No. 21-2118

United States Court of Appeals
For the Eighth Circuit

STATE OF MISSOURI,

Plaintiff-Appellant,

v.

JANET L. YELLEN, in her official capacity as Secretary of the Treasury; RICHARD DELMAR, in his official capacity as acting inspector general of the Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, The Honorable Henry E. Autrey

BRIEF OF APPELLANT STATE OF MISSOURI

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

A provision of the American Rescue Plan Act (ARPA), the "Tax Mandate," prohibits States from using ARPA funds to "directly or indirectly offset" a reduction in net tax revenue on pain of losing a similar amount of ARPA funds. Secretary Yellen—who enforces the law—says it requires States to institute a revenue-neutral tax policy. That raises serious constitutional issues, as a State's taxing power is central to its sovereignty. Fortunately, the Tax Mandate is much narrower; it only bars States from deliberately and expressly using ARPA funds to pay for a tax cut. So Missouri sued to ensure that Treasury enforced the Tax Mandate's plain terms. The district court concluded that Missouri lacked an interest in preserving its own taxing authority and ARPA funds and so lacked standing. That is error.

Due to the complexity and importance of the issues in this case—which touch on key facets of the constitutional structure—Missouri requests 15 minutes of oral argument per side. Missouri also waives any geographic limitation on the location of oral argument.

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 2201–02. *See* JA11 ¶ 13. On May 11, 2021, it denied Missouri's motion for a preliminary injunction and dismissed the case for want of jurisdiction and lack of ripeness. JA752, Add. 15. Missouri timely filed its notice of appeal on May 17, 2021. JA753–54. This Court has jurisdiction under 28 U.S.C. § 1291 and § 1292(a)(1).

STATEMENT OF THE ISSUES

ARPA provides Missouri a deal: billions of dollars so long as the State does not deliberately use those funds to pay for tax cuts. Secretary Yellen changed the deal: billions of dollars so long as the State does not institute policies that reduce tax revenue.

I. The first issue, which has two parts, is whether there is a justiciable case:

1. First is whether Secretary Yellen's broad reading of the Tax Mandate, which penalizes Missouri for instituting revenue-reducing tax policies by taking ARPA funds from the State, inflicts a cognizable harm on Missouri's sovereign authority to set tax policy and its interest in accepting ARPA money.

Most apposite cases:

- *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)
- *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013)
- *Ohio v. Yellen (Ohio II)*, 2021 WL 2712220 (S.D. Ohio July 1, 2021)

2. Second is whether this case is ripe or whether Missouri has to wait for Secretary Yellen to attempt to recoup funds before it can challenge her interpretation of the Tax Mandate.

Most apposite cases:

- *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007)
- *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013)

II. The second issue is whether Missouri is entitled to a preliminary injunction.

Most apposite cases:

- *National Federation of Independent Business v. Sebelius (NFIB)*, 567 U.S. 519 (2012)
- *New Hampshire v. Maine*, 532 U.S. 742 (2001)
- *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994)
- *Ohio v. Yellen (Ohio II)*, 2021 WL 2712220 (S.D. Ohio July 1, 2021)

STATEMENT OF THE CASE

I. The American Rescue Plan Act and the Tax Mandate

In response to the economic downturn caused by the COVID-19 pandemic, Congress provided States with relief funds in the American Rescue Plan Act (ARPA). Relevant here is part of section 9901 of the Act, codified at 42 U.S.C. § 802. *See* JA26–31 (providing that provision).[1]

That provision provides States $195.3 billion of relief funds, 42 U.S.C. § 802(b)(3)(A), with Missouri allocated almost $2.7 billion, *see* U.S. DEP'T OF THE TREASURY, *Coronavirus State and Local Fiscal Recovery Funds*, https://bit.ly/2SGyFZ9 (last visited June 16, 2021) (allocation chart hyperlink located under "Allocation Information") [hereinafter "Missouri's Allocation"].[2] That represents between 13 and 14 percent of Missouri's annual general-revenue expenditures from the last two fiscal years. *Compare id.*, *with* JA17 ¶ 45 (providing Missouri's general revenue expenditures for fiscal years 2019 and 2020).

But ARPA is not a blank check. Rather, the law limits States to

[1] For ease of reference, this brief will cite to the U.S. Code.
[2] At the time Missouri filed the complaint and briefed its preliminary injunction motion, the State only had an estimated allocation. *See* JA13–14 ¶ 29. Treasury has since provided official allocations.

using funds to cover expenditures that fall into one of four categories. 42 U.S.C. § 802(c)(1). It also prohibits States from depositing ARPA money into pension funds. § 802(c)(2)(B). Then there is the Tax Mandate, which provides that:

> A State … shall not use [ARPA] funds … to *either directly or indirectly offset a reduction in the net tax revenue of such State* … resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

§ 802(c)(2)(A) (emphasis added).

The Tax Mandate covers the period beginning "on March 3, 2021," and ending "the last day of the fiscal year" in which a State spends or returns all its ARPA money or Treasury recoups it. § 802(g)(1). If a State violates the Tax Mandate, ARPA allows the Secretary to recoup the "lesser of" "the amount of the applicable reduction to net tax revenue attributable to such violation" or "the amount of funds received by [the] State … ." § 802(e); *see also* § 802(b)(6)(A)(ii)(III).

Lastly, the Treasury Secretary may "issue such regulations as may be necessary or appropriate to carry out this section." § 802(f).

II. The Two Interpretations of the Tax Mandate

Questions about how Secretary Yellen would interpret the Tax Mandate led the Attorneys General of twenty-one States, including Missouri, to send her a letter, noting two possible interpretations of the law. One is a broad interpretation that would require revenue-neutral tax policies by "deny[ing] States the ability to cut taxes in any manner whatsoever—even if they would have provided such tax relief with or without the prospect of COVID-19 relief funds." JA73. Such an interpretation, the States noted, "would amount to an unprecedented and unconstitutional intrusion on the separate sovereignty of the States … ." *Id.* At a high-level, "money is fungible," so that reading could cover any State tax policy that reduces tax revenue. JA74. The States also noted that that reading of the Tax Mandate renders the statute ambiguous, imposes conditions unrelated to ARPA's purpose, commandeers State tax policy, and is coercive. *See* JA77–78.

To avoid those issues, the States urged Secretary Yellen to adopt a second, narrower interpretation that reads the law only to "preclude[] *express* use of [ARPA funds] for direct tax cuts rather than for the purposes specified by the Act." JA78.

On March 23, 2021, Secretary Yellen responded and signaled her belief that the broad interpretation is right: "If States lower certain taxes but do not use funds under the Act to offset those cuts—*for example, by replacing the lost revenue through other means*—the limitation in the Act is not implicated." JA81 (emphasis added).

Secretary Yellen affirmed that view the next day at a hearing of the U.S. Senate Committee on Banking, Housing, and Urban Affairs. There, she was asked how she "intend[s] to approach the question of what is directly or indirectly offsetting a tax cut." *See The Quarterly CARES Act Report on Congress Before Senate Committee On Banking, Housing, and Urban Affairs* (2021) (1:10:00–15:00), https://bit.ly/3tRAobm [hereinafter Yellen Testimony]; *see also* JA538 (discussing the testimony). She said that, "given the fungibility of money, it's a hard question to answer." *See* Yellen Testimony, *supra*; JA538. As the States pointed out in their March 16 letter, the fungibility of money only matters under the broad interpretation of the Tax Mandate. *See* JA74.

III. This Lawsuit

A. Missouri's claims

The debate about the proper scope of the Tax Mandate was a

problem for Missouri. The State's legislature was in active session and was considering at least eight different tax-reduction proposals. *See* JA17–18 ¶¶ 47–50; JA466–67. And Missouri legislators publicly expressed concern that the Tax Mandate would mean that if the State cut taxes, it would lose ARPA funds. *See* JA537–38 (citing a public statement of Sen. Andrew Koenig, Chair of the Missouri Senate's Ways and Means Committee, that the Tax Mandate is an attempt by "the federal government to shutdown tax policy in all 50 states").

