IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE STATE OF MISSOURI, *Plaintiff*, v. JANET L. YELLEN, in her official capacity as Secretary of the Treasury; RICHARD K. DELMAR in his official capacity as acting inspector general of the Department of the Treasury; and U.S. DEPARTMENT OF THE TREASURY; *Defendants*.	No. 4:21-cv-00376-HEA

THE STATE OF MISSOURI'S MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

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INTRODUCTION

The States' authority to set their own tax policies is a core attribute of their sovereignty and a central principle of federalism. The U.S. Supreme Court has stated of the States' taxing power: "There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation." *Lane County v. Oregon*, 74 U.S. (7. Wall.) 71, 77 (1868). This lawsuit challenges a direct attack on the States' taxing authority by the federal government.

On March 11, 2021, President Biden signed the American Rescue Plan Act ("the Act") into law. The Act is a major COVID-19 economic-stimulus plan. It offers Missouri billions of dollars—one estimate is that Missouri will receive almost $2.8 billion. Those amounts represent about 14 percent of Missouri's general expenditures and, more importantly, are sorely needed as the State works through the COVID-19 pandemic. But the money comes with a catch.

The catch is the "Tax Mandate." The mandate appears in § 9901 of the Act, in a provision that amends Title VI of the Social Security Act to include a Section 602. Subsection (c)(2)(A) of new Section 602 contains the mandate and says:

> "A State . . . shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) ***to either directly or indirectly offset a reduction in the net tax revenue*** of such State . . . resulting from a change in law, regulation, or administration 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."

Compl. Ex. A, Doc. 1-1, at 4 (emphasis added) (reattached to Declaration of D. John Sauer ("Sauer Decl.") as Exhibit A) (hereinafter "Ex. A"). At first blush, one might think that the Tax Mandate arguably applies to *any* state tax policy that reduces tax revenue. Indeed, some of the Mandate's Senate sponsors appeared to endorse this interpretation to the New York Times shortly after the Tax Mandate was enacted. *See* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict*

State Tax Cuts, N.Y. TIMES (March 12, 2021), https://www.nytimes.com/2021/03/12/us/politics/biden-stimulus-state-tax-cuts.html (quoting Senators Manchin and Wyden as endorsing this broad interpretation of the Act). And the Secretary of the Treasury has carefully left open the possibility that she, too, will adopt this broad interpretation of the Act. *See* Compl. Ex. C, Doc. 1-3, at 1 (reattached as Sauer Decl., Ex. C) (hereinafter "Ex. C").

That is not, however, what the Act says. The plain meaning of the Tax Mandate's terms, its statutory context, and traditional canons of interpretation, show that it is quite narrow. Specifically, they show that far from applying to *any* State policy that results in a reduction of tax revenue, the Tax Mandate only applies—and, thus, only bars—a State from deliberately using the Act's COVID-19 to offset a specific tax cut, while leaving the States free to pursue tax-reduction policies for any other valid reason.

Indeed, that must be the case. The Constitution's Spending Clause empowers Congress to spend money in support of the "general Welfare." U.S. CONST. art. I, § 8, cl.1. But that power has limits, especially where, as here, Congress is setting conditions on funds it provides to States. One limit is that the spending condition must be unambiguous—a limit the Tax Mandate fails if it has a broader reach. Another is that the condition relate to the purpose for the spending—and, again, the Tax Mandate fails that condition if it reaches broadly. Further, Congress cannot use its spending power to circumvent the Tenth Amendment and coerce States to adopt federal rules and policies—and, again, the Tax Mandate does exactly that if it reaches more broadly than its terms allow. And the Tenth Amendment prohibits Congress from commandeering the States' taxing authority, which the Tax Mandate will also do if broadly interpreted.

Missouri therefore requests that the Court preliminarily enjoin the defendants from enforcing any interpretation of the Tax Mandate broader than its narrow, correct, and constitutional interpretation.

STATEMENT OF FACTS

A. COVID-19's effect on Missouri

To protect themselves and their loved ones from COVID-19, Missourians took precautions, including staying home and limiting many economic activities. But that decision had adverse effects on Missouri's economy. Businesses closed or drastically reduced operations. People lost jobs or worked reduced hours for less pay.

Those adverse effects impacted Missouri's general revenues. Missouri's revenue collection dropped 32 percent in April and June 2020, which was when Missouri's COVID-19 lockdown orders were in effect, compared to 2019. *See Revenue Information*, Office of Admin., https://oa.mo.gov/budget-planning/revenue-information (last visited Apr. 1, 2021). Those shortfalls required significant spending cuts. For example, due to anticipated revenue declines, Missouri's governor restricted over $435 million of expenditures. *See* Press Release, Office of Governor Michael L. Parson, Governor Parson Announces $209 Million in Additional Expenditure Restrictions (June 1, 2020) (discussing the restrictions the pandemic forced the governor to make), https://governor.mo.gov/press-releases/archive/governor-parson-announces-209-million-additional-expenditure-restrictions. Yet at the same time, demand for state services increased. For example, almost 200,000 Missourians have enrolled in the State's Medicaid plan since last February. *See Annual Summaries for Enrollment Data*, Mo. Dep't of Soc. Servs., https://dss.mo.gov/mhd/mc/pages/enroll.htm (last visited Apr. 1, 2021). And "[d]uring fiscal year 2020 [July 1, 2019, to June 30, 2020], actual payouts to individuals receiving regular unemployment benefits increased by 255.4 thousand individuals, or 348.2%." STATE OF MISSOURI, COMPREHENSIVE

ANNUAL FINANCIAL REPORT: FISCAL YEAR ENDED JUNE 30, 2020, at 9 (2020) (hereinafter "MO. 2020 CAFR") (Sauer Decl., Ex. L).

