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 REPLY IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Secretary Yellen refused to adopt Missouri's narrow interpretation of the Tax Mandate in her letter to twenty-one States, her public statements, and her sworn congressional testimony. But now, last Friday, the U.S. Department of Justice ("DOJ") endorsed that narrow interpretation in its brief in response to Missouri's motion for preliminary injunction. *See* Doc. 20. DOJ's concession means that Missouri wins. Missouri's principal argument is that the federal Defendants *must* adopt the narrow interpretation of the Mandate because it is the best interpretation of the statute. DOJ agrees. But Treasury, not DOJ, has the authority to interpret and to enforce the Mandate, and until Treasury endorses that narrow interpretation, Missouri operates under a "sword of Damocles." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). DOJ effectively concedes that Missouri is overwhelmingly likely to prevail on its statutory-interpretation argument, and DOJ does not dispute that Missouri's alternative argument that the broad interpretation of the Mandate is unconstitutional. Indeed, if the broader interpretation is even arguable, the condition is ambiguous and thus unconstitutional. The Court should enter a preliminary injunction requiring Treasury to follow Missouri's narrow interpretation of the Tax Mandate.

ARGUMENT

I. DOJ Agrees With Missouri's Narrow Interpretation of the Tax Mandate, But Secretary Yellen Has Refused to Endorse It.

Missouri's principal argument in this case is that the Tax Mandate should be interpreted narrowly to prohibit only "a State from deliberately using the Act's COVID-19 relief funds to offset a specific tax cut, while leaving the States free to pursue tax-reduction policies for any other valid reason." Doc. 7, at 2. In other words, just as the Act prohibits States from depositing relief money into any pension fund, it also prohibits States from depositing Act funds directly into their

general revenue coffers for the specific purpose of offsetting a net loss of revenues from a state tax-reduction policy—and nothing more. *See id.* As Missouri points out, this restriction is "quite narrow." *Id.* Neither Missouri's legislature, nor (most likely) any other state legislature in the country, is contemplating using Act funds in that way.

A. DOJ accepts Missouri's narrow interpretation of the Tax Mandate.

DOJ agrees with Missouri's narrow interpretation of the Tax Mandate. DOJ states that "the State and Defendants fundamentally agree" that "[a] State is . . . free to change its tax law as it believes appropriate," and that "if a State chooses to make changes that result in a reduction of tax revenue, the Act bars a State only from using Rescue Plan funds . . . to offset that reduction." Doc. 20, at 1. DOJ's argument mirrors Missouri's interpretation, even citing the same dictionary definitions and the same grammatical analysis of the statutory language. DOJ notes that "[a] State . . . does not transgress the limitation if it does not 'use' Rescue Plan funds to 'offset' a reduction in net tax revenue." *Id.* at 13. DOJ argues that "the term 'offset' means '[t]o balance' or 'compensate for.'" *Id.* at 13–14 (quoting BLACK'S LAW DICTIONARY (11th ed. 2019)). And DOJ urges that "[t]he term 'use' connotes 'volitional' 'active employment' of federal funds." *Id.* (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2278-79 (2016). "Taken together, this language simply ensures that States are not employing federal funds to finance state tax cuts." *Id.* at 14. DOJ cites case law "describing 'offset' as balancing out a specific loss with another specific gain." *Id.* at 14 (citing *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 19 (1995)). Again echoing Missouri's arguments, DOJ argues that the adverb "indirectly" does not change the ordinary and natural meaning of "offset": "Both 'directly' and 'indirectly' are adverbs that cannot 'alter the meaning of the word' that they modify (here, 'offset')." Doc. 20, at 14 (quoting *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019)).