So Missouri sued Secretary Yellen, Treasury's acting Inspector General, and the Department of Treasury (collectively, the "Government"). *See* JA7–25. Count One of the complaint seeks a declaration that the narrow interpretation of the Tax Mandate (that it prohibits only the deliberate and express use of ARPA funds to pay for tax cuts) is the best reading of the law. JA18–20 ¶¶ 53–60. Count Two alleges that, if the broad interpretation of the Tax Mandate is correct, the Tax Mandate exceeds Congress's power under the Spending Clause and violates the Tenth Amendment. JA20–24 ¶¶ 61–80.

On April 2, 2021, Missouri moved for a preliminary injunction on both claims. JA49–51. As to Count One, Missouri used dictionaries to

point out that the word "offset" in the Tax Mandate "requires a *deliberate* act by the State," and thus "leaves States free to pursue tax-reduction policies for any lawful reason, provided they are not deliberately using [ARPA funds] to replace revenues lost from a specific tax-reduction policy." JA468–69. That reading, Missouri pointed out, was also consistent with the broader context of the Tax Mandate, *see* JA469–71; Congress's Spending Clause power, *see* JA471–72; the Supreme Court's rule that Congress must provide a clear statement when intruding in areas of traditional state concern or allowing agencies to push constitutional limits, *see* JA472–74; the canon of constitutional avoidance, *see* JA474–75; past history that respected the States' authority over their own tax policies, *see* JA475–76; and the rule that agencies cannot alter a statute's plain terms, *see* JA476–78.

As for Count Two, Missouri noted that a broad interpretation of the Tax Mandate requires States to adopt revenue-neutral tax policies of some stripe. *See* JA465 (discussing Secretary Yellen's letter to the States); JA479 (similar). But that would mean, Missouri argued, that the Tax Mandate was ambiguous, unrelated to ARPA's purposes, and unconstitutionally coercive—and therefore beyond Congress's spending

power. JA478–81, 483–86. The State also argued that a broad interpretation of the Tax Mandate violated the Tenth Amendment's anti-commandeering rule by coercing States to adopt revenue-neutral or revenue-raising tax policies. *See* JA482–83.

B. The Department of Justice's arguments and Missouri's reply

On April 23, 2021, the U.S. Department of Justice (DOJ), representing the Government, told the district court that "the State and Defendants fundamentally *agree*" about the Tax Mandate's effects on State tax policy: "[E]ven if a State chooses to make changes that result in a reduction in net tax revenue, the Act bars a State only from using Rescue Plan Funds—as opposed to other means—to offset that reduction." JA502 (emphasis added); *see also* JA502, 507, 510, 510–11, 511, 512, 513, 515, 515–16, 516, 517–18, 520, 521.

DOJ's merits arguments rested on that representation. For example, DOJ cited one of the dictionary definitions of "offset" that Missouri did. *See* JA514–15; *see also* JA514. And DOJ argued the Tax Mandate is constitutional, adopting Missouri's statutory reading as correct: "Missouri's constitutional challenge is based entirely on the incorrect premise that the Rescue Plan bars all tax changes that reduce

tax revenue. This Court can reject the State's constitutional arguments on that basis alone … ." JA516; *see also*, *e.g.*, JA517 ("As explained above, and *contrary to Missouri's 'broad interpretation,'* the offset provision applies only when a State uses [ARPA] funds to offset a reduction in 'net' tax revenue.") (emphasis added); JA521 ("As an initial matter, the State's coercion argument similarly *rests on an erroneous 'broad interpretation'* of the offset provision.") (emphasis added). DOJ did not defend the constitutionality of the broad interpretation of the Tax Mandate.

But because Missouri was right about the statute's meaning, DOJ argued, there was no justiciable case or controversy. For example, DOJ faulted the State for failing to "allege … that it intends to use [ARPA] funds to offset any reductions in its net tax revenue that might result from any changes the State ultimately chooses to adopt." JA510; *see also* JA512 (similar). Likewise, according to DOJ, the Tax Mandate did not offend Missouri's sovereignty because it does "not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under [ARPA] to offset a reduction in net tax revenue." JA511. Nor was the lawsuit ripe, DOJ argued, because Missouri was not faced with the imminent threat of a recoupment action, in part because

the State had not "decided to use [ARPA] funds to offset" a reduction in net tax revenue. JA513. Nowhere did DOJ suggest that the Government would enforce a different reading of the Tax Mandate.

But, as Missouri noted in reply, ARPA made Secretary Yellen, not DOJ, responsible for implementing the Tax Mandate. JA537. And Secretary Yellen, as Missouri noted, had embraced the broad interpretation. *See* JA537–39. Thus, there was a justiciable controversy because the State was suing to ensure she follows the narrow interpretation. *See* JA540–41.

C. The preliminary injunction hearing

On May 4, 2021, the district court conducted a hearing on Missouri's preliminary injunction motion. *See* JA551. During the hearing, the district court asked DOJ whether "Treasury agree[s] … that the narrow interpretation is correct … ?" JA568:1–4. DOJ, consistent with its brief, affirmed. The attorney said, "I'm here today as counsel for Secretary Yellen and the Department of the Treasury and its acting Inspector General, so the []views that are reflected in our briefs … are the views of our clients and the interpretation of the statute that our clients have authorized us to present to the Court. … [W]e don't agree

with the broad interpretation that prompted the State of Missouri and some other states to file these lawsuits." JA568:23–569:7.

Thus, per DOJ, "the federal government and the Missouri government agree with the fundamental meaning of the statutory provision … ." JA571:14–16. That is—"states remain free to cut taxes [under the Tax Mandate] so long as they are not cutting revenue and so long as they are not … plugging any shortfall with the federal money." JA571:8–12.

IV. The Interim Final Rule

After the hearing, the Government submitted the Interim Final Rule, in prepublication form, which implements the Tax Mandate. *See* JA583–737. DOJ represented that the Interim Final Rule was consistent with the position it had taken in its briefing and at the hearing. *See* JA584. The text of the rule indicates otherwise.

Specifically, the Rule says that a State will "be considered to have used [ARPA funds] to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation *if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery Funds to offset the reduction in net tax revenue*."

Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786, 26,807 (May 17, 2021) (emphasis added);[3] *see also* Dep't of Treasury, FACT SHEET: The Coronavirus State and Local Fiscal Recovery Funds Will Deliver $350 Billion for State, Local, Territorial, and Tribal Governments to Respond to the COVID-19 Emergency and Bring Back Jobs 8 (2021), https://bit.ly/33Antiz ("If a state or territory cuts taxes, they *must* demonstrate how they paid for the tax cuts from sources other than [ARPA funds]—by enacting policies to raise other sources of revenue, by cutting spending, or through higher revenue due to economic growth.") (emphasis added). In other words, contrary to DOJ's representation to the district court, Treasury interpreted the Mandate broadly to require *revenue-neutral or -increasing* changes in tax policy.

The Interim Final Rule uses a four-step process to determine if a State violated the Tax Mandate:

1) It first determines if there was a "covered change," that is, "a change in law, regulation, or administrative interpretation,"

[3] The Federal Register published the Interim Final Rule on May 17, 2021 (codified at 35 C.F.R. §§ 35.1–.12). For ease of reference, this brief cites to the Federal Register and the C.F.R., which are substantively the same as the version filed in the district court.

that does, or is projected to, reduce tax revenue.

2) It next sees if the sum of all covered changes "exceeds 1 percent of the State's" tax baseline, which is the tax revenue a State received in fiscal year 2019 adjusted for inflation.

3) It then checks if a State's actual tax revenue is below that baseline.

4) Lastly, it sees if the State increased taxes or cut spending in areas where the State is not using ARPA funds.

31 C.F.R. §§ 35.3, 35.8(b); *see also* 86 Fed. Reg. at 26,807–10 (describing the calculation process). Any reduction "not covered by [sources identified in Step 4] will be considered to have been offset by Fiscal Recovery Funds, in contravention of the offset provision." 86 Fed. Reg. at 26,807.

That conclusion does not require the State to have deliberately used ARPA funds to pay for the tax increase. "[B]ecause money is fungible," the Interim Final Rule says—echoing Secretary Yellen, *see* JA538—"even if Fiscal Recovery Funds are not *explicitly or directly used* to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to

substitute for the State's or territory's funds that would otherwise have been needed to cover the costs of the reduction." 86 Fed. Reg. at 26,807 (emphasis added).

