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

REPLY BRIEF OF APPELLANT STATE OF MISSOURI

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INTRODUCTION

This case addresses the meaning and constitutionality of the Tax Mandate, 42 U.S.C. § 802, which says:

> A State or territory shall not use the funds provided under this section … 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.

Missouri has always argued the law prohibits no more than a State deliberately using ARPA funds to pay for a specific decrease in net tax revenue. *See*, *e.g.*, Appellant Br. 8, 47, 63 (providing examples of the State's arguments below and here). That is the narrow interpretation.

By contrast, the Government and its counsel, DOJ, have now provided three readings of the Tax Mandate:

(1) Secretary Yellen views the statute as prohibiting policies that reduce net tax revenue. *See* Appellant Br. 6–7, 24–26 (summarizing her views). That is the broad interpretation, and is what prompted this suit.

(2) Secretary Yellen and Treasury issued the Interim Final Rule, which embraces the broad interpretation, albeit with a *de*

minimis exception and baselines to account for economic growth. *See*, *e.g.*, Coronavirus State and Local Fiscal Recover Funds, 86 Fed. Reg. 26,786, 26,823 (May 17, 2021) (codified at 31 C.F.R. § 35.8); *see also* Appellant Br. 26.

(3) In the district court, DOJ agreed with Missouri's narrow interpretation, and represented that Treasury agreed with that position as well. *See*, *e.g.*, JA502, 507, 510, 510–11, 511, 512, 513, 515, 515–16, 516, 517–18, 520, 521; *see also* JA568:23–569:4 ("I'm here today as counsel for Secretary Yellen and the Department of the Treasury and its acting Inspecting 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."). The district court relied on that representation to conclude that Missouri lacked standing. *See*, *e.g.*, JA747, Add. 10 (quoting DOJ's brief); JA750, Add. 13.

Here, the Government reverses positions, backpedaling furiously from its position in the district court. It now claims that the Broad Interpretation—as embodied by the Interim Final Rule—is correct.

"Missouri is … mistaken," the Government says, "in asserting that the Offset Provision is implicated only by the 'deliberate and express use of [Fiscal Recovery] funds to pay for tax cuts.'" Appellees Br. 7. Rather, "[t]he regulations *reject* both the broad interpretation that Missouri fears and the atextually narrow interpretation it prefers, instead *confirming* the common-sense implementation of the plain statutory text." *Id.* at 8 (emphases added); *see also id.* at 7 ("[T]hose regulations explicitly recognize that the [Tax Mandate] is not implicated if a State cuts taxes but offsets any resulting reduction … with [certain] spending cuts … , increases in other taxes, or revenue derived from macroeconomic growth."); *id.* at 12 ("[T]he regulations simply track the statute").

The Government's new position is, to be sure, buried and scattered throughout its brief. Indeed, there are times when the Government seems to adopt the narrow interpretation of the law, *see*, *e.g.*, Appellees Br. 1, 5–6, 9, 17—as DOJ did in the district court, *see* JA502, 507, 510, 510–11, 511, 512, 513, 515, 515–16, 516, 517–18, 520, 521. But the Government cannot escape the fact that the Interim Final Rule unambiguously adopts the broad interpretation Secretary Yellen advanced, which DOJ expressly disavowed before the district court.

The Interim Final Rule says that if a State reduces net tax revenue, it has violated the Tax Mandate: "[B]ecause 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 statue by indirectly being used to substitute for the State's … funds that would otherwise have been needed to cover the costs of the reduction." 86 Fed. Reg. at 26,807. That agrees with Secretary Yellen's public statements adopting the broad interpretation. *See* JA538 (noting Secretary Yellen's reference to the "fungibility of money" in Senate testimony). Indeed, in her response to a letter from twenty-one State Attorneys General asking her to adopt the narrow interpretation, Secretary Yellen basically summarized the Interim Final Rule: "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 [Tax Mandate] is not implicated." JA81 (emphasis added). *Compare id.*, *with* 86 Fed. Reg. at 26,807 ("By focusing on the cost of changes that reduce net tax revenue—and how a recipient government is offsetting those reductions … the framework prevents efforts to use [ARPA funds] to indirectly offset reductions in net

tax revenue for which the recipient government has not identified other offsetting sources of funding."), *and* 31 C.F.R. § 35.8(b) (setting out how Treasury will determine if there is a violation of the Tax Mandate).