B. The American Rescue Plan Act and the Tax Mandate

In March 2021, Congress enacted the Act as an economic stimulus package in response to the COVID-19 pandemic. The Act provides, among other things, $195.3 billion in aid to the States and the District of Columbia. *See* Ex. A, at 2 (Pub. L. No. 117-2, § 9901 (adding § 602(b)(3)(A)to the Social Security Act 42 U.S.C. § 801 *et seq.*)).

Under the Act, Missouri will receive an amount based on its unemployed population from October through December of 2020. *See* Ex. A, at 2 (Pub. L. No. 117-2, § 9901 (adding § 602(b)(3)(B)(iii))). That number will run into the billions of dollars; one estimate has it at almost $2.8 billion. Jared Walczak, *State Aid in American Rescue Pan Act is 116 Times States' Revenue Losses*, Tax Foundation (Mar. 3, 2021), https://taxfoundation.org/state-and-local-aid-american-rescue-plan/. Last year, Missouri spent roughly $20 billion out of its general fund, which is the general operating fund of the state. *See*, *e.g.*, MO. 2020 CAFR, Ex. L, at 19. So if the estimate is right, the Act will provide Missouri with funds equivalent to about 14 percent of its general operating expenditures.

Missouri, however, is not free to use funds it receives through the Act on anything. First, there are four categories of permissible uses of Act funds: (1) responding to COVID-19 or mitigating negative economic effects stemming from COVID-19 responses; (2) paying essential workers a premium; (3) paying for government services that received cutbacks due to lower revenue; and (4) making "necessary investments in water, sewer, or broadband infrastructure." Ex. A, at 4 (Pub. L. No. 117-2, § 9901 (adding § 602(c)(1))). The Act follows that with two further restrictions: States cannot deposit Act funds into "any pension fund," and the Tax Mandate at issue here. *Id.* (adding § 602(c)(2)).

If a State violates the Tax Mandate, the Secretary of the Treasury is empowered to recoup the lesser of: (1) the amount of the applicable reduction to net tax revenue; or (2) the amount of funds the State received from the Federal Government. *See id.* at 5 (adding § 602(e)). The statute does not entitle the States to any process before the money is reclaimed.

C. The Department of the Treasury's Refusal to Interpret the Tax Mandate

Due to the importance of the funds to their public fiscs, twenty-one States, including Missouri, sent a letter to Secretary Yellen asking her to confirm that Treasury will hew to the correct and narrow meaning of the Tax Mandate—that it "merely prohibit[s] States from *expressly* taking COVID-19 relief funds and rolling them directly into a tax cut of a similar amount"—and not read it as "prohibit[ing] tax cuts or relief of any stripe, even if wholly unrelated to and independent of the availability of relief funds." Doc. 1-2, Compl. Ex. B, at 2 (reattached as Sauer Decl., Ex. B).

In a response letter of March 23, 2021, Secretary Yellen declined to endorse this narrow reading. At first, she said that "[n]othing in the Act prevents States from enacting a broad variety of tax cuts." Sauer Decl., Ex. C, at 1. But then she suggested that the Tax Mandate requires States to ensure that any tax-reduction policy is *revenue-neutral* by "replacing the lost revenue through other means," such as corresponding tax *increases*. *See id.* ("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.") (emphasis added). Secretary Yellen stated that "Treasury is crafting further guidance . . . that will provided additional information about how this provision will be administered." *See id.* at 2. But she did not provide any further clarity, and she declined to provide any timeline for future guidance.

In the meantime, the Missouri legislature is currently in session that expires on May 28, 2021, and it is currently deliberating about several significant tax-reduction proposals. These proposals include:

- SB 153, which would reduce Missouri's individual income tax in phases based on net general revenue meeting certain revenue triggers, *see* Sauer Decl., Ex. D;
- SB 245, which would increase the rate of phased reductions to Missouri's individual income tax based on preexisting revenue triggers, *see* Sauer Decl., Ex. E;
- SB 313, which would expand phased reductions to Missouri's individual income tax based on net general revenue collections, *see* Sauer Decl., Ex. F;
- SB 393, which would phase out Missouri's corporate income tax over two years, *see* Sauer Decl., Ex. G;
- SB 24, which would provide an ethanol fuel tax credit for retail dealers selling higher ethanol blend, and would reduce the personal property tax assessment rate over time, *see* Sauer Decl., Ex. H;
- SB 627, which would reduce the top individual income tax rate in Missouri, *see* Sauer Decl., Ex. I;
- HB 497, which would accelerate revenue-triggered reductions in the individual income tax rates in Missouri, *see* Sauer Decl., Ex. J;
- HB 1292, which would eliminate individual income taxes for persons under 26 years of age, *see* Sauer Decl., Ex. K.

None of those tax-reduction proposals purports to deliberately counterbalance or offset any reduction in tax revenues with COVID-19 relief funds; on the contrary, all were filed before the Tax Mandate was signed into law on March 11, 2021. *See* Sauer Decl. ¶¶ 5–12. Yet the Tax

Mandate generates confusion and uncertainty about the legal and fiscal effects of such proposals by creating the specter that Treasury could withdraw funds if any such proposal is passed.

LEGAL STANDARD

Courts consider four factors when deciding whether to issue a preliminary injunction: "(1) the threat of irreparable harm to the movant, (2) the balance between that harm and the injury that granting the injunction would inflict on other interested parties, (3) the probability that the movant will succeed on the merits, and (4) whether the injunction is in the public interest." *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013). The most important factor is the likelihood of success. *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam). Because Missouri challenges the "implementation of a duly enacted . . . statute," the state must show it is "likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–33 & n.6 (8th Cir. 2008) (en banc).

ARGUMENT

I. Missouri Is Likely to Prevail on the Merits of its Statutory and Constitutional Claims.

First, the most important factor favors Missouri because Missouri is highly likely to succeed on the merits of its claims. The narrow interpretation of the Tax Mandate, which respects Missouri's sovereignty, is the better interpretation for at least seven reasons. *See infra* Part I.A. And if the Tax Mandate is interpreted broadly, it is unconstitutional under the Spending Clause and the Tenth Amendment, for at least four independently fatal reasons. *See infra* Part I.B.