The Interim Final Rule requires States to report "[a]ctual net tax revenue," "[e]ach revenue-reducing change made" in a year and the value of that change, "[e]ach revenue-raising change" and its value, and each spending cut used to pay for a revenue reduction plus its value plus "documentation demonstrating that" the cut can pay for the revenue reduction under the rule. *Id.* at 26,810.

V. The District Court's Decision[4]

Hours after DOJ provided the Interim Final Rule, and before Missouri could file its analysis of the rule, the district court entered its judgment. JA738–52, Add. 1–15. Though the Government had not filed a motion to dismiss, the district court denied Missouri's requested injunction and dismissed the case for lack of standing and ripeness. JA752, Add. 15.

The district court first held that Missouri had not shown an injury-in-fact. JA745, Add. 8. As to ARPA funds, the district court said that

[4] The decision is available at 2021 WL 1889867.

because "Congress both appropriated recovery funds and placed a condition on a State's receipt of those funds. ... Missouri's interest in accepting the ARPA recovery funds does not establish standing and is not relevant to the injury-in-fact analysis." JA746–47, Add. 9–10.

Next, the district court acknowledged Missouri's interest in setting state tax policy, but said that "State tax cuts are not proscribed by the ARPA." JA747, Add. 10. That conclusion rests on DOJ's representation that the Government agreed with Missouri's interpretation of the Tax Mandate:

> As Defendants state … :
>
> > [T]o ensure that the new federal funds are used for those purposes and not others Congress chose not to support, the [ARPA] requires a State to agree that it will not use the federal funds to offset a reduction in net tax revenue resulting from changes to state law. The Rescue Plan does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [ARPA] to offset a reduction in net tax revenue. No State has a sovereign interest in using federal funds for that purpose.
>
> In short, State tax cuts are not proscribed by the ARPA.

JA747, Add. 10 (quoting DOJ's brief).

That also bottoms the district court's conclusion that Missouri did not face a "credible threat of prosecution … ." *See* JA747, Add. 10. Per the district court, "recoupment is not triggered by a reduction in State

tax revenue, it is triggered by a State's use of federal recovery fund[s] to offset a reduction in its net tax revenue." JA748, Add. 11. Thus, the district court's analysis of standing rested on its acceptance of DOJ's representation that Treasury *agreed* with Missouri's narrow interpretation of the Mandate—even though Treasury had contradicted this representation in the Interim Final Rule filed a few hours earlier.

The district court's ripeness analysis also rests on that representation. The district court said, "Missouri's claim is based upon contingent future events that may not occur." JA750, Add. 13. Among those contingencies is "the passage of tax cuts by the State legislature, a decrease in net revenue due to those tax cuts, and *the Department of the Treasury's recoupment of funds based on a broad interpretation of the Offset Provision*. Notably, Defendants, through counsel, *have explicitly asserted that they do not agree with the 'broad interpretation' proposed by Missouri*, … further attenuating Missouri's claim of the 'threatened' broad interpretation." *Id.* (citing the hearing transcript) (emphases added).

That led the district court to conclude that "this case would benefit from further factual development. For example, [Treasury] has not yet

promulgated regulations interpreting the [Tax Mandate]." JA751, Add. 14. (In fact, the Government provided those regulations a few hours before the district court's decision, *see* JA5–6). It also led the district court to conclude "that the hardship to the parties factor weighs against ripeness." *Id.* That was because "[t]he [Tax Mandate] does not require Missouri to engage in, or refrain from, any conduct, including legislative conduct regarding tax policy." JA751, Add. 14.

Missouri timely appealed. JA753–54.

SUMMARY OF ARGUMENT

I. The district court concluded that there was no justiciable case because it accepted the DOJ's representation that Secretary Yellen agreed with Missouri's narrow interpretation. That, however, is inconsistent with the allegations and evidence Missouri provided and with the Interim Final Rule. Those show that Secretary Yellen was poised to—and ultimately did—adopt the broad interpretation. In doing so, she changed the Tax Mandate's condition so as to penalize Missouri for instituting revenue-reducing tax policies and inflicted five concrete injuries on Missouri:

First, the broad interpretation harms Missouri's sovereign right to set tax policy by punishing the State when it exercises that right to reduce taxes.

Second, the broad interpretation harms Missouri's interest in receiving ARPA funds based on the conditions Congress set. Changing those conditions to be more onerous—as Secretary Yellen did by broadly reading the Tax Mandate—harms that interest.

Third, and related to the second, making ARPA's conditions more onerous logically leads to greater compliance costs—as has happened in the Interim Final Rule. That is an Article III harm.

Fourth, the broad reading of the Tax Mandate increases the chance that Missouri will lose ARPA funds. And that is a concrete harm.

Fifth, the threat of Secretary Yellen enforcing the broad interpretation inflicts a concrete harm on Missouri. The State intends to take ARPA funds and exercise its sovereign right to set tax policy—including by reducing tax revenue—in ways that would comply with the Tax Mandate as written but would not comply with a broad reading of the law. Thus, Secretary Yellen's broad interpretation makes Missouri

choose between its taxing authority or ARPA money. That coercive choice is a cognizable injury.

For much the same reasons that Missouri has standing, this challenge is also ripe. The scope of the Tax Mandate—and its constitutionality—are questions of law. Until they are answered, the broad interpretation chills Missouri's exercise of its sovereign right to set tax policy by threatening to take ARPA funds if the State cuts taxes.

II. Missouri should also receive preliminary relief. Indeed, this is not a close question—in large part because the Government premised its entire argument in the district court on its *agreement* with Missouri's narrow reading of the Tax Mandate. Because the district court accepted that position, the Government is estopped from contesting Missouri's statutory and constitutional arguments.

Regardless, the Tax Mandate's plain language and context, the Supreme Court's plain-statement rules, and the canon of constitutional avoidance all establish that the best reading of the Tax Mandate is Missouri's narrow interpretation—that the law only bars States from expressly and deliberately using ARPA funds to pay for tax cuts.

Moreover, the broad interpretation of the Tax Mandate is unconstitutional. It commandeers state tax policy and exceeds Congress's spending power by imposing an ambiguous, unrelated, and unconstitutional condition on ARPA funds, which are so great as to coerce States into accepting the law's conditions, including the broad interpretation.

ARGUMENT

I. There Is a Justiciable Controversy.

The district court's dismissal for lack of standing and ripeness receives *de novo* review. *See*, *e.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011).

A. The district court improperly relied on DOJ's misrepresentation that the Government would follow the narrow interpretation.

In the district court, Missouri and the Government, via DOJ, agreed that the narrow interpretation of the Tax Mandate was (1) the best reading of the law[5] and (2) constitutional.[6]

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[5] *See*, *e.g.*, JA467–78 (Missouri's statutory analysis); JA514–16 (the Government's statutory analysis); JA569:5–7 ("So in terms of what this statute means, we don't agree with the broad interpretation that prompted the State of Missouri and some other states to file these lawsuits.").

[6] *See*, *e.g.*, JA478–86 (Missouri's constitutional analysis of the broad

That agreement, DOJ said, meant there was no justiciable case. *See*, *e.g.*, JA511 (arguing that Missouri lacked standing because the Tax Mandate "does not prohibit a State from cutting taxes; it merely restricts a State's ability to use [ARPA funds] to offset a reduction in net tax revenue"); JA512 (faulting Missouri for not alleging "any plan to use [ARPA] funds to offset a reduction in net tax revenue"); *id.* (claiming the case isn't ripe "[f]or similar reasons").

The implication was that Secretary Yellen would follow Missouri's reading. After all, if that were not true, Missouri would have standing. *See*, *e.g.*, *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009) (concluding that plaintiffs lacked standing based on a subjective belief officials may abuse a statute). The district court clearly understood that to be DOJ's position. It concluded that "Missouri does not face a credible threat of prosecution" because the Tax Mandate "does not prohibit a State from implementing its own tax policy," including tax cuts. JA747, Add.

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interpretation); JA516 ("Missouri's constitutional challenge is based entirely on the incorrect premise that the [Tax Mandate] bars all tax changes that reduce tax revenue. This Court can reject the State's constitutional arguments on that basis alone, as Missouri presents no argument that the [Tax Mandate] is unconstitutional if interpreted to mean what it says.").

10. In discussing ripeness, the district court relied on the fact that "Defendants, through counsel, have explicitly asserted that they do not agree with the 'broad interpretation' proposed by Missouri," thus rendering speculative that Treasury will enforce a broad reading of the law. JA750, Add. 13.