Thus, the Interim Final Rule adopts the broad interpretation, which contradicts the statute's plain language and the Constitution. It requires States to adopt only *revenue-increasing or revenue-neutral tax policies*, on pain of losing ARPA funds. So the Government has completely reversed its position on what the law means and thus, as Missouri argued and as the Government does not contest, is estopped from defending its new interpretation. *See* Appellant Br. 42–45.

Regardless, the Government's arguments fail on the merits. The broad interpretation, even as embodied in the Interim Final Rule, is inconsistent with the Tax Mandate's text and the Constitution. The Government's belated adoption of it simply underscores Missouri's standing, and the fact that this lawsuit presents an Article III case and controversy. Missouri has now accepted the ARPA funds, and it is directly subject to the Tax Mandate's intrusion on its sovereignty (under Secretary Yellen's unconstitutional broad interpretation) and the Secretary's onerous accounting and reporting requirements.

ARGUMENT

I. The Tax Mandate's text does not support the Government's new, and unconstitutional, reading.

A. Missouri's interpretation is the only one consistent with principles of statutory interpretation.

The Government does little to square its new position on the Tax Mandate with the law's text. What it says—buried in its standing section—is that the Tax Mandate "does not use the phrase 'deliberate and express,' and the Supreme Court has rejected the contention that the 'misuse[]' of federal funds depends 'on any subjective intent attributable to grant recipients.'" Appellees Br. 7 (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 664 (1985)).

That argument is meritless. As Missouri's opening brief emphasizes, the plain meaning of "offset," as found in the dictionary, necessarily entails a *deliberate* action—it denotes the deliberate and intentional "counterbalancing" of two things against each other. Appellant Br. 45–46. In fact, DOJ made the exact same argument to the district court. *See* JA514–15 (arguing that "[t]he term 'use' connotes 'volitional,' 'active employment' of federal funds," and that "offset" likewise entails a volitional act). The key words are "use" and "offset," and Missouri looked at dictionary definitions, statutory context, clear-

statement rules, and canons of construction to construe them. Appellant Br. 45–49. That careful, contextual inquiry is what statutory interpretation requires. *See*, *e.g.*, *Bond v. United States*, 572 U.S. 844, 860–63 (2014); *United States v. Smith*, 756 F.3d 1070, 1073 (8th Cir. 2014). The plain meaning of both "offset" and "use" entail "deliberate and express" action—one does not "offset" or "use" something unknowingly or inadvertently. The Government's argument contradicts the plain meaning of those terms, as found in the dictionary—as DOJ contended below, *see* JA514—and violates the Supreme Court's clear-statement rules and canons of interpretation.

The Government argues that *Bennett* says that violations of spending conditions cannot turn on subjective intent. *See* Appellees Br. 7. But the correct, narrow interpretation does not have a subjective-intent element. It turns on whether there is "a link between the revenue reduction and ARPA funds" that shows deliberate use. Appellant Br. 26.

In any event, the Government misconstrues *Bennett*. The passage the Government cites says, in full, "Our discussion [in *Bell v. New Jersey*, 461 U.S. 773 (1983),] in no way suggested that the 'misuse' of Title I funds depended on any subjective intent attributable to grant recipients."

Bennett, 470 U.S. at 664. That is a description of the Court's holding in a prior case, not a universal rule applicable to this case. What is applicable is how the *Bennet* Court addressed the subjective-intent issue—whether "the absence of bad faith absolves a State from" failing to comply with a spending condition. 470 U.S. at 664. To answer that, the Court considered its prior holding and the statutory scheme. *See id.* at 664–65.

Such traditional interpretation is what this Court should to do with the Tax Mandate. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), provides on-point guidance. In *ACF Industries*, the Supreme Court concluded that the terms and statutory context of the R-4 Act militated against a reading restricting a State's power to create property tax exemptions, *see id.* at 339–44, and then noted that "[p]rinciples of federalism support, in fact compel" that reading, *id.* at 345. Likewise here. The Tax Mandate "sets limits upon the taxation authority of state government, an authority … recognized as central to state sovereignty." *Id.* Thus, Missouri's narrow interpretation, which is consistent with the law's text and principles of interpretation, is correct—"in fact, compel[led]." *Id.*

B. The broad interpretation of the Tax Mandate is unconstitutional.

The Government's constitutional arguments are no more persuasive, in large part because the Government, while affirmatively embracing the broad interpretation, bases its constitutional argument on Missouri's narrow interpretation. *Compare* Appellees Br. 7, *with id.* at 17 (saying that Tax Mandate "simply bars a State from using [ARPA funds] to offset a reduction in net state tax revenue"). That is understandable, because only the narrow interpretation is constitutional.