A. Missouri is likely to prevail on its statutory claim because, properly understood, the Tax Mandate only prohibits a state legislature from deliberately and expressly using COVID-19 relief funds to counterbalance a specific tax cut.

First, Missouri is likely to prevail on its statutory-interpretation claim in Count One of the Complaint, which contends that the Tax Mandate should be narrowly interpreted to apply only to cases where the state legislature deliberately and expressly uses COVID-19 relief funds to offset

a specific revenue reduction from a tax cut. Properly understood, the Tax Mandate leaves the States free to pursue tax-reduction policies for any other lawful reason. This narrow interpretation is consistent with the plain meaning of the Tax Mandate, the context and structure of the Act, the proper scope of Congress's spending power, well-established principles of interpretation, the Supreme Court's clear-statement rules, and basic principles of federalism.

1. The plain meaning of "offset" supports the narrow interpretation of the Tax Mandate.

The first step in determining what the Tax Mandate means is considering its text and context. *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 Act funds "to either directly or indirectly ***offset*** a reduction in the net tax revenues of such State." Ex. A, at 4 (emphasis added) (Pub. L. No. 117-2, § 9901 (adding § 602(c)(2)(A))). The key word is "offset" which, 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"). What the Tax Mandate therefore prohibits is *counterbalancing* (or calculating against or compensating for) specific state tax cuts with Act funds.

The Tax Mandate, therefore, requires a *deliberate* act by the State to "offset" a revenue reduction from tax relief with COVID-19 funds. *See id.* One does not, for example, inadvertently or negligently "counterbalance" or "counteract" something—one does so deliberately. So where the state legislature is not deliberately "counterbalancing" or "compensating for" a specific tax-reduction policy through its use of Act funds, the Tax Mandate does not, by its own terms, apply. Thus, the Tax Mandate leaves States free to pursue tax-reduction policies for any lawful reason,

provided they are not deliberately using the COVID-19 revenues to replace revenues lost from a specific tax-reduction policy.

That conclusion does not change just because the Tax Mandate modifies "offset" with "directly or indirectly" because the verb ("offset") still defines the scope of the prohibition. The verb "offset" entails a deliberate action of counterbalancing, and counterbalancing still entails deliberate action when it is done "indirectly." The Supreme Court addressed a similar issue in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). There, the Supreme Court refused to read section 10(b) of the Securities Exchange of 1934, which makes it "unlawful for any person, *directly or indirectly*" to commit securities fraud, as covering aiders-and-abettors of security fraud. *Id.* at 177–78. The Court reasoned that "aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity . . . ." *Id.* at 176. So too here—"indirectly" modifies "offset," and thus, while it may cover accounting tricks that conceal a deliberate application of Act funds to a tax cut, it cannot extend beyond deliberate application of Act funds to counterbalance or compensate for a decrease in tax revenue. To put it another way, just because a state cut taxes and received Act funds does not mean that the State "indirectly" offset the tax cut with Act funds—there must be something more. *See also Janus Capital Grp, Inc. v. First Derivative Traders*, 564 U.S. 135, 147 n.11 (2011) (concluding that "indirectly" "merely clarifies" the scope of a prohibited act).

2. The statutory context supports the narrow interpretation of the Tax Mandate.

The Tax Mandate's immediate statutory context also strongly supports the narrow interpretation of the Tax Mandate. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058–60 (2019) (looking to neighboring provisions of a law to interpret it). The Act dictates how States may apply Act funds in new § 602(c) in three paragraphs. *See* Ex. A, at 4 (Pub. L. No. 117-2,

§ 9901). The first paragraph (new § 602(c)(1)) restricts States to applying, at their discretion, funds to four permissible categories of uses. New § 602(c)(1) is also "[s]ubject to paragraph (2), and except as provided in paragraph (3)"—the next two paragraphs in new § 602(c). The second paragraph (new § 602(c)(2)) contains two "further" restrictions: barring depositing Act funds into "any pension fund," and the Tax Mandate. The third paragraph (new § 602(c)(3)) allows States to transfers funds it receives to certain, specified entities and is not relevant here.

That structure shows that the Tax Mandate in § 602(c)(2) only applies to uses of funds that otherwise fall within the four permissible categories of uses in new § 602(c)(1). New § 602(c)(1), while listing how State may use Act funds, is also a prohibition. It requires that States "shall only use the funds" the Act provides for expenditures within those four categories; by implication, therefore, it bars expenditures that fall outside those categories. That prohibition would include using Act funds to offset tax cuts that do not fall within one of the listed categories. As to those offset, then, the Tax Mandate is superfluous; but as to revenue offsets that new § 602(c)(1) would allow, it has independent force. So the better reading of the law is that the Tax Mandate covers *only* those offsets that new § 602(c)(1) would otherwise permit.

That Congress intended that conclusion follows from the Act's description of the Tax Mandate as a "[f]urther restriction"—as opposed to just a "restriction"—on how States use Act funds. *See* Ex. A, at 4 (Pub. L. No. 117-2, § 9901 (adding § 602(c)(2))). It is also consistent with new § 602(c)(1)'s statement that it is "[s]ubject to" the Tax Mandate. *Id.* Those two contextual features of the Act, as well as the fact that the Tax Mandate is contained in the same section as § 602(c)(1) but follows it, establish that the Mandate applies only to those offsets that new § 602(c)(1) would otherwise permit. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW:

THE INTERPRETATION OF LEGAL TEXTS 167 (2012) (the whole-text canon requires considering a text's "physical and logical relation" to "the entire text").