That, however, was error. DOJ doesn't administer ARPA; Secretary Yellen does. It is therefore her views that count. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (declining to defer "to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands'") (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). And she takes a broader view of the Tax Mandate than DOJ represented she does—as Missouri showed.

For one, as Missouri noted, Secretary Yellen rejected twenty-one States' request that she "confirm that the [Tax Mandate] does not prohibit States from generally providing tax relief … but at most precludes *express* use of [ARPA funds] for direct tax cuts … ." JA78, 81–

82; *see also* JA15 ¶ 35; JA45, 47–48; JA465; JA538. Instead, she indicated that the Tax Mandate means that "[i]f States lower certain taxes but do not use funds under the Act to offset those cuts—*for example, by replacing the lost revenue through other means*—the [Tax Mandate] is not implicated." JA81 (emphasis added); JA47 (same). But if the Tax Mandate only applies where a State expressly uses ARPA funds to pay for a tax cut, the italicized proviso is unnecessary. So Secretary Yellen's statement implies that States must adopt revenue-neutral or revenue-increasing tax policies or lose ARPA funds.

Missouri also pointed to Secretary Yellen's Senate testimony in the preliminary-injunction proceedings. *See* JA538; JA556:7–25. When asked at a Senate Hearing how she "intend[s] to approach the question of what is directly or indirectly offsetting a tax cut," she said that "given the fungibility of money, it's a hard question to answer." JA538. By invoking "the fungibility of money," *id.*, Secretary Yellen implied that state revenue cannot "be drained off here"—*i.e.*, at a spot removed from the State's actual use of ARPA funds—"because a federal grant is pouring in there." *Sabri v. United States*, 541 U.S. 600, 606 (2004). But that concern matters only under the broad interpretation of the Tax Mandate.

Under the narrow interpretation, there would need to be a link between the revenue reduction and ARPA funds.

Then there is the Interim Final Rule, which—contra DOJ's representation, *see* JA584—embraces the broad interpretation. The rule explicitly rests on the theory that "because money is fungible, even if [ARPA] Funds are *not explicitly or directly* used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the State's or territory's funds that would otherwise have been needed to cover the costs of the reduction." 86 Fed. Reg. at 26,807 (emphasis added); *see also*, *e.g.*, 31 C.F.R. § 35.8(b) (providing that unpaid tax revenue losses above a de minimis amount violate the Tax Mandate); 86 Fed. Reg. at 26,807 ("A recipient government would only be considered to have used [ARPA] Funds to offset a reduction in net tax revenue … if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the [ARPA] Funds to offset the reduction in net tax revenue.").

Thus, Missouri alleged, and presented evidence, that Secretary Yellen read the Tax Mandate broadly. And the district court should have

credited those claims. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Jones v. Jegley*, 947 F.3d 1100, 1103 (8th Cir. 2020); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 869–70 (8th Cir. 2013) (denying inferences in plaintiff's favor is only proper for summary judgment motions). In any event, any doubt evaporated a few hours before the district court entered its judgment, when DOJ filed Treasury's Rule adopting the broad interpretation. That the district court instead accepted DOJ's representations that Secretary Yellen would follow the narrow interpretation is reversible error alone.

B. The broad interpretation penalizes Missouri for reducing taxes, alters ARPA's conditions, imposes extra compliance costs, jeopardizes ARPA funds, and creates uncertainty that affects the State's tax policy discussions—all concrete injuries.

The question, for standing purposes, is whether Missouri suffered an "actual or imminent invasion of a concrete and particularized legal interest,'" *Kuehl v. Sellner*, 887 F.3d 845, 850 (8th Cir. 2018) (quoting *Sierra Club v. Kimbell*, 623 F.3d 549, 556 (8th Cir. 2010)), given (1) Congress conditioned ARPA funds on the State agreeing not to use those funds deliberately and expressly to cut taxes, *see*, *e.g.*, JA19 ¶ 54, (2) but Secretary Yellen believes the condition is that States cannot accept ARPA

funds and adopt revenue-reducing tax policies, *see*, *e.g.*, JA15 ¶ 35, 538. In analyzing the question, Missouri "is entitled to special solicitude in [the] analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). And the analysis shows the State suffered five injuries.

1. The first injury is to Missouri's sovereign right to set tax policy. Missouri claims, and the Government does not dispute, that its only realistic option is to take ARPA funds. *See* JA16 ¶ 42, 23 ¶ 72, 486. So the State is certain to be subject to the Tax Mandate, including Secretary Yellen's broad reading of it. Because Missouri must take ARPA funds, the State is, practically speaking, a regulated party.

That means the broad interpretation of the Tax Mandate injures the State's sovereign rights. A State's ability to set tax policy—which includes policies that reduce tax revenue—is "central" to its protected sovereignty, as the Supreme Court has emphasized for over two centuries. *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 345 (1994).[7] It is also constitutionally protected. *See* U.S. CONST. amend. X.

[7] *See also*, *e.g.*, *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) ("[I]t is of the utmost importance to [the States] that the modes adopted to enforce the taxes levied should be interfered with as little as possible."); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) ("[T]o the existence of the States, ... the power of taxation is indispensable.");

But Secretary Yellen's broad interpretation reads the Tax Mandate as fining Missouri every time it exercises its sovereign authority to reduce net tax revenue simply because it took ARPA funds.

Punishing Missouri for exercising its sovereign, constitutionally-guaranteed right is "an invasion of a legally protected interest which is … concrete and particularized … ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also TransUnion LLC v. Ramirez*, 2021 WL 2599472, at *7 (U.S. June 25, 2021) ("[T]raditional harms [that are cognizable] may also include harms specified by the Constitution itself."). Specifically, the State has "a judicially cognizable interest in the preservation of its own sovereignty" and thus standing to sue for "a diminishment of that sovereignty … ." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 50 n.17 (1986) (quoting the district court) (discussing a State's employment relations with its employees); *see Brackeen v. Haaland*, 994 F.3d 249, 296 (5th Cir. 2021) (en banc) (Dennis,

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Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 561 (1830) ("We will not say that a state may not relinquish [the taxing power] ... but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed ... ."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) ("[T]he power of taxing the people and their property[] is essential to the very existence of government ... .").

J.) ("If … the Secretary promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest … ."); *Minn. Citizens Concerned for Life v. F.E.C.*, 113 F.3d 129, 131 (8th Cir. 1997) ("When government action … is challenged by a party who is a target or object of that action … 'there is ordinarily little question that the action or inaction has caused him injury … .'") (quoting *Lujan*, 504 U.S. at 561–62). Fining Missouri for exercising its sovereign authority—which is no different than taxing the State for exercising that authority—certainly fits the bill. *See McCulloch*, 17 U.S. (4 Wheat.) at 431 ("[T]he power to tax involves the power to destroy … .").

2. Missouri also has an interest in the offer Congress provided the State in ARPA, and Secretary Yellen's embrace of the broad interpretation harms that interest.

Spending Clause legislation—like ARPA—"is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). As with any contract, the offeree (Missouri) has an interest in what the offeror (Congress) puts on the table. *See*, *e.g.*, *United States v. Halford*, 948 F.2d 1054, 1056 (8th Cir. 1991) (discussing plea

agreements); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 24 (Am. Law Inst. 1981) (defining "offer"). That is all the more true in the context of Spending Clause legislation, where States have a constitutional right to certain offers, such as ones that have "clarity regarding" their conditions. *Ohio v. Yellen (Ohio II)*, 2021 WL 2712220, at *6 (S.D. Ohio July 1, 2021).

In ARPA, Congress promised federal funds in exchange for a promise not to use those funds to pay for a tax cut. Secretary Yellen's broad interpretation alters the condition to be a promise to implement a revenue-neutral or revenue-increasing tax policy—a much more onerous condition. That is a cognizable injury. *See Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994, 996 (D.C. Cir. 2013) ("We have held that an agency interpretation that defines contractual rights and obligations may itself create enough of an injury to confer standing on a party to that contract."); *Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008) ("FERC's alteration of Dominion's obligations under the 2001 and 2005 Settlements suffices to" show a concrete and particularized injury); *see also Clinton v. City of New York*, 524 U.S. 417, 430–31 (1998) (using the line-item veto to impose liabilities Congress removed conferred standing).