DOJ reaffirms its commitment to Missouri's narrow interpretation throughout its brief. In its section about the constitutionality of the Tax Mandate, DOJ relies on the narrow interpretation to defend the Mandate's validity. *See* Doc. 20, at 15 ("Properly interpreted, the Act is plainly constitutional."). DOJ repeatedly reasserts the narrow interpretation in its merits argument. *Id.* at 16-17 ("The offset provision is . . . not implicated, unless a State 'uses' its Rescue Plan funds—rather than another means—to 'offset' any reduction in net tax revenue."); *id.* at 19 ("Congress simply sought the assurance that States would not displace their own tax-revenue sources with the federal funds that Congress had appropriated for other purposes."); *id.* at 20 ("Missouri is . . . free to lower its net tax revenue, as long as it does not use the Rescue Plan funds to offset that reduction.").

Likewise, DOJ's argument that Missouri lacks standing is entirely premised on its claim that Missouri suffers no injury *from the narrow interpretation* of the Tax Mandate. DOJ asserts the narrow interpretation at the outset of its standing argument: "Missouri cannot meet [the standing standard] because its asserted injury is hypothetical and speculative. Its complaint and preliminary-injunction motion . . .nowhere even suggest[] that it plans to use [Act funds] in a manner inconsistent with the offset provision." Doc. 20, at 8. And this narrow interpretation is the centerpiece of DOJ's standing analysis. *See id.* at 9 (arguing that Missouri lacks standing because it does not allege "that it intends to use Rescue Plan funds to offset any reductions in its net tax revenue that might result from any changes the State ultimately chooses to adopt"); *id.* at 9-10 ("The offset provision restricts only a State's using Rescue Plan funds to offset a reduction in net tax revenue resulting from a change in state law; it does not prohibit the adoption of any tax change on its own."); *id.* at 10 ("The Rescue Plan does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the Rescue Plan to offset a

reduction in net tax revenue."); *id.* at 11 (arguing that the Act only prohibits a State "to use Rescue Plan funds to offset a reduction in net tax revenue resulting from a change in state law"); *id.* (arguing that Missouri's injury is speculative because "only if Missouri's net tax revenues fell, and only if Missouri decided to use Rescue Plan funds to offset that reduction, would recoupment even be possible").

In short, DOJ agrees with Missouri's narrow interpretation at least fourteen times in its brief. *See* Doc. 20, at 1, 6, 8, 9, 9-10, 10, 11, 12, 13, 14, 15, 16-17, 19, 20. Because the parties agree on the statute's interpretation, the "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981). Missouri should win.

B. Secretary Yellen and Department of Treasury have not adopted the narrow interpretation.

But there is a hitch. Secretary Yellen and Treasury had not adopted this position before the filing of DOJ's brief, despite many opportunities to do so. The Act confers authority to interpret and enforce the Tax Mandate on Secretary Yellen and the Treasury Department, not on DOJ. Doc. 6-3, at 6 (§ 602(e), (f)). And so far, they have pointedly declined to endorse Missouri's (and DOJ's) narrow interpretation of the Mandate.

The passage of the Tax Mandate resulted in immediate, nationwide concern about the Mandate's potentially broad meaning. The media widely reported on the Mandate as imposing the broad interpretation. *See, e.g.,* Alan Rappeport, *A Last-Minute Add to Stimulus Bill Could Restrict State Tax Cuts*, N.Y. TIMES (March 12, 2021), https://nyti.ms/3dX7PDL. Senate sponsors of the Tax Mandate made public statements endorsing the broad, unconstitutional interpretation. *See id.* (recounting a Senate sponsor "arguing that states should not be cutting taxes" and "urg[ing] States to postpone their plans to cut taxes"). Key Missouri legislators expressed their concern that the Mandate interferes with Missouri's ability to pursue its own tax policy, in the current legislative

session. *See*, *e.g.*, Sen. Andrew Koenig (@Koenig4MO), TWITTER (Apr. 8, 2021, 1:19 PM), https://bit.ly/3xsLhTg (providing the statement of the Chair of the Missouri Senate's Ways and Means Committee that the Tax Mandate is an attempt by "the federal government to shut down tax policy in all 50 states," and an "egregious overreach by the federal government").