And this conclusion underlines that the best reading of "offset" requires that a State choose deliberately to offset a tax reduction with Act funds. The Tax Mandate applies if a State attempts to use *Act* funds. *See* Ex. A, at 4 (Pub. L. No. 117-2, § 9901 (adding § 602(c)(2)(A)) (saying that States "shall not use the *funds provided under this section*" to offset a reduction in net revenue) (emphasis added). But the only uses a State can make of Act funds are by allocating them among the four categories in new § 602(c)(1). That requires a deliberate choice. And because the Tax Mandate applies only within those four contexts, what it means is that a State cannot make a deliberate choice—*i.e.*, it cannot choose what would, in the absence of the mandate, be a permissible use of the funds—to apply Act funds to offset a revenue reduction.

Thus, the text of the Tax Mandate and its statutory context establish that the mandate applies only where a State has deliberately applied Act funds to offset a specific policy that resulted in a decrease in tax revenue. Specifically, it only applies if a State chooses to apply Act funds to a particular category of permissible uses that include a tax cut. And, equally importantly, it *does not* apply to any other State tax policy decision.

3. The narrow interpretation of the Tax Mandate is consistent with the scope of Congress's power under the Spending Clause.

Third, the narrow interpretation is the better reading of the Tax Mandate because it is consistent with the scope of Congress's power under the Spending Clause. Under the Spending Clause, Congress may "attach conditions on the receipt of federal funds," and may "condition[] receipt of federal money upon compliance by the recipient with federal statutory and administrative directives." *Van Wyhe v. Reisch*, 581 F.3d 639, 649 (8th Cir. 2009) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)) (alterations omitted). But when Congress does so, the

"conditions on federal funds must be related to the federal interest in particular national projects or programs." *Id.* Here, the "national project[] or program[]," *id.*, is a COVID-19 relief package. It is within the scope of Congress's authority under the Spending Clause to define the purposes for which the federal funds in its spending program may be used, and that arguably includes the authority to prohibit them from being used solely to finance tax relief. *See id.* But it goes way beyond the scope of the "federal interest" in the COVID-19 relief package to dictate and to micromanage unrelated state tax policy for possibly four years. *See* Ex. A, at 4–5 (Pub. L. No. 117-2, § 9901 (adding § 602(c)(2)(A), (g)) (defining the "covered period" when the Tax Mandate is in force). Accordingly, the narrow interpretation of the Tax Mandate is consistent with Congress's authority under the Spending Clause, while the broader interpretation is not.

4. The narrow interpretation of the Tax Mandate is required by the Supreme Court's clear-statement rules.

The narrow interpretation of the Tax Mandate also draws support from two clear-statement rules adopted by the Supreme Court. First, a broader interpretation would disrupt the traditional federal-state balance absent a clear statement that that was Congress's intent. "Among the background principles of construction . . . are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857–58 (2014). To protect that relationship, "'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.'" *Id.* at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting another source)). "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also id.* ("[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."). "In

traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*

Thus, in *Bond*, the Court concluded that a provision of the Chemical Weapons Convention Implementation Act defining "chemical weapon" "did not reach a wife's attempt to injure her husband's lover" with chemical irritants. *United States v. Robinson*, 781 F.3d 453, 464 (8th Cir. 2015). The Supreme Court conceded that the statute defined the term "extremely broadly" so that it arguably would reach "the simplest assaults" and "intrude upon the police power of the States . . . ." *Bond*, 572 U.S. at 860, 863. But it refused to adopt that reading since doing so "would fundamentally upset the Constitution's balance between national and local power" without "a clear indication that Congress meant to reach purely local crimes . . . ." *Id.* at 860, 866.

If given a broad interpretation, the Tax Mandate would suffer from the same deficiencies. *See Bond*, 572 U.S. at 858 ("We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility."). And to the extent the claim is the Tax Mandate, by its terms, allows the federal government to micromanage state tax policy through 2024, that would mean the statute "displace[s] the public policy of [the States], enacted in [their] capacity as sovereign . . . ." *Bond*, 572 U.S. at 865 (internal quotations omitted). And it would do so "[a]bsent a clear statement of that purpose." *Id.* at 866. And thus this Court should "not presume Congress to have authorized such a stark intrusion into traditional state authority." *Id.*

Second, the Supreme Court requires a clear statement before presuming that Congress has invoked the outer limits of one of its enumerated powers. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the Supreme Court "expect[s] a clear

indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). The same reasoning applies to the interpretation of statutes: "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. Here, the broad interpretation of the Tax Mandate would "invoke[] the outer limits of Congress' power" under the Spending Clause, *SWANCC*, 531 U.S. at 172—indeed, it would exceed those limits. *See infra* Part I.B. Accordingly, the Court would violate this well-established principle of interpretation if it adopted a broad interpretation of the Tax Mandate that would, at very least, test the limits of Congress's enumerated power, when a more reasonable interpretation is readily available.

5. The canon of constitutional avoidance supports the narrow interpretation.

Furthermore, "[a]nother rule of statutory construction . . . is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). "This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate." *Id.* (citation omitted). Under longstanding Supreme Court case law, "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts

will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.*; *see also*, *e.g.*, SCALIA & GARNER, *supra*, at 66 ("The presumption of validity disfavors interpretations . . . that would cause a statute to be unconstitutional.").

This case is a textbook example for application of the canon of constitutional avoidance. The broad interpretation of the Tax Mandate would "raise serious constitutional problems." *Edward J. DeBartolo*, 485 U.S. at 575. As discussed below in Part I.B, it would violate the Constitution in at least four ways: (1) it would impose ambiguous conditions on the use of federal relief funds, in violation of the Spending Clause; (2) it would impose conditions on federal spending that are unrelated to the purposes of the federal program at issue, namely the Act's COVID-19-related economic stimulus, in violation of the Spending Clause; (3) it would violate the Tenth Amendment by commandeering the States' taxing authority; and (4) it would impermissibly coerce the States to relinquish a core aspect of their sovereignty, in violation of the Spending Clause. *See infra* Part I.B. The Court should construe the Tax Mandate narrowly to avoid those serious constitutional problems.