3. Changing ARPA's conditions to be more onerous will also logically lead to further compliance costs—a third concrete harm. For example, the Interim Final Rule requires States to report actual net tax revenue, the value of changes in tax policy, and spending cuts with documentation showing that the cuts can cover a tax revenue decrease under the rule. *See* 86 Fed. Reg. at 26,810. There is no need for those reporting requirements if, as Missouri says, the Tax Mandate only bars the deliberate use of ARPA funds to offset a loss in tax revenue. Since such extra compliance requirements are necessary only under a broad interpretation of the Tax Mandate, they establish Missouri's standing. *See*, *e.g.*, *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 878 F.3d 1099, 1102 (8th Cir. 2018) (standing arises from injuries "stemming from" regulations); *Minn. Citizens Concerned for Life*, 113 F.3d at 131 (noting that the "object" of government action typically has standing) (quoting *Lujan*, 504 U.S. at 561–62); *see also Texas v. EEOC*, 933 F.3d 433, 446–47 (5th Cir. 2019) ("An increased regulatory burden typically satisfies the injury in fact requirement.") (quoting *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015)).

4. Missouri has also suffered an injury because of the increased chance it loses ARPA funds under the broad interpretation. To see why, consider *City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018). That case involved an Executive Order which directed agencies "to withhold funds appropriated by Congress" from sanctuary cities. *Id.* at 1233. Because the plaintiff localities had "policies … that arguably would qualify for grant withdrawal" under the EO, they suffered an injury in fact: "the *likely* loss of funds promised under federal law." *Id.* at 1236 (quotation omitted) (emphasis added).

Contrary to what the district court said, *see* JA746, Add. 9, that is this case. Congress promised Missouri ARPA funds under one condition; Secretary Yellen and Treasury now say that condition is different—that Missouri will lose ARPA funds if the state enacts a tax policy that reduces revenue. As Missouri pointed out, it is likely to enact such policies.[8]

[8] At the time Missouri initiated suit, for example, its legislature was debating a number of bills that could implicate the broad interpretation. *See*, *e.g.*, JA17–18 ¶¶ 49–50. Also, Missouri must balance its budget every year, so tax cuts are an integral policy tool. *See* JA555:17–556:6. There are also tax issues outside the control of Missouri's political branches, such as voter referenda. *See* 2022-R002 (May 28, 2021), https://bit.ly/361teac (referendum on the General Assembly's gas tax). Those facts increase the likelihood that the State will reduce tax revenue in violation of the broad interpretation of the Tax Mandate.

By imposing a more onerous condition on federal funds, Secretary Yellen increased the likelihood that Missouri loses ARPA funds. That is a concrete harm. *See San Francisco*, 897 F.3d at 1236; *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (losing a chance for a favorable settlement or the power to "bring [a] lawsuit … that … had settlement value" constitutes an injury in fact); *Arkla Expl. Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 354 (8th Cir. 1984) (losing "revenue to which it is statutorily entitled" injures a State).

5. Missouri also has standing when viewing this as a pre-enforcement case (*i.e.*, a future injury case), as the district court did. *See* JA745, Add. 8. Under that view, Missouri need not have violated the broad interpretation of the Tax Mandate. *See*, *e.g.*, *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threated action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat … ."); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) ("A party … need not expose itself to arrest or prosecution in order to challenge a criminal statute."). Indeed, this Court "encourage[s] a person aggrieved by laws he considers unconstitutional to seek a

declaratory judgment … while complying with the challenged law, rather than … deliberately break the law and take his chances in the ensuing suit or prosecution." *Gaertner*, 439 F.3d at 488 (quoting *Mobil Oil Corp. v. Att'y Gen.*, 940 F.2d 73, 75 (4th Cir. 1991)).

Instead, Missouri must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and [that] there exists a credible threat of prosecution thereunder." *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 777 (8th Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus (SBA List)*, 573 U.S. 149, 159 (2014) (quoting another source)). "This is a forgiving standard, satisfied so long as plaintiff's 'intended future conduct is arguably proscribed by the [law] it wishes to challenge." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021) (alterations omitted) (quoting *SBA List*, 573 U.S. at 162).

And it is a standard Missouri meets. Missouri must take ARPA funds, *see*, *e.g.*, JA16 ¶ 42, 486; and it was actively considering tax bills that could violate a broad interpretation of the Tax Mandate, *see*, *e.g.*, JA17–18 ¶¶ 49–50, 466–67. More generally, tax cuts are a key policy tool. *See* JA555:17–556:6. Missouri showed its intent to act in a manner

that, under the broad interpretation of the Tax Mandate, exposes it to the loss of ARPA funds.

That last step is what the district missed. To be sure, the district court acknowledged Missouri's "constitutional interest in setting its own tax policy." JA745–46, Add. 8–9. But, as discussed above, it adopted DOJ's representation that Treasury and Secretary Yellen would follow the narrow reading of the Tax Mandate, and so concluded that Missouri's conduct was not proscribed and would thus not subject the State to recoupment. *See* JA747–48, 750–52, Add. 10–11, 13–15.

Since that was improper—because the district court needed to accept Missouri's standing allegations and because, as the Interim Final Rule showed, Secretary Yellen did not feel bound by DOJ's representation—Missouri has standing. Article III does not "require plaintiffs to 'bet the farm … by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (quoting *MedImmune, Inc.*, 549 U.S. at 129). And that is because the gamble itself is an immediate, concrete harm.

After all, Secretary Yellen reads the Tax Mandate to condition Missouri's $2.7 billion on the State not reducing tax revenue; Missouri disagrees. But what are Missouri's legislators to do? If they cut taxes, they risk losing ARPA funds as well as the burden of litigating recoupment. At some point, that gamble becomes coercive; why not defer cutting taxes—that is, abandon Missouri's right to set tax policy for a season—to receive ARPA funds?

Fortunately, "putting the challenger to the choice between abandoning his rights or risking prosecution[] is 'a dilemma that it was the very purpose of the Declaratory Judgment Act'"—and judicial review more generally—"'to ameliorate.'" *MedImmune, Inc.*, 549 U.S. at 129 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). And so courts have found standing in numerous cases that put plaintiffs to a similar choice as the one the broad interpretation of the Tax Mandate puts Missouri.[9]

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[9] *See*, *e.g.*, *SBA List*, 573 U.S. at 168 (Plaintiff need not "choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.") (quoting *Abbott Labs.*, 387 U.S. at 152); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (standing exists to challenge a law "aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and

Iowa League of Cities v. EPA is particularly apropos. There, this Court held that a group of cities could challenge EPA guidance involving water quality standards even though "the EPA portray[ed] the harm as lurking, if at all, on the distant horizon …." 711 F.3d at 868. The reason: "League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money" by creating facilities that did not meet EPA's guidance. *Id.* That is "the type of

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costly compliance measures or risk criminal prosecution"); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (standing exists to challenge threatened enforcement of trespass laws); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749–50 (8th Cir. 2019) (standing exists to challenge Minnesota's reading that its Human Rights Act requires plaintiff to film same- and opposite-sex weddings); *Monson v. DEA*, 589 F.3d 952, 958 (8th Cir. 2009) (intending to cultivate hemp in contravention of DEA's interpretation of federal law conveys standing); *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) (noting a plaintiff has standing to challenge a never-enforced law where he faces a "literal dilemma" of having to do something that would violate the law) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968)); *Blatnik Co. v. Ketola*, 587 F.2d 379, 381 (8th Cir. 1978) (concluding there is standing to sue over a "general as well as an actual threat of state prosecution"); *see also Turtle Island Foods, SPC*, 992 F.3d at 699–700; *Jones*, 947 F.3d at 1103; *281 Care Comm.*, 638 F.3d at 627; *Zanders*, 573 F.3d at 594.

Such suits are similar to the historic practice of allowing defendants at law to raise certain defenses at equity. *See* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 998–1000 (2008).

'concrete' and 'actual or imminent' harm necessary to establish an injury in fact." *Id.* at 870.

Likewise, Secretary Yellen's broad interpretation of the Tax Mandate—now codified, in part, in the Interim Final Rule—requires the State to alter its tax policies to avoid reducing revenue or to gamble its ARPA funds with each tax cut. That, per *Iowa League of Cities*, establishes an injury in fact. *See id.*; *see also Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) ("[B]eing pressured to change state law constitutes an injury.").