In the face of those urgent concerns, twenty-one States promptly sent a letter to Secretary Yellen asking her to endorse the narrow interpretation of the Tax Mandate. Doc. 6-4, at 3 (urging Secretary Yellen to interpret the Mandate to "merely prohibit the States from *expressly* taking COVID-19 relief funds and rolling them directly into a tax cut of a similar amount"). In her response, Secretary Yellen pointedly declined to adopt that narrow interpretation, instead implying that the States must offset any tax cut with a corresponding tax *increase* to avoid violating the Mandate. Doc. 6-5, at 2. Soon thereafter, she again refused to endorse the narrow interpretation in congressional testimony. When asked at a Senate Hearing how she "intend[s] to approach the question of what is directly or indirectly offsetting a tax cut," she said that "given the fungibility of money, it's a hard question to answer." *The Quarterly CARES Act Report on Congress Before Senate Committee On Banking, Housing, and Urban Affairs* (2021) (1:10:00–15:00), https://bit.ly/3tRAobm. By invoking "the fungibility of money," *id.*, Secretary Yellen implied that state revenue cannot "be drained off here"—*i.e.*, at a spot removed from the State's actual use of Act funds—"because a federal grant is pouring in there." *Sabri v. United States*, 541 U.S. 600, 606 (2004). That concern applies only on the broad interpretation of the Mandate.

Thus, while Secretary Yellen never set the outer limits of her view of the Tax Mandate, she claims the statute is ambiguous in a way that permits her to expand its scope beyond the law's plain terms. It is therefore natural to conclude that the Department of the Treasury will enshrine that broader view in whatever guidance it issues—guidance that will issue without any chance for

public notice-and-comment. *See*, *e.g.*, *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). As a result, sixteen States have now filed four federal lawsuits to block the broad interpretation of the Tax Mandate. Given the ongoing uncertainty created by Secretary Yellen's failure to adopt the narrow interpretation of the Act, and with the end of its legislative session impending, Missouri's need for judicial relief remains live and urgent.

II. Missouri Is Likely To Prevail on the Merits of Its Statutory-Interpretation Claim.

Given that DOJ agrees with Missouri's interpretation of the statute, Missouri is overwhelmingly likely to succeed on its statutory-interpretation claim. *See* Doc. 7, at 7-18. DOJ does not dispute any of Missouri's seven reasons for interpreting the statute narrowly, and it affirmatively agrees with many of them. Doc. 20, at 13-15. And DOJ comes to the same conclusion as Missouri about the statute's narrow meaning. *Id.*

Mysteriously, having spent several pages conceding that Missouri's statutory interpretation is correct, DOJ concludes that "[t]he Court should *reject* Missouri's statutory claim." Doc. 20, at 15 (emphasis added). On the contrary, the Court should *accept* the statutory interpretation that all parties now concede is correct, that the DOJ has endorsed, that is supported by at least seven compelling reasons, that avoids grave constitutional problems, and that dissipates the threatened injury to Missouri's sovereignty. Doc. 7, at 7-18. DOJ's argument to the contrary erroneously conflates the merits with standing—DOJ argues, in essence, that Missouri cannot prevail on its (correct) statutory interpretation because the statute is so clear that there is no reasonable prospect that Secretary Yellen will adopt any other interpretation. *See* Doc. 20, at 14-15 (arguing that "Missouri cannot demonstrate that Treasury has adopted or will adopt" the broad interpretation, and "the plain text of the Rescue Plan refutes Missouri's speculation"). While Missouri hopes that DOJ's prediction about Treasury's interpretation is correct, Secretary Yellen's public letter to twenty-one States and sworn congressional testimony indicate the opposite. *See supra*, Part I.B.