6. The narrow interpretation of the Tax Mandate is consistent with basic principles of federalism and the States' traditional authority over their own tax policies.

Moreover, the narrow interpretation of the Tax Mandate is preferable because it is consistent with basic principles of federalism and respects the States' traditional authority over their own tax policies. The U.S. Supreme Court has stated of the States' taxing power: "The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people

expressed in the State constitutions or through [state] elections . . . . There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 77 (1868). The taxing power of the States is thus a core attribute of their sovereignty and a central principle of our system of federalism. *See id.* "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 v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819). And so the people "prescribe[d] no limits to the exercise of [the taxing power], resting confidently on the interest of the legislator, and on the influence of their representative, to guard them against its abuse." *Id.* The narrow interpretation of the Tax Mandate is consistent with this central aspect of our system of federalism. By contrast, if the Court were to adopt the broad interpretation, it would impute to the federal government an attempt to wrest away from the States a core aspect of their sovereignty. The narrow interpretation is preferable because it accords with basic principles of federalism and avoids needless conflict between the federal government and the States.

7. Secretary Yellen lacks authority to change the meaning of the Tax Mandate through agency interpretation.

For the six reasons discussed above, the proper interpretation of the Tax Mandate is that it applies only where a State deliberately uses funds to pay for a policy change reducing tax revenue. And Secretary Yellen cannot change that fact via administrative interpretation. *See*, *e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) (An agency's interpretive power, "does not include a power to revise clear statutory terms . . . .").

If Secretary Yellen contends that she has authority to clarify the scope of the Tax Mandate because it is ambiguous, *see Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

843 (1984),[1] that would not save the Tax Mandate. Secretary Yellen could not adopt an interpretation of the Tax Mandate that would apply it to state tax policy that was unrelated to a State's deliberate use of Act funds to offset a specific tax reduction. *Chevron* applies when the statute is ambiguous and authorizes a federal agency to fill in the ambiguity. *See id.* But, as discussed below, *infra* Part I.B.1, an ambiguous condition on federal spending violates the Spending Clause, so any contention that the Tax Mandate is subject to agency interpretation because it is ambiguous effectively concedes that the Tax Mandate is unconstitutional.

Further, just as with statutes, the U.S. Supreme Court held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the Supreme Court "expect[s] a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. And, as detailed above, there is no such clear statement here. To the contrary, the Tax Mandate's text and context clearly indicate that the law sweeps no broader than where a State deliberately uses Act funds to offset a policy change reducing

[1] *Chevron* does not apply here. *See*, *e.g.*, *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so."). But even if it did, *Chevron* should be overruled by the Supreme Court. "*Chevron* compels judges to abdicate the judicial power without constitutional sanction," "gives federal agencies unconstitutional power," "is likely contrary to the APA," and lacks any special, historic justification and should be overruled. *Baldwin v. United States*, 140 S. Ct. 690, 691–93 (2020) (Thomas, J., dissenting from denial of certiorari); *see also Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 780–81 (5th Cir. 2018) (Ho, J., concurring) (gathering examples of justices questioning *Chevron* and noting it unconstitutionally "collaps[es] three separate government functions into a single entity"). The State of Missouri acknowledges that the Supreme Court has the sole authority to overrule its own precedents, but if *Chevron* is deemed to apply here, Missouri contends and explicitly preserves the argument that *Chevron* should be overruled.

tax revenues. And, for that reason, the Court should reject any broader *agency* interpretation as well.

B. Missouri is likely to prevail on its constitutional challenge to the Tax Mandate if the broad interpretation is adopted.

In the alternative, if the Court were to adopt the broad interpretation of the Tax Mandate, Missouri would then be likely to prevail on its constitutional challenge to the Tax Mandate in Count Two of the Complaint. If it is broadly interpreted, the Tax Mandate is unconstitutional for at least four reasons.

1. If the narrow interpretation is not accepted, the Tax Mandate is at best ambiguous, and thus it violates the Spending Clause.

First, under a broader interpretation, the Tax Mandate is at best ambiguous. Under the Spending Clause, Congress cannot impose ambiguous conditions on the States through spending legislation—those conditions must be clear. Accordingly, if broadly interpreted, the Tax Mandate is unconstitutional.

If the narrow and precise interpretation of the Tax Mandate set forth above is rejected, then the Tax Mandate is necessarily vague, overbroad, and ambiguous on any broader interpretation. The Tax Mandate states that: "A State . . . shall not use the funds provided under this section or transferred pursuant to section 603(c)(4) ***to either directly or indirectly offset a reduction in the net tax revenue*** of such State . . . resulting from a change in law, regulation, or administration 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." Sauer Decl., Ex. A, at 4 (Pub. L. No. 117-2, § 9901 (adding § 602(c)(2)(A))) (emphasis added). If it is not limited to specific, deliberate counterbalancing of one set of funds against

another, the operative phrase, "either directly or indirectly offset" has no clear limiting principle. *Id.*

Consider the range of possibilities under the broader reading of the Tax Mandate. For example, if the Tax Mandate did not apply to every change to tax policy that resulted in a decrease in tax revenue, what would it mean for Act funds to "indirectly offset" a change in net tax revenue? There is no clear answer. And how does one know whether a change to tax policy causes a net reduction in revenue? Is the change measured prospectively or retrospectively? Would, for example, the Tax Mandate apply if a reduction in tax rates stimulated economic growth such that revenues are higher with the tax cut than without, or does it not account for the positive economic effect of tax cuts? The Tax Mandate does not say.

