No. 22-352

In the Supreme Court of the United States

THE STATE OF MISSOURI,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

ANDREW BAILEY
Missouri Attorney General
D. JOHN SAUER
Deputy Attorney General
MICHAEL E. TALENT
Deputy Solicitor General
Counsel of Record
OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 340-4869
Michael.Talent@ago.mo.gov
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Regulations

REPLY BRIEF

Treasury's opposition highlights why this case is worthy of certiorari review.

To start, the agency's standing analysis underscores that the Eighth Circuit's decision is wrong. Like the Eighth Circuit, Treasury starts by misstating Missouri's argument. The State's position is not that the agency is interpreting the Tax Mandate to bar all tax cuts; it is that the agency is interpreting the law too broadly. Strawman in hand, Treasury concludes Missouri lacks standing because the Tax Mandate supports Treasury's interpretation. Such conflation of standing and the merits shows that this case should be resolved on the latter, not the former.

Treasury's attempt to reconcile the Eighth Circuit's decision and the Ninth Circuit's analysis in *Arizona* v. *Yellen*, 34 F.4th 841 (2022), is equally flawed. The agency's cursory analysis underscores that the two courts—when faced with cases involving similar facts and similar theories—reached contradictory conclusions.

Furthermore, the Sixth Circuit's decisions in *Ohio* v. *Yellen*, 53 F.4th 983 (2022), and *Kentucky* v. *Yellen*, 54 F.4th 325 (2022), have deepened the split. In analyzing standing, the Sixth Circuit adopted reasoning that tracks with what the Ninth Circuit said in *Arizona*. But in concluding that Treasury's regulations mooted challenges premised on the plaintiff States' pre-enforcement theories of standing, the court adopted reasoning that is similar to the Eighth Circuit's decision here.

While the Sixth Circuit's analysis does not cast doubt on Missouri's Article III standing, it

underscores the need for certiorari review. Three circuits have now addressed the jurisdictional issues this case raises in four opinions. And two of those decisions drew partial dissents. That well-developed split highlights the need and appropriateness of review here.

Finally, Treasury fails to show why the Court should not review the important question of the Tax Mandate's meaning and constitutionality. The agency's only objection is that this case does not provide the Court with a proper vehicle for doing so. That ignores that the Eighth Circuit's—and Treasury's—conflation of standing and the merits means both issues are fairly presented. It also ignores that Missouri is the only State to provide an interpretation of the Tax Mandate that is consistent with the law's text and that is constitutional; every other case challenges the Tax Mandate's constitutionality outright. Further percolation will therefore not bring Missouri's statutory analysis to the Court, and so review is appropriate. Indeed, the fact that Missouri alone, among all pending challenges, offers a saving construction of the Tax Mandate that preserves state sovereignty while avoiding constitutional problems makes this case a uniquely appropriate vehicle for review.

I. Treasury's standing analysis repeats the Eighth Circuit's errors.

Treasury treats Missouri's challenge as the Eighth Circuit did—as one to "'a specific potential interpretation'" of the Tax Mandate. Opp. 8 (quoting App. 9a); *see also* Opp. 10 (similar). That permits Treasury—again, like the Eighth Circuit, *see* App. 9a–10a—to say "that there is no threatened application of

[that] interpretation" because the Tax Mandate's "plain terms foreclose such an interpretation" and the "regulations implement" those terms. Opp. 9–10 (quotations and alterations omitted); *see also*, *e.g.* Opp. 11 (saying "tax cuts simpliciter do not violate the" Tax Mandate).

Treasury attacks a strawman. Missouri's claim is that the Tax Mandate prohibits "only the deliberate use of ARPA funds to pay for a tax cut." Pet. 11. That is, Missouri does not challenge a specific, potential interpretation. It challenges "an interpretation that is broader than Missouri's and that implicates tax cuts the State was considering at the time it filed suit and tax cuts it has subsequently enacted." Pet. 19; *see also* Pet. 19 n.6 (providing record cites). Moreover, Treasury admits, as it must, that its reading of the law diverges from Missouri's. *See* Pet. 18–19 (noting that fact).

For example, Treasury's regulations create a presumption that a drop in net tax revenue violates the Tax Mandate. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786, 26,807 (May 17, 2021) (the IFR) (noting that such reductions "will be considered to have been offset by" ARPA funds unless a safe harbors applies); *see also* 31 C.F.R. § 35.8(b). To avoid recoupment, States must "identify any sources of funds that have been used to permissibly offset" that reduction. Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338, 4,423 (Jan. 27, 2022) (final rule). Those regulations are consistent with how Secretary Yellen has interpreted the law. *See* Pet. 6–7 (detailing that history). So Treasury does not key a violation of the Tax Mandate to whether a State deliberately uses

ARPA funds to pay for a tax cut (as Missouri says it should)—it keys the violation to a drop in tax revenue.