It is therefore natural to conclude—as Missouri did—that Treasury will likely adopt the broader view in whatever guidance it issues. That will result in one of two mutually exclusive things: Secretary Yellen's interpretation is wrong and the Tax Mandate only applies where a State deliberately and expressly uses Act funds to offset a decrease in tax revenue, or Secretary Yellen is correct that the statute is ambiguous, which means that it is unconstitutional. *Compare* Doc. 7, at 7 (claiming that the "narrow interpretation" is better but a broader interpretation "is unconstitutional"); *and* Doc. 1, at ¶ 53–60 (providing the "correct" interpretation), *with* Doc. 7, at 18 (arguing the unconstitutionality of the broad interpretation "if the Court were to adopt it"); *and* Doc. 1, at ¶ 62 ("In the alternative to Count One, if the Court adopts a broader interpretation of the Tax Mandate, than the Tax Mandate is unconstitutional and invalid . . . ."). Either way, Missouri is entitled to injunctive relief against the broad interpretation.

III. Missouri Has Standing, and the Case Is Ripe, Because Secretary Yellen's Threatened Interpretation Inflicts Immediate, Concrete Injury on the State.

DOJ argues that Missouri lacks standing, but its standing argument rests entirely on the premise that Missouri *is not injured by the narrow and correct interpretation of the Tax Mandate*. Doc. 20, at 8-12; *see also id.* at 9-10 (arguing that Missouri lacks standing because "[t]he offset provision restricts only a State's using Rescue Plan funds to offset a reduction in net tax revenue resulting from a change in state law; it does not prohibit the adoption of any tax change on its own"). But Missouri does not contend that it is injured by the narrow interpretation of the Tax Mandate—Missouri sued to *require* Treasury to adopt that narrow interpretation. Missouri has standing because Treasury, not DOJ, has authority to interpret and enforce the Mandate, and Treasury continues to refuse to adopt the narrow interpretation. The threat of the *broad* interpretation confers standing on Missouri, and DOJ does not dispute that the broad interpretation grievously injures Missouri's sovereignty. *See also* Doc. 18, at 3 (noting that the broad

interpretation "is already eroding state sovereignty," and that "[w]ith States forced to put these [tax-reduction] policies on hold out of fear that they will threaten their federal relief, there can be no question that the States and their citizens are suffering irreparable injury right now").

A. Missouri has standing because Secretary Yellen's broad interpretation undercuts Missouri's legislative deliberations over tax policy now.

Article III limits federal courts to hearing "cases" or "controversies," which means that a party "seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) 'injury in fact[,]' . . . (2) a causal relationship between the injury and the challenged conduct[,] . . . and (3) a likelihood that the injury will be redressed by a favorable decision." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663–64 (1993). Only the first is at issue here, and Missouri has shown an injury-in-fact.

Missouri intends to comply with the law *as written*. DOJ claims that Missouri has not suffered an injury-in-fact because the State has not alleged it "plans to use [funds] in a manner inconsistent with the offset provision." Doc. 20, at 8–9. Just so; Missouri *will* use Act funds in a manner consistent with the Tax Mandate, but it also is considering whether to cut taxes. *See* Docs. 6-6, 6-7, 6-8, 6-9, 6-10, 6-11, 6-12, 6-13. And the problem here is that those tax cuts may run afoul of how *Secretary Yellen* erroneously interprets the Tax Mandate. *See* Doc. 7, at 27 ("[T]he federal government's *threat to adopt* the broad interpretation of the Tax Mandate threatens irreparable injury to Missouri.") (emphasis added); *id.* at 28 ("*Secretary Yellen's failure to repudiate* the overly broad, unconstitutional reading of the Tax Mandate inflicts another species of irreparable injury on Missouri.") (emphasis added).

Thus, contrary to DOJ's argument, Missouri has alleged "'an intention to engage in a course of conduct'" (cutting taxes and accepting Act funds) that is "'arguably affected with a constitutional interest'" (the State's Tenth Amendment rights and inherent limits on Congress's

Spending Clause power) that is "'arguably proscribed by the statute'" (based on Secretary Yellen's view) and that comes with a substantial "threat of future enforcement" (recoupment). *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161, 162, 164 (2014) (alterations omitted) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see*, *e.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (similar); *Religious Sisters of Mercy v. Azar*, 2021 WL 191009, at *14 (D.N.D. Jan. 19, 2021) (noting that the "state sovereignty interests embedded in the Spending Clause" "implicate[] constitutional interests"). *See also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in judgment) (noting "the presumed availability of federal equitable relief against threatened invasions of constitutional interests"); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . .").