And neither does Secretary Yellen. Her response to the State's request that she endorse the narrow—and proper—reading of the Tax Mandate highlights how ambiguous a broad reading can be. She says, for example, that "[n]othing in the Act prevents States from enacting a broad variety of tax cuts." Ex. C, at 1. But "broad" is indeterminate; that sentence is consistent with the Act also *prohibiting* an equally broad variety of tax cuts. So too is Secretary Yellen's suggestion that the Tax Mandate requires States to institute only *revenue-neutral* tax policy changes—saying that, as an example, the Act would not bar States from cutting taxes and "replacing lost revenue through other means . . . ." *Id.* That is a subtle shift away from her statement that the Tax Mandate allows States to cut a broad variety of taxes, and it is also unhelpful as she provides it as just one example of an allowable act. At worst, the statement implies that the States *must* adopt only revenue-neutral tax policies for the next four years, by offsetting any tax reductions with corresponding tax *increases*. Ultimately, Secretary Yellen's response kicks the interpretive can down the road, saying that the Department of the Treasury will "provide this guidance before a

State must submit a certification under § 602(d)(1)." *Id.* at 2. Thus, far from providing clarity, her letter highlights the wide swings in interpretation that a broad reading of the Tax Mandate would engender—and the impermissible ambiguity of such a reading. *See Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 583 (2012) (op. of Roberts, C.J.) ("[A] shift in kind, not merely degree" fail to give States notice of the conditions of federal funding.).

Such ambiguity in the provision of federal funds is unconstitutional under the Spending Clause. As the Eighth Circuit has stated, "legislation is a permissible use of Congress's spending power" only if "conditions on the state's receipt of federal funds [are] set out unambiguously so that the state's participation is the result of a knowing and informed choice." *Van Wyhe*, 581 F.3d at 650 (citing *Dole*, 483 U.S. at 207–11). The Supreme Court emphasized this requirement in *South Dakota v. Dole*: "we have required that if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." 483 U.S. at 207. As the Supreme Court stated in another case, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*." *Id.* (emphasis added). On any broad interpretation, the Tax Mandate fails this test.

2. Under the broad reading, the Tax Mandate is not "related to the federal interest" in COVID-19-related economic stimulus.

Furthermore, a broad reading of the Tax Mandate would mean that it does not relate to the federal purpose behind the Act: providing fiscal stimulus in the wake of the COVID-19-driven economic downturn. As the Eighth Circuit held in *Van Wyhe*, in order to be valid under the Spending Clause, "conditions on federal funds must be *related to the federal interest in particular national projects or programs*"—here, the COVID-19 economic stimulus policy of the Act. *Van Wyhe*, 581 F.3d at 650 (emphasis added). If the Tax Mandate is interpreted broadly to prohibit all or many state tax-reduction proposals that are unrelated to the use of federal stimulus funds, then no such relation exists. Tax relief is, after all, a well-established form of economic stimulus—a fact that the Act recognizes since it *does not* bar local governments from cutting taxes using the funds they receive under § 9901. *See* Sauer Decl., Ex. A, at 9–10 (Pub. L. No. 117-2, § 9901 (adding § 603(c))). Tax relief stimulates economic growth and encourages small businesses that have suffered particularly under pandemic-related shutdown orders. Therefore, a sweeping *prohibition* on a common form of post-COVID-19 economic stimulus by the States—state-level tax relief—cannot plausibly be "related to" a congressional law whose very *purpose* is post-COVID-19 economic stimulus. The broad interpretation would render the Act's Tax Mandate condition on stimulus funds, not just *unrelated* to the federal interest or programs established by the Act, *Van Wyhe*, 581 F.3d at 650, but directly at loggerheads with the Act's purposes. This would violate the Spending Clause. *See Dole*, 483 U.S. at 207 (holding that "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs") (quotation marks omitted); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (holding that Spending Clause conditions must be "reasonably related to the federal interest in particular national projects or programs").

3. On the broad reading, the Tax Mandate violates the Tenth Amendment's anti-commandeering principle.

A broad interpretation of the Tax Mandate is also unconstitutional for two additional, closely related reasons: it violates the Tenth Amendment by seeking to commandeer state taxing authority, and it does so through the imposition of a coercive condition on federal spending that violates the Spending Clause.

First, the Tenth Amendment prohibits Congress from coopting or "commandeering" state taxing authority in this fashion. "The Constitution confers on Congress . . . only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. 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 of the two spheres 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"—not concentration—"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*, 501 U.S. at 458). It also "promotes political accountability." *Murphy*, 138 S. Ct. at 1477. When "a State imposes regulations only because it has been commanded to do so by Congress," voters are unable to accurately determine whom to credit or blame. *Id*. Prohibiting such commandeering aids citizens in holding the right officials accountable.

That is especially true when it comes to taxes. If the federal government could order State governments to raise taxes, there would be an accountability problem. Taxes are generally unpopular. So if Congress could mandate that States raise taxes, "[m]embers of Congress [could]

take credit for 'solving' [the] problem[] without having to ask their constituents to pay for the solution[] with higher federal taxes." *Printz*, 521 U.S. at 960.

But the accountability problem is even greater because, when it comes to taxes, political accountability is a major safeguard against abuse of governmental power. "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 people "prescribe[d] no limits to the exercise of [the taxing power], resting confidently on the interest of the legislator, and on the influence of their representative, to guard them against its abuse." *Id.* But if the federal government could direct a state's tax policy, that check would be gone. Instead of the people of a state overseeing, and thus controlling, how their representatives set taxes, a third party, significantly less accountable to them, would have that power. So the Framers wisely did not allow the federal government to do 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). Accordingly, Congress lacks authority to direct state governments not to adopt tax-cutting measures. But that is what the broad interpretation of the Tax Mandate would require, at least to some significant degree. Accordingly, the broad interpretation of the Tax Mandate violates the Tenth Amendment.

4. On the broad interpretation, the Tax Mandate is unconstitutionally coercive under the Spending Clause.

Moreover, the Tax Mandate's violation of the anti-commandeering principle is not saved by the fact that it imposes its mandate indirectly, through the threatened loss of billions of dollars of federal COVID-19 relief funds. As just discussed, Congress cannot lawfully commandeer state tax policy. Nor can it do it indirectly by using its spending power. *See NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.) (holding that the anti-commandeering principle applies "whether Congress

directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own"). As the Eighth Circuit has held, for a condition on federal spending to be valid under the Spending Clause, "the circumstances must not be so coercive that 'pressure turns into compulsion.'" *Van Wyhe*, 581 F.3d at 650 (quoting *Dole*, 483 U.S. at 211). On its broad interpretation, the Tax Mandate is unconstitutionally coercive.