Anti-Commandeering. Contrary to the Government, the broad interpretation plainly "does … forbid tax cuts," as the Interim Final Rule shows. Appellees Br. 17. If a recipient State reduces net tax revenue, it is subject to recoupment; Treasury need not show the State "explicitly or directly used" ARPA funds to cover the decrease in net tax revenue. 86 Fed. Reg. at 26,807.

That is no different than fining States for enacting particular tax policies, which "unequivocally dictates what a state legislature may and may not do." *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018); *cf. Jake's, Ltd. v. City of Coates*, 356 F.3d 896, 902 (8th Cir. 2004) (noting that contempt fines are a "*coercive* civil contempt remedy" used to ensure

compliance with a court decree) (emphasis added). It is unconstitutional commandeering. *See*, *e.g.*, *Murphy*, 138 S. Ct. at 1485.

Spending Clause. The Government's argument that the Spending Clause authorizes the broad interpretation fares no better:

First, as to coercion, the Government does not dispute that the amount of ARPA funds Missouri receives "is so significant … 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). Rather, the Government argues that coercion does not come into play because the Tax Mandate governs the use of ARPA funds. *See* Appellees Br. 18.

That is incorrect. The Interim Final Rule, and the broad interpretation, look to a State's general tax policy to determine a violation; there need not be a connection between the offset and a State's use of ARPA funds. *See*, *e.g.*, 31 C.F.R. § 35.8(b); 86 Fed. Reg. at 26,807. Because the broad interpretation does not merely govern the use of ARPA funds but purports to dictate broader tax policy, the coercion analysis applies. *See*, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 580–82 (2012) (Roberts, C.J.); *Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020).

As Missouri pointed out, *see* Appellant Br. 58–59, ARPA is coercive. *See also* Br. *Amici Curiae* Chamber of Commerce U.S. & Nat'l Fed'n Indep. Bus. 13–17. Indeed, a federal district court recently agreed. *Kentucky v. Yellen*, 2021 WL 4394249, at *6 (E.D. Ky. Sept. 24, 2021).

Second, as to relatedness, the Government claims that the Tax Mandate—as embodied in the Interim Final Rule—is like maintenance-of-effort provisions, which "ensure that federal grants are used to supplement and not supplant state spending." Appellees Br. 19. But maintenance-of-effort rules involve state spending in discrete areas. Maintaining a general "no new tax cuts" policy (requiring tax revenues to increase or be neutral relative to a baseline) is qualitatively different.

In any event, the Government's maintenance-of-effort analogy undermines its argument. The broad interpretation, as implemented in the Interim Final Rule, requires States to maintain tax revenue at or above a certain baseline. *See* 31 C.F.R. § 35.8(b); *see* 86 Fed. Reg. 26,807. Maintenance-of-effort laws, by contrast, require States to maintain spending levels in an area *relevant to the federal program*—as the Government's own cases show. *See Bennett*, 470 U.S. at 671 ("Both the statutory provision and the implementing regulations expressly required

that Title I funds not be used to supplant state and local funds for the *pupils* participating in Title I programs."); *Mayhew v. Burwell*, 772 F.3d 80, 84 (1st Cir. 2014) ("[I]n order to continue receiving those Medicaid funds they had received for this population, states were required to 'freeze' their eligibility standards for children for a period of approximately nine years."); *S.C. Dep't of Educ. v. Duncan*, 714 F.3d 249, 251 (4th Cir. 2013) (In return for IDEA funds, a "State must not reduce the amount of its own financial support for special education 'below the amount of that support [it provided] for the preceding fiscal year.'") (quoting 20 U.S.C. § 1412(a)(18)).

So it is incorrect to say those provisions "implicate a State's spending power." Appellees Br. 19. They implicate *part* of a State's spending power. The broad interpretation, by contrast, implicates a State's *entire* tax power. It does not require that Missouri maintain certain tax revenue levels in areas related to use of ARPA funds, and it is unrelated to the law's purposes and federal interests. Indeed, it undermines those purposes, by prohibiting States from pursuing tax-relief policies to stimulate economic growth to recover from the pandemic.

