislative history, the Secretary's contention that the statute "clearly" provides the opposite fails.

* * * * *

The upshot is the Manchin Interpretation, or other similarly broader readings, are eminently plausible interpretations of the Act.

B. The Tax Mandate Is Unconstitutionally Ambiguous

1. The Tax Mandate's Conditions Are Not Remotely Unambiguous

The Supreme Court has consistently analogized grants imposing conditions under the Spending Clause as being "in the nature of a contract[,]" and their legitimacy rests on States being able to "voluntarily and knowingly" accept the terms. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). For that reason, the Court has repeatedly demanded that "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously[.]'" *Arlington*, 548 U.S. at 296; *accord South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst*, 451 U.S. at 17.

But the Secretary notably does not even attempt to contend that the Tax Mandate's essential conditions are "unambiguous"—a word that tellingly does not escape her lips even once in her Opposition. And while she says (at 11-13) that the conditions are "clear," that contention is belied by the eminent plausibility of the Manchin Interpretation as set forth above. And it is further undermined by her own "host of thorny questions" admission, which unambiguous/clear language should, *by definition*, never raise.

2. Defendants Cannot Cure Constitutional Violations By Regulation.

Implicitly recognizing the patent ambiguity in the Tax Mandate's text, the Secretary attempts to backfill the essential requirements by asserting (at 12) that she can belatedly supply the necessary details of the conditions by regulation *after* the State has already agreed to them. This unprecedented contention fails for three reasons.

First, the Supreme Court's precedents repeatedly require the *text* of the statute to be unambiguous. *See Arlington*, 548 U.S. at 296. And while the federal government could perhaps fill in *minor* details by regulation or address specific factual scenarios, *cf. Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), something as fundamental as whether the State is surrendering its independent sovereignty over taxation is beyond the bounds ever tolerated by courts. The statute must provide "clear notice" of what States are agreeing to, and the Tax Mandate provides little-to-no information on that front. *Arlington*, 548 U.S. at 296.

Second, the Supreme Court has repeatedly stressed that conditions imposed under the Spending Clause are "in the nature of a contract." *See Pennhurst*, 451 U.S. at 17. But the Secretary's contention that she can *unilaterally* alter the conditions by regulation—*after* the State has accepted them—bears no resemblance *whatsoever* to the law of contracts. That is not a mutual "meeting of the minds," but rather the hegemonic and unilateral imposition of will. Nor could Congress constitutionally provide the Secretary such authority, which would violate non-delegation doctrine.

Third, the agency's power to fill in necessary details in this context could only arise if the Constitution were already violated. It is elementary administrative law that agency's power to shape how laws are interpreted in a manner commanding deference only arises if the statutory text is "ambiguous." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984). But if the Tax Mandate is ambiguous—thus potentially triggering *Chevron* deference if valid regulations were issued—then it is also, *necessarily*, unconstitutional under *Arlington*/*Dole*.

C. ARPA Unconstitutionally Attacks The Constitution's Federal Character

As the State explained, the Tax Mandate's "indirectly offset" language unconstitutionally attempts to collapse the *fundamental federal* structure of the Constitution if it encumbers any non-ARPA dollars. Mot. at 13-14. The Secretary's only apparent response (at 13-14) is that the Tax Mandate does not, and she does not offer *any* apparent defense if the Tax Mandate's reach extends even an inch past ARPA funds.

The State agrees that the Tax Mandate does not violate the State's sovereign taxing authority in this manner *if* the Minimalist Interpretation is correct. But if "indirectly" has any effect at all, the Tax Mandate's violation of the Constitution is effectively conceded. And its unconstitutionality is particularly apparent as when a law lacks "historical precedent," that is a "telling indication of [a] severe constitutional problem." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) (quotation omitted).

D. The Tax Mandate Violates The Relatedness Requirement

The Secretary similarly offers only a minimal response (at 10-11), which is again entirely predicated on her Minimalist Interpretation. The State will thus necessarily prevail on this claim if the Tax Mandate is read in any other manner.