To be sure, the Spending Clause permits "Congress [to] attach conditions on the receipt of federal funds" that encourage States to do things that Congress could not command them to do. *E.g.*, *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) (quoting *Dole*, 483 U.S. at 206). But, setting aside the question whether Congress could ever validly "encourage" States to give up a core aspect of their sovereignty, "encourage" means exactly that. States must have "a legitimate choice whether to accept the federal conditions in exchange for federal funds." *NFIB*, 567 U.S. at 578 (op. of Roberts, C.J.). And there comes a point when the encouragement of federal funding "turns into compulsion." *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)); *see also Van Wyhe*, 581 F.3d at 650. That point occurs "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 (op. of Roberts, C.J.). Indeed, courts must vigilantly police that line. "[B]ecause Congress can use" its spending power "to implement federal policy it could not impose directly under its enumerated power," the "danger" that it may try to use it to coerce States to do its bidding "is heightened." *NFIB*, 567 U.S. at 578.

NFIB provides a case in point. The Affordable Care Act allowed the Secretary of Health and Human Services to withhold Medicaid funds to States whose Medicaid plans did not "comply

with the Act's requirements" by expanding Medicaid coverage. *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.); *see* 42 U.S.C. § 1396c (2012). But the withholding of funds would have major effects on state budgets: "Medicaid spending account[ed] for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.). So if a State failed to abide by the Act's terms, it could have lost at least 10 percent of its total budget. *Id*. And that, the Chief Justice explained, "is economic dragooning that leaves the States with no real option but to acquiesce" to Congress's demands. *Id*. at 582 (op. of Roberts, C.J.); *accord id*. at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Far from being "mild encouragement," the condition was "a gun to the head." *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.). *Contrast Dole*, 483 U.S. at 211 (loss of 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) (loss of 60 percent of Nebraska's budget for a single department, the Department of Social Services, was not coercive); *Jim C.*, 235 F.3d at 1082 (loss of 12 percent of state education budget is not coercive).

The broad interpretation of the Tax Mandate is no different. Under the Act, the Secretary of the Treasury can recoup funds a State used to offset a reduction in tax revenue, up to the entire amount of federal relief funds received. *See* Ex. A, at 5 (Pub. L. No. 117-2, § 9901 (adding § 602(e))). Thus, a broad interpretation of the Tax Mandate would mean that States were risking Act funds every time they reduced revenue even if they never used Act funds to offset any tax cut. To avoid that result, States would have to avoid making policy changes that reduce their tax revenue or forego receiving funds under the Act.

But there is no way they would do the latter. In return for subjecting their "indispensable" power to control tax policy to Congress, *Lane County*, 74 U.S. (7 Wall.) at 76, the States receive

a massive amount of money at a very critical time—the economic recovery from the pandemic. For Missouri, the Act promises billions of stimulus dollars—by one estimate, more than $2.7 billion. To put it another way, the Act offers Missouri roughly 14 percent of the 2020 fiscal year expenditures out of the State's general fund or 10 percent of the 2020 fiscal year expenditures out of all of Missouri's governmental funds. *See* MO. 2020 CAFR, *supra*, at 19 (2020).[2] That proportion is comparable to, or exceeds, the proportion of a state budget that has held to be unconstitutionally compulsive under the Spending Clause. *See NFIB*, 567 U.S. at 581.

In normal times, it would be virtually impossible for a State to turn down that money, thus rendering the condition coercive and impermissibly commandeering of State taxing authority. *See NFIB*, 567 U.S. at 582 (op. of Roberts, C.J.) (loss of 10 percent of a state's budget is coercive). But the pressure to accept federal funds is even greater here. Missouri's need for funds has increased significantly due to recent pandemic. Responding to COVID-19 has led to a drastic reduction in economic activity; indeed, it led to temporary economic shutdowns. As a result, State revenues have dropped right when the need for them—due to increased demand for government social and healthcare services—has risen. The funds the Act provides Missouri is therefore more than what they can refuse. And, as such, they are coercive, and they effectively coerce States to follow Congress's direction in setting state tax policy.

II. Absent a Preliminary Injunction, Missouri Will Suffer Irreparable Harm.

Missouri will also suffer irreparable harm absent an injunction, thus entitling it to an injunction. *See Rounds*, 530 F.3d at 732 n.5. To receive funds under the Act, a state officer must

[2] Missouri's general fund "is the chief operating fund of the State." MO. 2020 CAFR, *supra*, at 8. "Governmental funds are used to account for most of the basic services provided by the State." *Id.* at 2. They "focus[] on when cash will be received and disbursed" and are "useful in evaluating a government's financing requirements in the near future." *Id.* The general fund is one of the governmental funds. *Id.*

certify that the State "requires the payment . . . to carry out the activities specified in [new § 602(c)] and will use any payment . . . in compliance with [new § 602(c)]," which includes the Tax Mandate. Ex. A, at 4–5 (Pub. L. No. 117-2, § 9901 (adding § 602(d)(1))). Normally, that would not be a problem. Properly understood, the Tax Mandate is narrow and only bars States from deliberately using Act funds to offset specific tax cuts. *See* Section I.A, *supra*. And there is a pressing need for the funds. Missouri is dealing with the COVID-19 pandemic and the aftershocks to its budget. And so "it may be some time before it is able to determine the full impact" of the pandemic. MO. 2020 CAFR, *supra*, at III.