Third, the Government wrongly argues that the broad interpretation of the Tax Mandate is not unconstitutionally ambiguous. Appellees Br. 19.

To start, the Government's argument falsely equates RLUIPA's well-known standard for evaluating the propriety of religious burdens to the *sui generis* broad interpretation. *See id.* at 20–21; *see also Arizona v. Yellen*, 2021 WL 3089103, at *3–*4 (D. Ariz. July 22, 2021) (making the same error in finding that Arizona lacked standing to challenge the Tax Mandate). "RLUIPA forbids the states from imposing substantial burdens on religious exercise absent a compelling government interest accomplished by the least restrictive means necessary to serve that interest. This standard is not new to Georgia or any state." *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004). It is "the strict scrutiny long applied to the states in disputes regarding the free exercise of religion … ." *Id.*

The well-established standard of strict scrutiny makes all the difference. A State official reading RLUIPA's condition would understand that certain policies would have to pass strict scrutiny. So the fact that it may be unclear whether a particular policy passes that

test does not matter. *See Van Wyhe v. Reisch*, 581 F.3d 639, 650–51 (8th Cir. 2009); *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005); *Benning*, 391 F.3d at 1306–07; *Charles v. Verhagen*, 348 F.3d 601, 607–08 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *see also* Appellees Br. 20. What matters is that the framework for evaluating those policies is clear. *See Van Wyhe*, 581 F.3d at 651 ("RLUIPA sets forth the general right to heightened protection of religious exercise with sufficient clarity."); *Benning*, 391 F.3d at 1306; *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999) ("The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of 'discrimination' … ."). An official would "clearly understand that" certain policies would have to pass strict scrutiny, even if he could not tell which ones would. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

By contrast, the broad interpretation of the Tax Mandate does not provide a well-understood framework—as the Interim Final Rule shows. Assuming—as the Government wrongly claims, *see supra* Argument § I.A.1—that the regulation implements the text, the Rule contains a number of requirements that are not obvious from the text itself. For

example, while the regulation provides a *de minimis* exception, *see* 31 C.F.R. § 35.8(b)(2), the statute's text lacks even a hint that there is, or should be, such an exception, *see* 42 U.S.C. § 802(c)(2)(A). Nor is it obvious that the phrase "reduction in the net tax revenue" of a State, *id.*, permits States to treat spending cuts as offsetting tax cuts, *see* 31 C.F.R. § 35.8(b)(4). It is also non-obvious that the statutory text permits considering economic growth in determining violations, *see* 42 U.S.C. § 802(c)(2)(A), though the Interim Final Rule does, *see* 86 Fed. Reg. at 26,810.

There are further issues about the precise content of the broad interpretation of the Tax Mandate. *See* Appellant Br. 54–55. But the point is that those requirements—even assuming their consistency with the underlying law—are not clear from the Tax Mandate's text. And DOJ effectively admitted that Missouri's narrow interpretation is a reasonable alternative to Secretary Yellen's interpretation by repeatedly advancing it in the court below. *See*, *e.g.*, JA502 (saying the Government and Missouri "fundamentally agree" on the law's meaning). This effectively concedes that the broad interpretation is, at least, ambiguous.

Thus, under the broad interpretation of the Tax Mandate, "the Secretary could deem essentially *any* reduction in the rate of any one or more states—even if other tax rates were increased"—as violating the broad interpretation of the Tax Mandate. *Ohio v. Yellen (Ohio II)*, 2021 WL 2712220, at *15 (S.D. Ohio July 1, 2021), *appeal pending*, No. 21-3787 (6th Cir.). The statute does not provide a clear framework for evaluating any particular state policy, unlike RLUIPA. What it provides, under the broad interpretation, is a boundless grant of discretion to Treasury and Secretary Yellen to determine when there is a violation. *See id.* And so the broad interpretation is unconstitutionally ambiguous under the Spending Clause. *See id.*