Thus, at every step, there has been a dispute between Missouri and Treasury about what the Tax Mandate requires of the State; that is, of the lawfulness of what Treasury is requiring the State to do to avoid recoupment. That is the stuff of Article III cases and controversies. *See*, *e.g.*, *Susan B. Anthony List* v. *Driehaus (SBA List)*, 573 U.S. 149, 163 (2014); *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988); *City and County of San Francisco* v. *Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018); *see also Armstrong* v. *Exceptional Child Care Ctr., Inc.*, 575 U.S. 320, 327 (2015) (noting federal courts' power "to enjoin unconstitutional actions by . . . federal officers"); *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.").

Indeed, Treasury's opposition underscores that fact. The agency's standing analysis assumes that the Tax Mandate supports the agency's interpretation of the law, *see* Opp. 9–10, and so necessarily assumes that Missouri's statutory claim is not meritorious. But "[f]or standing purposes, [courts] accept as valid the merits of [the plaintiff's] legal claims." *FEC* v. *Cruz*, 142 S. Ct. 1638, 1647 (2022). Treasury's focus on what the Tax Mandate means underscores that this case "calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *see also Kentucky* v. *Yellen*,

54 F.4th 325, 349 n.16 (6th Cir. 2022) (making this point).

II. The circuit courts are split on how to evaluate a State's standing to challenge the Tax Mandate and spending conditions more generally.

1. Treasury's assertion that there is no conflict between the Eighth Circuit's decision in this case and the Ninth Circuit's decision in *Arizona* v. *Yellen*, 34 F.4th 841 (2022), *see* Opp. 11–12, relies on the Eighth Circuit's claim that "Arizona did not challenge a hypothetical 'broad interpretation' of the [Tax Mandate] but instead argued that, *as written*, the [Tax Mandate] is unconstitutionally ambiguous and unduly coercive," and that Missouri "developed no argument as to how it has suffered a concrete injury" under similar theories. Opp. 11–12 (quoting App. 9a n.5 (alterations omitted)).

The first point again relies on a misstatement of Missouri's position. Missouri seeks to enjoin enforcement of Treasury's unlawfully broad reading of the Tax Mandate, not one specific, hypothetical interpretation. As to the second point, the constitutional challenges and theories of injury that animate the Ninth Circuit's reasoning in *Arizona* undergird Missouri's statutory analysis and are the basis of the State's alternative constitutional claim. *See* Pet. 20–21.

There is thus no principled distinction between this case and *Arizona*. Factually and analytically, the cases are similar. *See* Pet. 17–21. The different results are therefore irreconcilable and certiorari is

warranted to address this clear, concrete split of authority.

2. Deepening the split are the Sixth Circuit's decisions in *Ohio* v. *Yellen*, 53 F.4th 983 (2022), and *Kentucky* v. *Yellen*, 54 F.4th 325 (2022). The decisions, taken together, have two jurisdictional rulings—a standing ruling and a mootness ruling.

First, the Sixth Circuit held that Kentucky and Tennessee had pre-enforcement standing to challenge the constitutionality of the Tax Mandate because both States alleged they "desire to enact (or have enacted) tax cuts," *Kentucky*, 54 F.4th at 335,[1] but the Tax Mandate "constrain[s] their sovereign authority to tax and exposed them to an imminent recoupment action should they wish to pursue their preferred policies," *id.* at 336. That tracks the Ninth Circuit's analysis, *see Arizona*, 34 F.4th at 851 ("There is a realistic danger that Arizona, after accepting federal funds under ARPA and passing a billion dollar tax cut, will be forced to repay federal funds for directly or indirectly using those funds to offset its tax cut, in violation of the Offset Provision."), and so splits with the Eighth Circuit's decision in this case, *see* App. 11a, and Judge Nelson's partial dissent in *Arizona*, *see* 34 F.4th at 856 ("A tax cut, on its own, does not fall within the Offset Provision's ambit.").

---

[1] The States also alleged past harm "from the receipt of an ambiguous or coercive offer." *Kentucky*, 54 F.4th at 338–39 (quotations omitted). Because the Sixth Circuit was considering the validity of an injunction, it did not discuss that injury in much depth. *See id.* at 339 (concluding that "an injunction cannot be used to redress a purely past injury.").