The Secretary also offers no apparent response to the glaring contradiction at the heart of ARPA and its Tax Mandate: that Congress itself cut taxes enormously in ARPA to provide coronavirus-related stimulus, so a prohibition on States doing the same is necessarily not reasonably related to Congress's purposes. Mot. at 13. The Secretary simply never explains how "Congress's message to the States [of] 'Tax cuts for me, but not for thee,'" *id.*, could even conceivably be constitutional. And Congress's apparent policy preferences are even more incoherent and lacking in a rational relationship as they did not subject *local* governments receiving ARPA funds to the Tax Mandate—only state governments. ARPA § 9901. And the legislative history further demonstrates how wanting in a proper purpose the Tax Mandate is: it apparently was motivated by Senator Manchin's antipathy to his successor-as-governor's plan to cut taxes in West Virginia—and, as a result, 49 other states were thrown in as collateral damage. Makar Decl. Ex. U.

E. ARPA Is Unconstitutionally Coercive

As with the State's other claims, the Secretary's coercion response (at 13-15), simply doubles down on her narrow-to-the-point-of-non-existence reading of the Tax Mandate. And the Secretary offers no other apparent defense—thereby conceding this claim too if the Minimalist Interpretation is rejected.

But even if courts eventually adopt the Minimalist Interpretation as the correct reading of the Tax Mandate, its text is at least ambiguous. *Supra* at 6-10. And ARPA improperly coerces the State into accepting the Tax Mandate and running the risk that the "host of thorny questions" will have more bite than the Secretary currently suggests.

Moreover, even granting the Secretary's premises, the Tax Mandate is still unconstitutionally coercive. She notably contends (at 12) that the Secretary has complete discretion "specify the parameters" of the Tax Mandate by "agency regulations"—*i.e.*, define what the Tax Mandate actually means. And what she can define by regulation, she can also change, *at will,* by subsequent regulations. Acceptance of ARPA funds thus places States at the mercy of the Secretary, who retains the power to redefine *unilaterally* what they have "agreed" to at any time. That is precisely the sort of coercive power that *NFIB* denies Congress. Congress cannot dangle a massive grant of funds before the States in return for putting their sovereign taxing power at the mercy of the Secretary's beneficence.

III. The Remaining Requirements For Injunctive Relief Are Satisfied

A. Arizona Will Suffer Irreparable Harm Absent An Injunction

The Secretary also contends that the State will not suffer irreparable harm absent an injunction, contending so (at 16) because (in her view) (1) Arizona has failed to cite a specific plan to reduce net tax revenue; and (2) Arizona would have an adequate alternative remedy by contesting any recoupment in some hypothetical "recoupment proceeding." Both contentions are specious.

Most fundamentally, the Secretary misunderstands the nature of the State's injury. The federal government violates the Constitution, and the States suffer cognizable injury, when the States are presented with ambiguous conditions or are coerced into accepting

conditions. Those harms occur when the State is presented with an unconstitutional choice—not *after* it makes a choice, then enacts tax cuts, and then is subject to an enforcement action (which would merely compound the State's injury, rather than being the genesis of it). Moreover, the State *has* enacted specific tax relief. *Supra* at 5.

Furthermore, the nature of the State's injury is injury to its *sovereignty*, not merely pocketbook. Such injury is not reparable with money *ever*, including some future recoupment proceeding or repayment. Moreover, the State will never be able to recover compliance costs it incurs as a result of the Tax Mandate as a result of sovereign immunity. And it is well established that irrecoverable injury constitutes irreparable harm. *See, e.g.*, *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

B. The Balance Of Equities And The Public Interest Favor Injunctive Relief

Because the Secretary only reads the Tax Mandate to encumber ARPA funds alone, and the State has no plans to use such funds specifically for tax relief, the federal government will not suffer appreciable harm from a preliminary injunction. And the Secretary's harms are further attenuated as an injunction that answers some of her "host of thorny questions" will take them off of her busy plate.

In addition, enforcing an unconstitutional law is "always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Moreover, any "delay" in determining what conditions that the Tax Mandate actually imposes on the State's sovereign taxing authority "may derange the operations of government, and thereby cause serious detriment to the public." *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870).

Finally, the Secretary's arguments (at 16-17) are heavily premised on its *merits* contentions that the Tax Mandate does not "intru[de up]on state sovereign interests" and is presumptively constitutional. But the Tax Mandate is unconstitutional and does infringe the State's sovereignty for all the reasons set forth above and previously.

CONCLUSION

The State's motion for a preliminary injunction should be granted.

RESPECTFULLY SUBMITTED this 10th day of May, 2021.

MARK BRNOVICH
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