Nor can the Interim Final Rule supply the requisite certainty—and the Government does not so argue. What the Government argues is that "Congress may rely on agencies to specify … details in implementing statutory conditions on the use of federal funds." Appellees Br. 21–22 (citing *Bennett*, 470 U.S. at 669). But whether "agency regulations interpreting grant conditions are entitled to deference," *see* Appellees Br. 22–24 (citing *Irving Independent School District v. Tatro*, 468 U.S. 883, 891–92 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *Baptist*

Memorial Hospital-Golden Triangle, Inc. v. Azar, 956 F.3d 689, 692–96 (5th Cir. 2020); *Children's Hospital Association of Texas v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019); *United States v. Miami University*, 294 F.3d 797, 814–15 (6th Cir. 2002); and *Gorrie v. Brown*, 809 F.2d 508, 516 (8th Cir. 1987), and discussing *Ohio II*), does not address whether regulations can cure an *unconstitutionally ambiguous* spending-clause condition.

Logically, they can't. In the delegation context, "[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems … internally contradictory." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). Likewise, it is internally contradictory to say that an agency—an executive entity—can fix and enforce an unconstitutional law. "An unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1879).

Case law confirms that logic. The Fourth Circuit rejected an argument for deference to an agency interpretation of ambiguous spending conditions, saying "[i]t is axiomatic that *statutory* ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the

manner asserted." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (emphasis added). The Fifth Circuit noted that "the ability to place conditions on federal grants ultimately comes from the Spending Clause, which empowers Congress, not the Executive," so allowing agencies to fix ambiguous spending conditions "would grant the Executive a power of the purse ... ." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021); *cf. Osseo Area Schs., Ind. Sch. Dist. No. 279 v. M.N.B. ex rel. J.B.*, 970 F.3d 917, 923 (8th Cir. 2020) (refusing to defer, or to find persuasive, informal agency guidance that failed to address the case's particular facts). Those cases are applicable here. *But see* Appellees Br. 24–25 (claiming the contrary).

Indeed, *Texas Education Agency* is particularly salient. As the Government notes, that case involved a statutory waiver of sovereign immunity. *See* Appellees Br. 25. That does not mean, as the Government suggests, *see id.*, that the case involves a unique spending clause analysis. *See* 992 F.3d at 361–62 (linking the analysis to general Spending Clause principles). But even if it did, it highlights the broad interpretation's constitutional deficiency. Spending conditions waive sovereign immunity only if the waiver is extremely clear. *See id.* at 359;

see also Doe v. Nebraska, 345 F.3d 593, 597–98 (8th Cir. 2003). There is a similar clear-statement rule for statutes purporting to limit a State's taxing power. *See ACF Indus.*, 510 U.S. at 345; *Chi. & Nw. Transp. Co. v. Webster Cty. Bd. of Supervisors*, 71 F.3d 265, 267 (8th Cir. 1995). So if agency regulations cannot provide the requisite clarity in the first instance, they cannot in the latter. Because the Tax Mandate does not clearly indicate that it extends more broadly than the deliberate use of ARPA funds to offset a tax cut, the broad interpretation (and the Interim Final Rule adopting it) is not a constitutional exercise of Congress's spending power. *See*, *e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

At the very least, even if "Congress may be able to delegate authority to an agency to supply the requisite clarity, Congress must provide for such delegation in clear and unambiguous terms." *Ohio II*, 2021 WL 2712220, at *15. The sensitive federalism issues involved in the Tax Mandate, not to mention the billions of dollars and economic import of limiting tax policy, demand no less. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (noting the need for clear delegations for issues "of deep 'economic and political significance'") (quoting *Util. Air Regulatory*

Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))); *cf. Bacon*, 457 U.S. at 140 n.8 (providing the agency's argument that the regulation "is authorized" by a statute stating that "a state plan … 'must provide such methods of administration as are found by the Secretary to be necessary for the proper and efficient operation of the plan'") (alterations in the quoted statute omitted).

There is no such clear statement as to the Tax Mandate. ARPA does, as the Government notes, *see* Appellees Br. 23, vest the Treasury Secretary with authority "to issue such regulations as may be necessary or appropriate to carry out" the law. 42 U.S.C. § 802(f). But that "general provision … does not suffice." *Ohio II*, 2021 WL 2712220, at *19. There was a similar provision in the statute the IRS used to promulgate the regulations at issue in *King*, *see* 26 U.S.C. § 36B(g) (2012), but the Supreme Court didn't even discuss it in refusing to defer to the agency's regulations implementing parts of the ACA "involving billions of dollars … and affecting the prices of health insurance for millions of people." *King*, 576 U.S. at 485–86.