Nor is there any need for Missouri to have alleged it has taken all the steps necessary to trigger recoupment. *See* Doc. 20, at 9. First, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for that threat . . . . The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but . . . does not eliminate Article III jurisdiction." *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128–29 (2007); *see also 281 Care Comm.*, 638 F.3d at 627 ("To establish injury in fact for a First Amendment challenge . . . , a plaintiff need not have been actually prosecuted or threatened with prosecution.").

Furthermore, Secretary Yellen's failure to embrace the narrow, correct interpretation of the Tax Mandate places the Missouri General Assembly on the horns of a dilemma: forgo passing tax cuts to ensure compliance with whatever Secretary Yellen will later say that the Tax Mandate

proscribes, or forgo needed federal funds. *See*, *e.g.*, Doc. 7, at 7, 28 (discussing the confusion the broad interpretation has created among Missouri legislators); Doc. 1, at ¶¶ 15, 50 (same). Such a scenario—where a State must choose between a state policy or federal funds—constitutes injury-in-fact. *See*, *e.g.*, *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (reaching that conclusion in reliance on *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 390–93 (1988)); *Arkla Expl. Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 354 (8th Cir. 1984) ("The injury alleged by the State of Arkansas is the loss of revenue to which it is statutorily entitled."); *cf. United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) (noting plaintiff has standing to challenge a never-enforced law where he faces a "literal dilemma" of having to do something that would violate the law) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968)).

At core, DOJ's argument is that Missouri lacks "a personal stake in the outcome of" this case. *Baker v. Carr*, 369 U.S. 186, 204 (1962). That is plainly incorrect. Missouri is currently considering tax cuts that are unrelated to how Missouri will spend Act funds; those tax cuts, if enacted, will occur during the "covered period," *see* Doc. 6-3, at 6; and Secretary Yellen—who enforces the Tax Mandate, *see id.*—has raised concerns about the validity of such tax cuts under the Mandate. Missouri's tax policy is thus "a target or object" of "government action," and so "'there is . . . little question that the action . . . has caused [Missouri] injury, and that a judgment preventing . . . the action will redress it.'" *Minn. Citizens Concerned for Life v. F.E.C.*, 113 F.3d 129, 131 (8th Cir. 1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)); *see Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir. 2009) ("The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having

adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.") (quoting *United Farm Workers*, 442 U.S. at 298 (quoting another source)).

B. Missouri suffers a concrete injury to its sovereign interests.

As for the injury to Missouri's sovereign interests, DOJ again bases its analysis of Missouri's injury by using the *correct* reading of the Tax Mandate instead of the impermissibly broad interpretation Secretary Yellen has threatened to adopt. Doc. 20, at 10.

The threat of the broad interpretation unquestionably injures Missouri's sovereignty. As the Supreme Court has emphasized for over two centuries, a state's authority to set its tax policy is "central to state sovereignty"—indeed, it is existential. *Dep't of Rev of Or. v. ACF Indus.*, 510 U.S. 332, 345 (1994); *see also*, *e.g.*, *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) ("[I]t is of the utmost importance to [the states] that the modes adopted to enforce the taxes levied should be interfered with as little as possible."); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) ("[T]o the existence of the States, . . . the power of taxation is indispensable."); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830) ("We will not say that a state may not relinquish [the taxing power] . . . but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed . . . ."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) ("[T]he power of taxing the people and their property[] is essential to the very existence of government . . . ."); *cf.*, *e.g.*, *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (quoting *Dows* to show that interference with state tax collection constitutes irreparable harm).