C. Because Treasury will enforce a broad interpretation of the Tax Mandate, this case is ripe.

This case is also ripe for the same reasons that Missouri suffered an injury in fact. *See*, *e.g.*, *MedImmune, Inc.*, 549 U.S. at 128 n.8 ("[S]tanding and ripeness boil down to the same question in this case."); *Iowa League of Cities*, 711 F.3d at 870 ("In many cases, ripeness coincides squarely with standing's injury in fact prong.") (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138–39 (9th Cir. 1999) (en banc)); *Johnson v. Missouri*, 142 F.3d 1087, 1090 n.4 (8th Cir. 1994) ("Although we realize that standing and ripeness are technically different doctrines, they are closely related … ."); *cf. Texas v. United*

States, 523 U.S. 296, 301 (1998) (noting that very contingent claims are not ripe, mirroring the injury in fact requirements).

First, this case is fit for review because it involves a purely legal issue: the meaning and constitutionality of the Tax Mandate. *See*, *e.g.*, *Minn. Citizens Concerned for Life*, 113 F.3d at 132. There is no need for "further factual development," especially now that Treasury promulgated the Interim Final Rule. *See* JA751, Add. 14 (saying the lack of such regulation was a reason the case wasn't ripe).

Second, Missouri will suffer "both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review." *Iowa League of Cities*, 711 F.3d at 867. Until the State has clarity about which reading of the Tax Mandate is proper—its or Secretary Yellen's—Missouri sets tax policy "beneath the sword of Damocles," *id.*, unsure of whether enacting certain tax policies will result in the loss of ARPA funds.

II. The Court Should Remand with Instructions to Enter a Preliminary Injunction in Missouri's Favor.

This Court should also instruct the district court to enter a preliminary injunction. This case presents a purely legal issue: Is Missouri's narrow interpretation or is Secretary Yellen's broad

interpretation of the Tax Mandate correct? And, if the latter, is the broad interpretation constitutional? So even though the district court did not analyze the preliminary injunction factors, Missouri's entitlement to a preliminary injunction is "susceptible of determination without additional factfinding, [so] a remand … will serve no useful purpose." *Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020) (per curiam) (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003) (quoting another source)).

"The factors for evaluating whether a preliminary injunction should be issued are: '(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.'" *Id.* (quoting *Dataphase Sys., Inc. v. C L Sys. Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). All favor Missouri.

A. Missouri is likely to succeed on its statutory or constitutional claim.

The most important factor is Missouri's likelihood of success on the merits. *E.g.*, *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam). It favors the State.

1. The Government is estopped from arguing against the narrow interpretation of the Tax Mandate.

The first reason Missouri is likely to succeed is that the Government agreed with the State's statutory interpretation argument below. Because the Government convinced the district court to adopt its position, it is judicially estopped from "relying on a contradictory argument to prevail" here. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000); *see Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998) ("The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation.").

Specifically, the three factors that justify applying judicial estoppel—(1) whether a party takes a position inconsistent with an earlier one; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position;" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped," *Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1006 (8th Cir. 2018) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (quotations omitted))—justify applying it against the Government.

First, the Government's argument below adopted Missouri's narrow reading of the Tax Mandate no fewer than fourteen times. *See* JA502, 507, 510, 510–11, 511, 512, 513, 515 (twice), 515–16, 516, 517–18, 520, 521. For example, the Government said that the Tax Mandate is inapplicable if a State "does not 'use' [ARPA] funds to 'offset' a reduction in net tax revenue." JA514 (quoting 42 U.S.C. § 802(c)(2)(A)). It then argued those terms refer to a State deliberately choosing to use ARPA funds to offset a tax increase. *See* JA514–15. That position also bottoms the Government's constitutional argument. *See* JA517–18, 521. And at the preliminary injunction hearing, DOJ represented that the Government does not "agree with the broad interpretation that prompted the State of Missouri and some other states to file these lawsuits." JA568:23–569:7; *see also* JA571:13–18 (claiming agreement on "the fundamental meaning of the" Tax Mandate). It would be inconsistent for the Government to now argue that the broad interpretation is the best reading of the Tax Mandate.

Second, the district court accepted the Government's position in dismissing Missouri's case. *See New Hampshire*, 532 U.S. at 752. Prominent in the district court's analysis of standing is this quote from

the Government's brief: "The [Tax Mandate] does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [ARPA] to offset a reduction in net tax revenue." *See* JA747, Add. 10 (second alteration in original). The district court then summarized that quote: "State tax cuts are not proscribed by the ARPA." *Id.*; *see also* JA747–48, Add. 10–11 (concluding there isn't a credible threat of enforcement because the Tax Mandate "does not prohibit a State from implementing its own tax policy"). And in analyzing ripeness, the district court said: "Notably, Defendants, through counsel, have *explicitly asserted that they do not agree with the 'broad interpretation' proposed by Missouri*, … further attenuating Missouri's claim of the 'threatened' broad interpretation." JA750, Add. 13 (emphasis added).

Third, the Government "derived an unfair advantage in the" district court from those representations. *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1034 (8th Cir. 2016). To start, it got the district court to dismiss the case. And it was able to issue the Interim Final Rule based on Secretary Yellen's interpretation, a regulation Missouri's requested preliminary injunction would have covered. Furthermore, the Government's representations imposed an "unfair detriment" on

Missouri, *New Hampshire*, 532 U.S. at 751, as the State still suffers from a lack of clarity as to the Tax Mandate's meaning.

But even if judicial estoppel does not apply, Missouri has shown a likelihood of success on the merits.

2. Missouri's statutory interpretation analysis is correct.

To start, Missouri is likely to succeed on its statutory interpretation argument for three reasons.

1. First is the Tax Mandate's text. *See*, *e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *United States v. Smith*, 756 F.3d 1070, 1073 (8th Cir. 2014). The Tax Mandate prohibits using ARPA funds "to either directly or indirectly *offset* a reduction in the net tax revenue of such State." 42 U.S.C. § 802(c)(2)(A) (emphasis added). And "offset," as a verb, means "[t]o balance or calculate against; to compensate for." *Offset*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Offset*, AM. HERITAGE DICTIONARY ("To counterbalance, counteract, or compensate for"), https://ahdictionary.com/word/search.html?q=offset; *Offset*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("counterbalance, compensate"). Because one only deliberately "counterbalances" or "counteracts" something, the Tax Mandate's plain terms prohibits only

deliberately using ARPA funds to replace lost tax revenues. *See Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion) ("Ordinarily, a word's usage accords with its dictionary definition."). That the Tax Mandate bars the "use" of funds to offset a revenue decrease also suggests that there must be a deliberate—*i.e.*, "volitional," *see Voisine v. United States*, 136 S. Ct. 2272, 2278–79 (2016)—act to trigger it, as DOJ conceded below, *see* JA514–15.

That "indirectly" modifies "offset" doesn't change things. As the Supreme Court noted in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), "indirectly" as a modifier cannot expand the scope of a statute's proscribed activity. *See id.* at 176; *see also Janus Capital Grp, Inc. v. First Derivative Traders*, 564 U.S. 135, 147 n.11 (2011) (concluding that "directly or indirectly" "merely clarifies" the scope of a prohibited act). Likewise, "indirectly" in the Tax Mandate cannot enlarge the scope of activity that "offset" covers. That is, it cannot eliminate the requirement that an offset be a deliberate act.

The Tax Mandate's context confirms that reading. *See, e.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058–60 (2019). States cannot use ARPA funds outside four categories of expenditures. 42

U.S.C. § 802(c)(1). So that prohibition limits a State's ability to use ARPA funds to offset tax revenue decreases; such an offset must fall within a category listed in § 802(c)(1). That also means the Tax Mandate is superfluous as to those tax cuts, and a better reading of the law is that it only prohibits offsets that § 802(c)(1) otherwise permits.

That shows the Tax Mandate bars only the deliberate use of ARPA funds to pay for a revenue reduction. Because the Tax Mandate only applies where § 802(c)(1) allows an offset, a precondition to the Tax Mandate's application is a State's identification and application of ARPA funds to a particular § 802(c)(1) category, which requires a deliberate act.