The Tax Mandate's statutory context also militates against such a delegation. States could certify, receive ARPA funds, and be subject to the Tax Mandate as of the Act's effective date. *See* 42 U.S.C. § 802(d)(1). "That is strong evidence that Congress considered the terms of the deal to be complete as of that date." *Ohio II*, 2021 WL 2712220, at *20. Had Congress intended to delegate to Treasury the ability to establish something like the Interim Final Rule as a condition for funding, it would have likely delayed the effective date for the Tax Mandate to give the Treasury time to issue regulations and States time to evaluate them. *See id.* It thus makes more sense to assume Congress did not provide such a delegation.[1]

Thus, the broad interpretation of the Tax Mandate, especially when reading it as the Interim Final Rule does, fails to describe unambiguously the condition which it imposes. Nor may Treasury fix that defect through

[1] The Government notes that Missouri did not attack the Interim Final Rule in the district court, as the preliminary injunction briefing and hearing concluded before the rule issued, and the final judgment was entered within a few hours of the Government's filing its notice of the new Rule. Appellees Br. 25–26. The Government's observation is beside the point. The Interim Final Rule adopts the broad interpretation, so it is relevant and falls within the scope of Missouri's requested relief. Moreover, the Government has put the regulations directly at issue by claiming that they are a valid reading of the Tax Mandate.

the Interim Final Rule—both as a matter of law and because Congress did not delegate that power to Treasury.

* * *

In short, the broad interpretation of the Tax Mandate, as embodied in the Interim Final Rule, is unsupported by the text of the law and unconstitutional under the Tenth Amendment and the Spending Clause.[2]

II. The disagreement about the meaning of the Tax Mandate proves Missouri's standing.

As the foregoing shows, the dispute over the Tax Mandate's meaning is real. Missouri claims the Tax Mandate requires one thing; the Government says it requires another, more onerous thing. Moreover, as it alleged from the outset, Missouri is sure to be subject to the Tax Mandate because it has no choice but to accept the ARPA funds. *See*, *e.g.*, Appellant Br. 28; JA16 ¶ 42, 23 ¶ 72. Indeed, after filing its opening brief in this appeal, Missouri filed its certification and received ARPA funds. *See* Press Release, Scott Fitzpatrick Mo. State Treasurer, *Missouri Receives $1.3 Billion Payment of American Rescue Plan Funds* (Aug. 5, 2021), https://bit.ly/3vfivEV. Missouri is now subject to the Tax Mandate

[2] Which is another reason why Missouri's narrow interpretation is correct. *See*, *e.g.*, *Clark v. Martinez*, 543 U.S. 371, 379 (2005).

and the Interim Final Rule, including both the broad interpretation's intrusion on Missouri's sovereign authority over its taxing policy and the regulation's onerous accounting and reporting requirements. Missouri's Article III standing to challenge these intrusions and burdens is clear and manifest, and has been so from the beginning of this case.

Specifically, Missouri is a regulated party, and claims that its regulator is exceeding its statutory authority. That is a quintessential case or controversy. "When a plaintiff is the object of government action, 'there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it.'" *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774, 777 (8th Cir. 2019) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)).

The Government tacitly concedes that fact. It says, "Missouri failed to demonstrate an Article III controversy over the actual terms of the [Tax Mandate], as opposed to the untenable 'broad interpretation' that it claims to fear." Appellees Br. 8. Implicit is that Missouri would have standing to challenge the broad interpretation. And so the Government's claim that the Interim Final Rule rejects "the atextually narrow

interpretation [Missouri] prefers," *id.*, necessary concedes Missouri's standing.

If there is any doubt, consider the Government's arguments about Missouri's claimed injuries. The Government first addresses Missouri's standing to bring this case as a pre-enforcement suit. The Government's view, relying on the district court's decision in *Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021), is that Missouri lacks standing unless it "imminently intend[s] both to cut taxes and also to use [ARPA funds] … to offset any resulting reduction in net tax revenue." Appellees Br. 9.