The injury the broad interpretation of the Tax Mandate inflicts on a State is much greater than a "naked contention that Congress has usurped the reserved powers of the several states . . . ." *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923); *see also* Doc. 20, at 10–11. It is a contention that Secretary Yellen is seeking to "promulgate[] a rule [that is] binding on [Missouri] without the

authority to do so" and that would limit Missouri's ability to control its tax policy; thus, the State has "suffered a concrete injury to [its] sovereign interest . . . ." *Brackeen v. Haaland*, --- F.3d ---, 2021 WL 1263721, at *25 (5th Cir. Apr. 6, 2021) (en banc) (Dennis, J.).

C. The case is ripe because Treasury puts Missouri under a "sword of Damocles."

DOJ also claims that this case is not ripe "[f]or similar reasons," basically parroting their standing argument. Doc. 20, at 11–12. Thus, "standing and ripeness boil down to the same question in this case." *MedImmune*, 549 U.S. at 128 n.8.

Contrary to DOJ, courts "do not require parties to operate beneath the sword of Damocles until threatened harm actually befalls them . . . ." *Iowa League of Cities*, 711 F.3d at 867. And so for the same reasons Missouri has standing to bring suit, this suit is also ripe—it presents a purely legal issue (the interpretation of the Tax Mandate) and denying review would impose a substantial hardship on Missouri (by causing confusion among its state legislators considering tax cuts, making them choose between forgoing those cuts or forgoing federal funds, and injuring its sovereignty interests). *See*, *e.g.*, *SBA*, 573 U.S. at 167–68. And, furthermore, the issue and facts are narrow: Is the Tax Mandate narrow or ambiguous and broad, and thus unconstitutional? *See State of Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1337–38 (8th Cir. 1997) (finding that the breadth of legal and fact issues renders a case unripe). Indeed, because Treasury intends to issue guidance without notice-and-comment, suit may be the *only* way Missouri can make its concerns heard. *See City and County of San Francisco v. USCIS*, 992 F.3d 742, 751 (9th Cir. 2021) (Van Dyke, J., dissenting from the denial of intervention) (notice-and-comment allows parties to "seek[] any meaningful relief through agency channels").

IV. Missouri Is Likely to Prevail on Its Constitutional Claim.

In the alternative, if Secretary Yellen adopts the broad interpretation of the Tax Mandate, the Mandate is unconstitutional on four separate grounds. Doc. 7, at 18-26. DOJ does not dispute

this. *See* Doc. 20, at 15-16 (attacking the broad interpretation). Instead, DOJ argues that the *narrow* interpretation is constitutional—which Missouri does not dispute. *Id.* Because DOJ does not defend the broad interpretation's validity, DOJ effectively concedes that the broad interpretation is unconstitutional—and that Secretary Yellen has no authority to adopt it. *See id.*

First, DOJ never contends that the Tax Mandate, interpreted broadly, would be related to the purposes of the Act. *See* Doc. 20, at 16-19. Instead, DOJ merely argues that the narrow interpretation is related to the Act's purposes: "Congress simply sought the assurance that States would not displace their own tax-revenue sources with the federal funds that Congress had appropriated for other purposes." *Id.* at 19. But on the broad interpretation, the Mandate is invalid because its conditions are not "related to the federal interest in particular national projects or programs." *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009).

Second, DOJ never disputes that, on the broad interpretation, the Act violates the requirement that "conditions on . . . federal funds must be set out unambiguously so that the state's participation is the result of a knowing and informed choice." *Id.* In fact, Secretary Yellen has described the Mandate's meaning as "a hard question to answer," thus conceding that it is, at best, ambiguous. *See* Section I.B., *supra*. If ambiguous, it is unconstitutional. *Id.*; *see also ACF Indus., Inc.*, 510 U.S. at 345 ("Principles of federalism . . . compel" a narrow reading of a law limiting a state's ability to tax railroad property.); *Lane County*, 74 U.S. (7 Wall.) at 77–78 (noting that the "general terms" of a federal law are insufficient to justify infringing on a State's tax collection methods); *Providence Bank*, 29 U.S. (4 Pet.) at 561 (noting that courts will not assume a state gave up taxing authority in chartering a bank).