2. Two clear-statement rules also support Missouri's reading.

First, there is "the well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Gonzalez v. CoreCivic, Inc.*, 986 F.3d 536, 539 (5th Cir. 2021) (quoting *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting another source)). The Supreme Court applied that rule in similar circumstances as here in *Department of Revenue of Oregon v. ACF Industries*, which involved whether a tax on railroad property was

discriminatory, and thus violated the Railroad Revitalization and Regulatory Reform Act (R-4 Act), because the State exempted some non-railroad property. *See* 510 U.S. at 335. After concluding the statute did not cover tax exemptions, the Supreme Court said that "[p]rinciples of federalism support, in fact compel, [that] view" because the R-4 Act "limits … the taxation authority of state government, an authority we have recognized as central to state sovereignty." *Id.* at 345. Since the law "impinges upon or pre-empts the States' traditional powers," the Court was "hesitant to extend the statute beyond its evident scope" absent a showing that was "'the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 320 (1947)).

Similarly, a broad interpretation of the Tax Mandate limits States' taxing authority by penalizing States who enact revenue-reducing policies; a narrow interpretation does not, and is consistent with the law's plain terms. Since Congress did not clearly state its intention for the law to sweep broadly, here, as in *ACF Industries*, "[p]rinciples of federalism … compel" the narrower view. 510 U.S. at 345; *see also Chi. & N.W. Transp. Co. v. Webster Cty. Bd. of Supervisors*, 71 F.3d 265, 267–68 (8th Cir. 1995) (applying *ACF Industries* similarly).

Second, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," there must be "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); *cf. FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Since Secretary Yellen's broad reading exceeds the limits of Congress's spending power and violates the Tenth Amendment without clear congressional authorization, it is improper.

3. Finally, there is "the canon that statutes should be interpreted to avoid constitutional doubts … ." *Clark v. Martinez*, 543 U.S. 371, 379 (2005). The broad interpretation of the Tax Mandate violates the Tenth Amendment and exceeds Congress's Spending Clause power. *See infra.* Since Missouri's narrow interpretation is constitutional and consistent with the law's text, it is the proper reading.

3. If Treasury's broad interpretation is permissible, the Tax Mandate is unconstitutional.

Even if the Court rejects Missouri's statutory argument in favor of Secretary Yellen's broad interpretation, Missouri is likely to succeed on

its claim that that reading violates the Tenth Amendment by commandeering State tax policy and exceeds Congress's spending power.

a. Missouri is likely to succeed on its anti-commandeering claim.

"The Constitution confers on Congress … only certain enumerated powers. … And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018); *see also New York v. United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."). "This separation … is one of the Constitution's structural protections of liberty." *Printz v. United States*, 521 U.S. 898, 921 (1997). It ensures "a healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front." *New York*, 505 U.S. at 181 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

That is especially true in the tax context. Taxes are unpopular. So Congress has every incentive to order States to raise taxes and then "take credit for 'solving' [tax-related] problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*,

521 U.S. at 930. That would weaken the protections Americans have against abusive taxes. "The only security against the abuse of [the taxing] power[] is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents." *McCulloch*, 17 U.S. (4 Wheat.) at 428. And so the greatest defense against abusive taxation is "the influence of a constituent over their representative … ." *Id.* Because the federal government has different, and many more, constituents than States, a State's citizens would have less influence, and thus less protection against federally-directed State tax policy. To avoid that, "there is *nothing* in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation." *Lane County*, 74 U.S. (7 Wall.) at 77 (emphasis added).

Yet the broad interpretation of the Tax Mandate is such an abridgment. The Tax Mandate applies only to States—other entities, such as localities, do not face similar limits, *see* 42 U.S.C. § 803(c)—and therefore "regulates the 'States as States.'" *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287 (1981) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 854 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). And it is coercive.

See U.S. ex rel. Zigler v. Regents of Univ. of Minn., 154 F.3d 870, 873 (8th Cir. 1998) ("There is no coercion in subjecting States to the same conditions for federal funding as other grantees … ."). ARPA funds are too great, and the post-pandemic needs too large, for States to turn down the money. *See*, *e.g.*, JA16 ¶ 42, 486.

But under the broad interpretation, States cannot reduce net tax revenue without losing ARPA funds. *See* 86 Fed. Reg. at 26,807 (calling any unpaid revenue reduction an impermissible offset). Essentially fining States for enacting particular policies is unconstitutional commandeering. *See*, *e.g.*, *Murphy*, 138 S. Ct. at 1478.

b. The broad interpretation of the Tax Mandate is an invalid exercise of Congress's spending power.

Congress enacted ARPA pursuant to its spending power. *See* U.S. CONST. art. I, § 8. Thus, "Congress may attach conditions on the receipt of [ARPA] funds." *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). But those conditions must be: (1) "in pursuit of the general welfare," (2) "set out unambiguously," (3) "related to the federal interest in particular national projects or programs," (4) "not be prohibited by other constitutional provisions, and" (5) "not be so coercive that pressure turns

into compulsion." *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009) (quotations omitted) (citing *Dole*, 483 U.S. at 207–11). The broad interpretation of the Tax Mandate fails the last four requirements.

1. "Under the Spending Clause … , 'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Osseo Area Sch., Indep. Sch. Dist. No. 279 v. M.N.B. ex rel. J.B.*, 970 F.3d 917, 922 (8th Cir. 2020) (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17). A condition is ambiguous when there are "*plausible* alternative interpretation[s] of the law … ." *Sch. Dist. of the City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring in the order); *see id.* at 277 (Cole, J.) (similar); *see Springdale Mem'l Hosp. Ass'n, Inc. v. Bowen*, 818 F.2d 1377, 1384 (8th Cir. 1987) (concluding a statute is ambiguous because it is "capable of at least two plausible interpretations"). Such ambiguity is, generally, incurable—the agency cannot fix it through interpretation. *See*, *e.g.*, *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021) (concluding that clarity "must come directly from the statute," not regulations); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (same); *see also New York v. Dep't of Justice*, 964 F.3d 150, 161

(2d Cir. 2020) (Pooler, J., dissenting from denial of rehearing en banc); *City of Chicago v. Barr*, 961 F.3d 882, 934 (7th Cir. 2020) (Manion, J., concurring in judgment).

The Tax Mandate fails that requirement, and the question isn't "particularly close." *Ohio v. Yellen (Ohio I)*, 2021 WL 1903908, at *1 (S.D. Ohio May 12, 2021); *Ohio II*, 2021 WL 2712220, at *12. To start, no one doubts Missouri's reading is at least plausible—indeed, DOJ conceded it is correct. So if Secretary Yellen's broad reading is even plausible, the Tax Mandate is unconstitutionally ambiguous.

But also consider what a broad interpretation of "directly or indirectly offset" could mean. It could mean—as Secretary Yellen initially suggested—that any reduction in net revenue is offset by the mere receipt of ARPA funds since money is fungible. *See*, *e.g.*, JA538; *see also* JA81. But it could also cover the Interim Final Rule, which provides a de minimis limit to account for certain contingencies. *See* 86 Fed. Reg. at 26,809.

Then there is how to measure a State's "reduction in net tax revenue." Does that mean projected net tax revenue, or actual net tax revenue? Does it take into account economic growth? What is the

baseline? *See Ohio II*, 2021 WL 2712220, at *13 (noting those issues); *see also* 86 Fed. Reg. at 26,809 (permitting different methods to measure revenue reductions).

Combined, a broad interpretation "is almost as though Congress had written the Tax Mandate[] as follows: 'Each certifying State agrees that, if a State reduces any tax rate, on any tax, the Secretary may recoup ARPA funding to the extent that the Secretary determines, in her discretion, that the rate reduction resulted in the State losing tax revenues, and the Secretary further determines, in her discretion, that those losses were offset with ARPA funding.'" *Ohio II*, 2021 WL 2712220, at *15. That cannot provide "a state official who is engaged in the process of deciding whether" to accept ARPA funds a clear understanding of its conditions, and thus renders the broad interpretation unconstitutionally ambiguous. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see Ohio II*, 2021 WL 2712220, at *15 (so holding).