To begin, the Government's argument fails to understand that Missouri sues to enjoin enforcement of the broad interpretation, which treats any tax revenue reduction as a violation of the Tax Mandate—as the Interim Final Rule does. *See*, *e.g.*, 86 Fed. Reg. 26,807. Missouri alleged that it was considering "tax-reduction policies that … could run afoul of the" broad interpretation. JA17 ¶ 48. And so it alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute." *Susan B. Anthony List v. Driehaus (SBA List)*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v.*

Farm Workers, 442 U.S. 289, 298 (1979)). Since Missouri's actions fall within the scope of the broad interpretation, there is also a credible threat of prosecution. *See Alexis Bailly Vineyard*, 931 F.3d at 778 ("[W]hen a course of action is within the plain text of a statute [here, a regulation], a 'credible threat of prosecution' exists."). Secretary Yellen's public embrace of the broad interpretation, *see*, *e.g.*, JA81; JA538; Treasury's adoption of that view in the Interim Final Rule; and the Government's switch here to defend that position all underscore that threat. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.").

At its core, the Government's argument is that standing requires Missouri to have violated the law. That is not, and never has been, the rule. "A plaintiff need not expose itself to liability to show an injury in fact, and the [law's] deterrent effect … is sufficient to establish an injury." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 720 (8th Cir. 2021) (citing *SBA List*, 573 U.S. at 158–59); *see also* Appellant Br. 36–

37.[3] As two courts have correctly recognized, that is sufficient to provide standing to challenge the Tax Mandate. *See Kentucky*, 2021 WL 4394249, at *3; *West Virginia v. U.S. Dep't of Treasury*, 2021 WL 2952863, at *7 (N.D. Ala. July 14, 2021).

The Government also does not seriously address the other concrete injuries Missouri suffered. *See* Appellant Br. 28–34.

First, the broad interpretation of the Tax Mandate injures Missouri's sovereignty. Contrary to what the Government says, Missouri is not seeking to adjudicate "abstract questions of political power or sovereignty." Appellees Br. 11 (quotation marks and alterations omitted) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 484–85 (1926)).[4] Missouri challenges the Government's interpretation of the Tax

[3] The Government characterizes the uncertainty Missouri's legislature faces as a separate from the pre-enforcement analysis. *See* Appellees Br. 10. Not so—that uncertainty is why parties may seek preenforcement review, and itself confers standing. *See*, *e.g.*, *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 129 (2007); *Iowa League of Cities v. EPA*, 711 F.3d 844, 868, 870 (8th Cir. 2013).

[4] The Government also says that there is no harm to Missouri's sovereignty because the Tax Mandate is a condition of funding "voluntarily assumed." Appellees Br. 10–11 (quoting another source). That wrongly conflates standing and the merits of whether the broad interpretation is a valid funding condition. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021).

Mandate, and, in the alternative, the statute's constitutionality. At stake are billions of dollars and Missouri's sovereign ability to set tax policy. *See* Appellant Br. 28–29. Specifically, the Government claims that Missouri needs to follow the federal government's dictated tax policy to receive or retain its ARPA funds.

That is far more than a "remote" and "abstract" "threat to federalism." *Texas v. United States*, 523 U.S. 296, 301, 302 (1998). It is an actual threat to Missouri's sovereign rights and entitlement to ARPA funds. Because the broad interpretation, as embodied in the Interim Final Rule, seeks to alter Missouri's "primary conduct," the State has standing. *Id.*[5]

Second, the broad interpretation harms Missouri's interest by changing the offer Congress provided and increasing the risk Missouri loses ARPA funds. *See* Appellant Br. 30–31, 33–34. The Government does not contest that those are valid interests. It does not even contest that, in the abstract, they are sufficient to confer standing. Rather, the

[5] Contrary to the Government's claim, Missouri is not trying to "circumvent Article III[]" by claiming the issue here is purely legal. Appellees Br. 11. As Missouri noted, that justifies directing the district court to enter the State's requested injunction. Appellant Br. 40–41.

Government says they do not confer standing "because [Missouri] did not challenge the regulations in this action and because the regulations simply track the statute." Appellees Br. 12.

The first objection is irrelevant because Missouri is challenging the broad interpretation of the Tax Mandate, and the broad interpretation is what alters the deal Congress provided in ARPA and increases the risk that the State may lose its funding. *See* Appellant Br. 31, 33–34. That the Interim Final Rule adopts the broad interpretation, *see supra* Argument § I, underlines Missouri's standing—it underscores that Missouri seeks effectual relief and is immediately injured by the broad interpretation. The second objection improperly conflates the merits with standing. *See Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021).