Third, on the broad interpretation, the Mandate involves both unconstitutional commandeering and coercion. On that interpretation, the Tax Mandate is a condition that "do[es]

not directly 'govern the use of the funds' [but] instead attempts to 'pressure the States to accept policy changes.'" *Gruver v. La. Bd of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 183 (5th Cir. 2020) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB*"), 567 U.S. 519, 580 (2012) (op. of Roberts, C.J.)) (original alterations omitted). Under the broad reading, the Tax Mandate requires States to change tax policy; States could not, for example, expend funds on "rebate[s]" or "credit[s]," Doc. 6-3, at 5, even if those rebates and credits were unrelated to the listed permissible uses of Act funds, *id.* Indeed, they would potentially have to adopt—depending on how broadly Secretary Yellen pushes her reading—a policy of making any tax cut revenue-neutral. *See* Doc. 6-5, at 1. When forcing a policy change is at stake in federal funding conditions, "a different test is appropriate to assess their constitutionality: the coercion inquiry." *Gruver*, 955 F.3d at 183; *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 179 (D.C. Cir. 2015); *Mayhew v. Burwell*, 772 F.3d 80, 88 (1st Cir. 2014).

And a broad interpretation of the Tax Mandate would render it coercive. Missouri is in no position to refuse the Act's funds. The Federal Government has promised Missouri roughly 14 percent of its 2020 general fund expenditures, or 10 percent of its governmental fund expenditures. Doc. 7, at 26; *see also* Doc. 18, at 8 (noting that the Act provides funds "equivalent to a whopping *20%* of the annual state tax collections of state governments"). Missouri's taxpayers, as federal taxpayers, are already on the hook for their share of that money. And the Government has done so at a particularly vulnerable time for Missouri: as it is attempting to respond to the economic downturn the COVID-19 pandemic has caused. *See*, *e.g.*, Doc. 7, at 26. Missouri is thus practically compelled to accept the funds, and the conditions that come with them. Indeed, there is no practical difference between this case and a situation where a party to a contract refuses to pay the counterparty—who is "in urgent need of cash to avoid foreclosure of a mortgage" and

cannot get money elsewhere—unless the counterparty "modifies the contract to reduce the price." RESTATEMENT (SECOND) OF CONTRACTS § 175 illus. 7 (AM. LAW INST. 1981). That "threat amounts to duress"—*i.e.*, coercion. *Id.*[1] And if Missouri is coerced by the federal government to relinquish its sovereign taxing authority, the federal government has unconstitutionally commandeered that power under the Tenth Amendment.

V. The Balancing of Harms and Public Interest Favor Missouri.

In light of DOJ's concession about the statute's meaning, the balancing of harms and the public interest overwhelmingly favor Missouri. As noted above, Missouri suffers daily irreparable injury as long as Treasury leaves the States under a "sword of Damocles." *Iowa League of Cities*, 711 F.3d at 867. The federal government will suffer no injury from adopting a statutory interpretation that it concedes is correct. And the public interest favors enforcing the interpretation on which all parties agree.

CONCLUSION

The Court should grant Missouri's motion for a preliminary injunction.

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[1] That reality also undermines Defendants' contention that there is no coercion because the Tax Mandate would not result in the loss of preexisting funds, *see* Doc. 20, at 21, and because recoupment is commensurate with the degree of the offset, *see id.* at 22. Coercion requires considering "[a]ll attendant circumstances," not just whether the funds are new or not. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c; *see Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1907) ("[T]he location of the point at which pressure turns into compulsion . . . would be a question of degree, at times, perhaps, of fact."). Even less relevant is whether Missouri may lose less than its full allotment of Act funds. What matters is whether it was coerced into accepting an unconstitutional condition unrelated to the Act's purposes. *See NFIB*, 567 U.S. at 582 n.12 (op. of Roberts, C.J.) ("'Your money or your life'" is a coercive proposition, whether you have a single dollar in your pocket or $500.").

Dated: April 27, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 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.

/s/ D. John Sauer