



**U.S. Department of Justice**  
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February 8, 2022

**Via CM/ECF**

Michael E. Gans, Clerk of Court  
U.S. Court of Appeals for the Eighth Circuit  
Thomas F. Eagleton Courthouse  
111 South 10th Street  
St. Louis, MO 63102

RE: *Missouri v. Yellen*, No. 21-2118 (argument set for February 15)

Dear Mr. Gans:

Missouri's letter relies on *West Virginia v. U.S. Department of the Treasury*, 2021 WL 5300944 (N.D. Ala. Nov. 15, 2021), *appeal pending*, No. 22-10168 (11th Cir.), which enjoined enforcement of the Offset Provision against the plaintiff States on the theory that it is "unconstitutionally ambiguous." *Id.* at \*14. That decision is incorrect on both jurisdiction and the merits.

As here, there is no live controversy over the Offset Provision in the *West Virginia* case. Governing precedent shows that disputes over the meaning (or ambiguity) of funding conditions are not adjudicated in the abstract; they are resolved if and when a concrete dispute arises over the condition's application. The clear-statement principle simply provides a rule of statutory construction for resolving such disputes. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006); *Osseo Area Sch. v. M.N.B.*, 970 F.3d 917 (8th Cir. 2020). Like Missouri, the *West Virginia* plaintiffs failed to show that a concrete dispute over the Offset Provision will ever arise. Their own evidence belied their assertion that the Offset Provision forbids tax cuts, which many plaintiff States enacted after the provision's enactment.

The *West Virginia* decision is also wrong on the merits. Every State that has a balanced-budget requirement—as Missouri and the *West Virginia* plaintiffs do—is familiar with the need to offset any negative revenue effects of a tax cut, either with increased revenue from economic growth, or with increases to other taxes,

or with spending cuts. The effect of the Offset Provision is simply that, when States determine how to balance their books, they may not use the new federal funds to do so; any negative revenue effect of a tax cut must be offset with state funds alone. That restriction on the use of federal funds is well within Congress's authority. Even assuming questions may arise about how it applies in particular instances, that is no basis to enjoin the condition under the demanding standard for a facial challenge. We are not aware of any other spending condition that has *ever* been held facially unconstitutional on ambiguity grounds.

Sincerely,

*/s/ Daniel Winik*

Daniel Winik

cc: All counsel (via CM/ECF)