Indeed, two well-reasoned decisions have found that a State's interest in receiving a constitutional deal from Congress is a concrete interest that gives States standing to challenge spending clause violations. *See West Virginia*, 2021 WL 2952863, at *6–*7; *Ohio v. Yellen (Ohio I)*, 2021 WL 1903908, at *8 (S.D. Ohio May 12, 2021). Missouri's

challenge to the broad interpretation, which transforms a constitutional law into an unconstitutional one, is no different.

Third, as to compliance costs, the Government relies on ARPA's requirement that States provide reports of "all modifications to the State's ... tax revenue sources" to Treasury, 42 U.S.C. § 802(d)(2)(A). *See* Appellees Br. 12–13. But that provision cannot justify reports unrelated to tax revenue sources—like actual net tax revenue or spending cuts. 86 Fed. Reg. at 26,810. And if the Government meant the ARPA provisions requiring reports of "such other information as the Secretary may require," those reports—as even the Government's own case concedes—must relate to "ARPA's conditions." *Arizona*, 2021 WL 3089103, at *4. Because the Interim Final Rule and broad interpretation lack statutory support or rest on an unconstitutional statute, the extra compliance requirements imposed by the Interim Final Rule and broad interpretation harm Missouri and establish standing. Appellant Br. 32.

* * *

Therefore, Missouri has standing because the broad interpretation, which is what the Interim Final Rule embodies, inflicts five types of concrete, particularized injuries on the State. *See* Appellant Br. 28–39.

This case is also ripe—a fact the Government does not contest. *See* Appellant Br. 39–40. Nor could it—here, "ripeness coincides squarely with standing's injury in fact prong." *Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013) (quoting another source). There is an Article III case or controversy, and the district court erred in concluding otherwise.

III. The equities justify a preliminary injunction.

Finally, because Missouri has standing and is likely to succeed on its statutory and constitutional arguments, it is entitled to a preliminary injunction. The Government does not dispute that the balance of harms and public interest weigh in Missouri's favor. Rather, it claims only that Missouri failed to show it would suffer irreparable harm absent preliminary relief. Appellees Br. 14–16. Specifically, the Government argues that it is unlikely that Treasury will seek to recoup ARPA funds during this litigation and, in any event, recoupment is a reparable harm. *Id.* at 15. Further, the Government claims that Missouri will not suffer irreparable harm to its ability to set tax policy because the Tax Mandate "is not amendable to the broad interpretation that Missouri fears" (which is what this case is about, and so is a meritless objection) and because

preliminary relief would not provide complete clarity to the State's legislators. *Id.* at 16.

Those arguments, however, ignore that an improper reading of the Tax Mandate offends the Tenth Amendment and fundamental precepts of federalism. Appellant Br. 59–60. To allow the Government to intrude on those rights by requiring compliance with the broad interpretation "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)); *see also Kentucky*, 2021 WL 4394249, at *7 (noting the irreparable harm in forcing States "to accept [an] unconstitutional contract of adhesion that impedes their sovereign powers").

The Government's latter argument ignores that setting tax policy—a core aspect of Missouri's sovereignty—takes significant time. *See Ohio II*, 2021 WL 2712220, at *8. So while it is true that Missouri's lawmakers "will still have to take into consideration" the possibility that Missouri may ultimately lose on the merits, *West Virginia*, 2021 WL 2952863, at *9, the Interim Final Rule directly interferes with the Missouri General Assembly's ability to debate and enact complex tax policies by the end of

Missouri's short, five-month legislative session. *See* MO. CONST., Art. III, § 20. Preliminary relief will ensure that Missouri's lawmakers are not unlawfully deterred from enacting the State's preferred tax policy due to the imminent threat of recoupment of ARPA funds, which hangs over Missouri like "the sword of Damocles." *Iowa League of Cities*, 711 F.3d at 867.

CONCLUSION

For those reasons, Missouri respectfully requests that this Court reverse the district court and direct the district court to enter Missouri's requested preliminary injunction.

Dated: October 15, 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. 28 and 32, that it is written in Century Schoolbook 14-point font, and that it contains 6,454 words as determined by the word-count feature of Microsoft Word. The brief has been scanned for viruses and is virus-free.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ D. John Sauer