Thus, the federal government's threat to adopt the broad interpretation of the Tax Mandate threatens irreparable injury to Missouri. *See* Ex. C, at 1-2. As discussed above, the broad interpretation of the Tax Mandate violates the Constitution and impermissibly infringes on a core aspect of Missouri's sovereignty—its ability to pursue its own tax policy. "[T]o the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government." *Lane County*, 74 U.S. (7 Wall.) at 76. Read broadly, the Tax Mandate would interfere with this "indispensable" and "essential function" of state sovereignty by effectively barring state-level tax cuts for four years. For the reasons stated above, *see supra* Part I.B, that unprecedented federal intrusion on state sovereignty would violate the Spending Clause (on three different grounds) and the Tenth Amendment. Such an unconstitutional interference with state sovereignty would inflict on Missouri ongoing irreparable injury of the first order. *See*, *e.g.*, *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"); *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (similar). Unconstitutionally depriving the state of its ability to pursue its sovereign functions constitutes *per*

se irreparable injury. *See*, *e.g.*, *King*, 567 U.S. at 1303 ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (alteration in original).

Moreover, Secretary Yellen's failure to repudiate the overly broad, unconstitutional reading of the Tax Mandate inflicts another species of irreparable injury on Missouri. It creates ongoing confusion and uncertainty that is interfering with Missouri's "orderly management of [its] fiscal affairs." *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). As Missouri winds up its legislative session, legislators are considering policies that could result in a reduction in tax revenue, thus triggering the Tax Mandate. As noted above, the Missouri legislature is currently considering at least eight tax-reduction proposals whose legal and fiscal consequences are unclear so long as the Tax Mandate's interpretation is unclear. *See* Sauer Decl. Exs. D–K; *id.* ¶¶ 5–12. Each of those proposals was filed before the Tax Mandate was enacted, and so they plainly do not run afoul of the narrow interpretation of the Tax Mandate discussed above in Part I.A. *See* Sauer Decl. ¶¶ 5–12. But a broader interpretation of the Tax Mandate creates, at the very least, confusion and uncertainty about the validity and consequences of these bills under the Tax Mandate. Legislators debating such tax-reduction proposals need to know whether a proposal's enactment could trigger the loss of billions of dollars in federal COVID-19 relief funds in order to engage in informed consideration of those proposed measures. Missouri's current legislative session concludes on May 28, 2020—long before any clarity can reasonably be expected from Treasury. *See* Ex. C, at 2 (telling states that Treasury "will provide this guidance before a State must submit a certification" without providing a date). The confusion and uncertainty created by the Tax Mandate, and by Treasury's refusal to give it any clear

interpretation, inflict another species of irreparable injury on Missouri. *See Barnes*, 501 U.S. at 1304 (interfering "with state tax collection always entails" irreparable injury).

Thus, a preliminary injunction is necessary to allow Missouri to receive Act funds as fast as possible, and thus fill a critical need, without running the intolerable risk that the defendants will attempt to use an improperly broad interpretation of the Tax Mandate to trench on its sovereign authority to conduct tax policy—an authority that the Constitution guarantees.

III. A Preliminary Injunction Will Not Harm Others and Is In the Public Interest.

Lastly, temporarily enjoining enforcement of the Tax Mandate will not harm anyone or the public interest. Such an injunction will not affect the disbursement of Act funds or any expenditure of funds. Indeed, it will not even bar all enforcement. Rather, it limits the Secretary of the Treasury's ability to recoup funds to those instances where a State deliberately applies Act funds to offset a tax cut. That is a minimal impact. Indeed, it is barely any impact. Even if Missouri ultimately loses on the merits—which is very unlikely—the Secretary of the Treasury can then recoup the lost funds. There will be no loss to the defendants from an injunction.

Moreover, a preliminary injunction would necessarily serve the public interest. Such an injunction would only prevent the Secretary of the Treasury from enforcing the broad interpretation of the Tax Mandate. But, under the broad interpretation, the Tax Mandate is unconstitutional for all four reasons discussed above: (1) it would impose unconstitutionally vague and ambiguous conditions on federal spending, (2) it would impose unconstitutional conditions on federal spending that are unrelated to the purposes of the federal program, (3) it would improperly commandeer state taxing authority under the Tenth Amendment, and (4) it would be unconstitutionally coercive under the Spending Clause. *See supra* Part I.B. The public interest does not favor the enforcement of an unconstitutional statute or policy. *See Rodgers v. Bryant*,

942 F.3d 451, 458 (8th Cir. 2019). Because the broad interpretation of the Tax Mandate is unconstitutional, enjoining it would advance the public interest. *Id.*

Furthermore, an injunction would advance the public interest by eliminating confusion and uncertainty about the scope of the Tax Mandate. Missouri legislators are considering policies that may implicate the broader interpretation of the Tax Mandate. *See*, *e.g.*, Sauer Decl. ¶¶ 5–12. An injunction would permit them to continue with that business—business that the Constitution leaves "within the discretion of the" state legislatures subject to "the will of the people" of the states. *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 elected representatives determine state tax policy.

CONCLUSION

For the reasons set forth above, Missouri respectfully ask the Court to issue a preliminary injunction enjoining Defendants from enforcing any interpretation of the Tax Mandate broader than its narrow, ordinary, and natural meaning of prohibiting the deliberate and express use of the Act's relief funds to offset revenue losses from a specific tax cut. In the alternative, if the Court determines that a broader interpretation of the Tax Mandate applies, Missouri respectfully requests that the Court issue a preliminary injunction against the enforcement of the Tax Mandate as unconstitutional under the Spending Clause and the Tenth Amendment, while leaving the rest of the Act in effect. Finally, due to the ongoing confusion and uncertainty created by the Tax Mandate, and the impending conclusion of the Missouri General Assembly's legislative session on May 28, Missouri respectfully requests a ruling on its Motion for Preliminary Injunction by May 3, 2021.

Dated: April 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 2, 2021, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system and to be served on those parties that have not appeared who will be served in accordance with the Federal Rules of Civil Procedure by mail or other means agreed to by the party.

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