IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF OHIO, *Plaintiff*, 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 Treasury; and U.S. DEPARTMENT OF THE TREASURY, *Defendants*.	Case No. 1:21-cv-181-DRC District Judge Douglas R. Cole

COMBINED MOTION FOR LEAVE TO FILE RESPONSE TO NOTICE FILED BY DEFENDANTS AND RESPONSE TO NOTICE FILED BY DEFENDANTS

MOTION FOR LEAVE TO FILE

Yesterday, the defendants notified this Court of the Treasury Department's submission of an interim final rule to the Federal Register. Because Treasury's notice contains arguments in support of its position, the State of Ohio moves for leave to file this short response.

Respectfully submitted,

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RESPONSE

The State raises three points in response to Treasury's notice of the interim final rule.

1. At oral argument, counsel for the defendants agreed with the State that conditions in Spending Clause legislation must be clear *when enacted*—they cannot be clarified with later-issued regulations. In other words, if the Tax Mandate is unconstitutionally ambiguous, the interim final rule cannot cure the constitutional problem. *Accord* Reply Br., R.30, PageID#276–77. The interim rule is thus irrelevant to Ohio's ambiguity argument. (Ohio purchased an early copy of the transcript. Ohio understands this Court's rules to prohibit the State from disclosing that transcript before it becomes publicly available. As the transcript of a public hearing contains no sensitive information, the State has no objection to an immediate release.)

2. To the extent the interim final rule sheds light on anything, it confirms the Mandate's unconstitutionality. Despite the defendants' attempt to suggest otherwise in their filing providing notice of the interim final rule, the rule bears little resemblance to the interpretation the Department of Justice offered to this Court. Whereas the defendants' attorneys declined to defend a broad version of the Tax Mandate, the interim final rule *adopts* such a reading. Under the scheme created by the interim final rules, *see* Rule, R.33-1, PageID#441–44, States must predict and report all legislative and administrative actions for the upcoming year that will reduce tax revenue compared to 2019. States must also predict and report all legislative and administrative actions that will increase revenue, again based on a comparison to 2019.

Finally, States must predict and report all of their cuts to spending—once again measured in comparison to 2019—in programs not using Rescue Plan funds. Treasury, after monitoring the State's predictions and decisions throughout the year, will recoup funds if it concludes a State has not taken enough action to add revenue or cut spending. Meaning, the Treasury Department now regards money as "fungible," and subjects *all* state tax decisions, *all* sources of state revenue, and *all* state spending decisions to Treasury's review, before, during, and after the fiscal year. *Id.*, PageID#441–42. That contradicts the Department of Justice's argument, before this Court, that the Tax Mandate governs only the "volitional" and "active" use of federal funds to finance state tax cuts. Gov. Br., R.29, PageID#253.

What is more, the interim final rule introduces *additional* uncertainty. It provides, for example: "each year, each recipient government will *identify and value* the changes in law, regulation, or *interpretation* that would result in the reduction of net tax revenue." Rule, R.33-1, PageID#442 (emphases added). But how will the State know what interpretations the Ohio Tax Commissioner will offer throughout the year? And what if the administrative interpretation is compelled by law? True, the Treasury Department says that interpretations are not subject to the Tax Mandate if they are "corrections to replace prior inaccurate interpretations." *Id.*, PageID#444. But who is to say whether an interpretation fits this exception? Does Treasury engage in its own independent analysis of state law? Consider also another ambiguity-causing portion of the interim rule. Specifically, the rule says that, if a State pursues a spending cut that Treasury believes at the beginning of the year will adequately

offset a tax cut, and if the State later uses Rescue Plan funds in a way that Treasury determines (using a "you know it when you see it" test) offsets that spending cut, Treasury may recoup the Rescue Plan funds. *Id.*, PageID#452.

In the end, the interim final rule, in addition to providing no meaningful clarity, does not even purport to *interpret* the Tax Mandate. To call the rule an "interpretation" is rather like saying that van Gogh "interpreted" his blank canvas to portray *The Starry Night* or that Van Halen "interpreted" his guitar to play *Eruption*. Treasury's invoking the Tax Mandate in hopes of implementing a scheme that runs contrary to the interpretation that the Department of Justice offered this Court proves the vacuous nature of the statutory language. The ever-evolving scope of the Tax Mandate confirms the State's need for *immediate* injunctive relief.

3. Finally, the federal government has attempted to portray the Tax Mandate as a mere limitation on the use of federal funds. On that ground, it argued that the offer of funds in exchange for an agreement to abide by the Tax Mandate is *per se* non-coercive. *See* Gov. Br., R.29, PageID#254. The interim final rule ends that fiction. The regulations create a program for measuring offsets in which the States must affirmatively identify spending cuts and revenue raisers for the federal government. In other words, if Ohio wants the funds—funds the interim rules recognize the States badly need, *see, e.g.*, Rule, R.33-1, PageID#382—it must agree to conduct its budgeting processes and undertake accounting tasks in the manner the government would prefer. That is not a mere limitation on what can be done with the money. It is "a means of pressuring the States to accept policy changes," *Nat'l Fed'n of Indep.*

Bus. v. Sebelius, 567 U.S. 519, 580 (2012) (op. of Roberts, C.J.), and a restriction on what the States can do with *their own* power and *their own* resources.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

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