2. Federal funding conditions "must … bear some relationship to the purpose of the federal spending." *New York*, 505 U.S. at 167; *see also South Dakota v. Dole*, 791 F.2d 628, 631 (8th Cir. 1986). Specifically, Congress may impose conditions that ensure "public funds [are] spent for

the purposes for which they were authorized," but cannot use them to regulate "conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 196–97 (2000). To accomplish the former, it may impose conditions involving the "scope of the" spending program; it impermissibly does the latter when it places "a condition on the *recipient* of the" money. *Id.* at 197

A broad interpretation of the Tax Mandate does the latter by conditioning ARPA funds on States adopting certain tax policies. And that is unconstitutional. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. (AID)*, 570 U.S. 205, 218–19 (2013) ("[R]equiring recipients to profess a specific belief … goes beyond defining the limits of the federally funded program to defining the recipient.").

Moreover, it is a condition that runs counter to ARPA's purpose. *See Van Wyhe*, 581 F.3d at 651 (indicating that this factor imposes a rationality requirement). Congress passed ARPA "to mitigate the fiscal effects stemming from" responding to COVID-19, 42 U.S.C. § 802(a)(1), including by providing economic stimulus, *see* § 802(c)(1)(A), (B). Tax cuts are a powerful stimulus and fiscal tool, especially for States, like Missouri, that must balance their budgets each year, and thus have

limited ability to provide stimulus through direct payments. *See* JA555:17–556:6. So limiting States' ability to cut taxes undermines ARPA's goal of stimulating post-pandemic economic recovery.

Nor can the broad interpretation be justified as a way to protect federal funds from misappropriation. *See Sabri v. United States*, 541 U.S. 600, 605 (2004); *Zigler*, 154 F.3d at 873. Missouri's narrow interpretation does that by prohibiting States from deliberately using ARPA funds to pay for tax cuts. Sweeping more broadly is unnecessary unless the goal is to "bring[] federal economic might to bear on a State's own choices of public policy"—here, tax policy. *Sabri*, 541 U.S. at 608. That Congress cannot do. *See id.*

3. For the reasons set forth in Section II.A.a, *supra*, the broad interpretation of the Tax Mandate violates the Tenth Amendment and is thus "prohibited by other constitutional provisions … ." *Van Wyhe*, 581 F.3d at 650.

4. Where, as the broad interpretation does here, a condition does not "govern the use of the funds," *National Federal of Independent Business v. Sebelius (NFIB)*, 567 U.S. 519, 580 (2012) (Roberts, C.J.), "the circumstances [of the funding] must not be so coercive that 'pressure

turns into compulsion.'" *Van Wyhe*, 581 F.3d at 650 (quoting *Dole*, 483 U.S. at 211); *see also NFIB*, 567 U.S. at 580–81 (Roberts, C.J.); *Gruver v. La. Bd of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020); *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 179 (D.C. Cir. 2015); *Mayhew v. Burwell*, 772 F.3d 80, 88 (1st Cir. 2014). That happens "when the amount of funding that a State would lose by not acceding to the federal conditions is so significant to the States' overall operations as to leave it with no real choice but to agree." *New York v. Dep't of Justice*, 951 F.3d 84, 115 (2d Cir. 2020); *see also NFIB*, 567 U.S. at 577–78 (Roberts, C.J.).

NFIB, for example, found there was impermissible coercion under the Affordable Care Act because it conditioned federal Medicaid funds, averaging roughly 10 percent of a State's budget on the low side, on States expanding Medicaid coverage. *NFIB*, 567 U.S. at 581 (Roberts, C.J.); *id.* at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). *Contrast Dole*, 483 U.S. at 211 (losing 5 percent of highway funds, or 0.5 percent of a State's budget, is not coercive); *Doe v. Nebraska*, 345 F.3d 593, 599 (8th Cir. 2003) (losing 60 percent of the budget for a single

department was not coercive); *Jim C.*, 235 F.3d at 1082 (losing 12 percent of the education budget is not coercive).

Here, ARPA provides Missouri between 13 to 14 percent of the State's annual general revenue expenditures from the last two fiscal years—a very significant amount of money compared to what the State spends to operate. *Compare* Missouri's Allocation, *supra*, *with* JA17 ¶ 45 (providing Missouri's general revenue expenditures for fiscal years 2019 and 2020). The State cannot realistically turn down that money—especially in the context of recovery from the COVID-19 pandemic. *See*, *e.g.*, JA16 ¶ 42. So it must accept those funds, and, with them, the Tax Mandate. *See*, *e.g.*, *NFIB*, 567 U.S. at 585 (Roberts, C.J.) (forcing acquiescence to federal policy via the spending power is unconstitutional).

B. All the other factors justify issuing a preliminary injunction.

1. Absent an injunction, Missouri suffers two species of irreparable harm. *See Planned Parenthood Minn., N.D., S.D., v. Rounds*, 530 F.3d 724, 732 n.5 (8th 2008) (en banc) (discussing this prong).

One injury is the broad interpretation's interference with an "indispensable" and "essential function" aspect of state sovereignty:

setting tax policy. *Lane County*, 74 U.S. (7 Wall.) at 76. Such an invasion "clearly inflicts irreparable harm on" Missouri. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (holding that a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). Indeed, it violates rights that the Tenth Amendment guarantees. *See*, *e.g.*, *Lane County*, 74 U.S. (7 Wall.) at 77. Like any constitutional right, that violation "for even minimal periods of time, unquestionably constitutes irreparable harm." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

Another harm is the confusion about the consequences of State tax policies that the broad interpretation creates. That confusion interferes with Missouri's "orderly management of its fiscal affairs," *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers), and thus irreparably harms its "imperative need … to administer its own fiscal operations," *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). That is so even though the Missouri's General Assembly is no longer in session. It is common sense that tax policy planning—given its importance to the State, its budget, and core operations of government—"start[s] anew as

a practical matter[] almost immediately" after the legislative session ends. *Ohio II*, 2021 WL 2712220, at *8. Indeed, the Missouri legislature can always go into special session to consider tax policy. *See* MO. CONST., Art. III, § 20(b). And Missouri's citizens are considering whether to put a referendum on the ballot that would repeal the gas tax the Missouri General Assembly just passed. *See* 2022-R002 (May 28, 2021), https://bit.ly/361teac. That could trigger recoupment under the broad interpretation of the Tax Mandate set forth in the Interim Final Rule. *See* 31 C.F.R. § 35.3 (defining "covered change" to include "a change in law"). Relief would clarify the effect of the Tax Mandate and help Missouri make informed choices regarding tax policy.

2. By contrast, the Government will suffer no cognizable harm from enjoining a broad interpretation of the Tax Mandate. The Government has no valid interest in enforcing an unlawful and unconstitutional interpretation of the Tax Mandate. Nor will an injunction stop Treasury from disbursing ARPA funds, or even seeking recoupment under the narrow reading of the Tax Mandate. *See Ohio II*, 2021 WL 2712220, at *21 (making a similar point).

And even if Missouri loses on the merits, Treasury could recoup any improperly used ARPA funds later. *See* 42 U.S.C. § 802(e). So whatever harm Treasury suffers from this injunction it can alleviate at a later date with a money payment—the paradigmatic reparable harm. *See*, *e.g.*, *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1020 (8th Cir. 2020).

3. Because the balance of harms tips in Missouri's favor, so, too, does the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that the factors merge "when the Government is the opposing party"). Regardless, Secretary Yellen's broad interpretation of the Tax Mandate exceeds the scope of her authority under ARPA and the Constitution, and enjoining unlawful acts is always in the public interest. *See*, *e.g.*, *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019).

Furthermore, an injunction would maximize Missouri's ability to set tax policy—an ability the Constitution leaves "within the discretion of the" state legislatures subject to "the will of the people … ." *Lane County*, 74 U.S. (7 Wall.) at 77. Thus, a preliminary injunction would promote the public interest the people of Missouri in having their State set their tax policy.

CONCLUSION

For those reasons, Missouri respectfully asks this Court to reverse the district court's dismissal of Missouri's complaint and to direct the district court to enter a preliminary injunction barring the Government from enforcing any interpretation of the Tax Mandate that is broader than prohibiting the deliberate and express use of ARPA funds to offset a net tax revenue loss from a specific tax cut.

Dated: July 14, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 32, that it is written in Century Schoolbook 14-point font, and that it contains 12,902 words as determined by the word-count feature of Microsoft Word. Both the brief and addendum have been scanned for viruses and are virus-free.

/s/ Michael E. Talent

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael E. Talent