The Sixth Circuit—over a dissent on this point—then held that Treasury's regulations mooted the States' pre-enforcement and sovereign theories of standing. *See Kentucky*, 54 F.4th at 341; *Ohio*, 53 F.4th at 990–92. The regulations, the court said, meant "there is no reasonable possibility" of recoupment because even if "Treasury *could* read the [Tax Mandate] in a broad way—as barring *any* tax cut"—the agency "disavowed" that interpretation. *Ohio*, 53 F.4th at 991–92 (quotations omitted); *see Kentucky*, 54 F.4th at 341. That splits with the Ninth Circuit, which concluded that Treasury's regulations evidenced Arizona's standing, *see Arizona*, 34 F.4th at 850 ("[T]he recoupment process outlined in the IFR show[s] the federal government's intent to enforce the Offset Provision."), and never mentioned them in analyzing the harms to Arizona's sovereign interests, *see* 34 F.4th at 851–53.

Instead, the Sixth Circuit said, the States needed to show "they intend to specifically violate *the Rule*." *Kentucky*, 54 F.4th at 341. That is, they needed to show that a tax cut "would (1) result in a reduction in … net tax revenue, and (2) that [the State] would then offset such a reduction with ARPA funds, or (3) fail to identify a permissible source of offsetting funds," *Ohio*, 53 F.4th at 992.[2] That is what the

[2] Alternatively, the Sixth Circuit held that the costs of compliance Tennessee faced meant the case was not moot as to it. *Kentucky*, 54 F.4th at 342. That reasoning applies here, too. *See* Pet. 22 (noting the costs Missouri will face to comply with Treasury's unlawfully broad reading).

Eighth Circuit said Missouri needed to show to establish standing. *See* App. 11a.[3]

Judge Nalbandian disagreed. He noted the regulations "still limit States from enacting tax policies if they do not offset a net reduction with permissible revenue sources." *Kentucky*, 54 F.4th at 364 (Nalbandian, J., concurring in part and dissenting in part). Thus, he said, the Tax Mandate "still restrict[s] States from enacting tax cuts in their sovereign capacities and Treasury-recoupment actions remain a credible threat." *Id.* That reasoning tracks the Ninth Circuit's analysis. *See Arizona*, 34 F.4th at 853 ("Here, Arizona has demonstrated that if the Offset Provision is as ambiguous and coercive as it alleges, it will face serious consequences in losing control over its taxing policies and being held to a funding offer that it does not understand.").

3. Thus, the Sixth Circuit's analysis deepens the split between the Eighth and Ninth Circuits. And on the merits, the Sixth Circuit's analysis does nothing to undermine Missouri's standing.

Because the Sixth Circuit's standing analysis supports Missouri, *see Kentucky*, 54 F.4th at 335–36 (discussing the States' "original theories" that established standing), the question is whether the court's mootness analysis applies. It does not. To start, the Sixth Circuit's mootness holding is wrong for the same reason the Eighth Circuit's standing

---

[3] Even here, there is a conflict. *But see* Opp. 12 n.2. By holding that Treasury's regulations mooted the Plaintiff States' challenges, the Sixth Circuit placed the burden of "defeat[ing] jurisdiction" on Treasury rather than on the States to show standing. *Kentucky*, 54 F.4th at 340 n.10.

analysis is wrong. The Sixth Circuit said, to avoid mootness, the States needed "to provide evidence that they intend to specifically violate *the Rule*." *Id.* at 341. But that "approximates requiring [the States] to admit to violating a law in order to have standing to challenge it," and so embraces a theory of jurisdiction this Court "has repeatedly rejected." *Arizona*, 34 F.4th at 849 (gathering examples); *see also* Pet. 22–23.

But even on the Sixth Circuit's terms, jurisdiction exists. Missouri faces compliance costs and sovereign harms from Treasury's inappropriately broad reading of the Tax Mandate. *See* Pet. 22 (compliance costs); Pet. 24–26 (sovereign harms). That means there is a live controversy, and so jurisdiction. *See Kentucky*, 54 F.4th at 342 (finding that compliance costs prevents mootness).

Even Missouri's pre-enforcement standing remains. The Sixth Circuit's mootness analysis rests on the view that Kentucky's and Tennessee's injuries stem from their fear that the Tax Mandate bars "*any* tax cut . . . ." *Ohio*, 53 F.4th at 991; *see Kentucky*, 54 F.4th at 341. But Missouri's claim is that the Tax Mandate prohibits only the deliberate use of ARPA funds to pay for a tax cut. *See*, *e.g.*, *supra* § I. And the source of the State's injuries is Treasury's implementation of a broader interpretation of the law. *See*, *e.g.*, 31 C.F.R. § 35.8(b) (codifying the broader reading). As a result, Treasury has not "repeatedly disavowed" an interpretation of the Tax Mandate that injures Missouri, *Ohio*, 53 F.4th at 991, it has embraced it.

***

There is thus a circuit split on when States have standing to challenge the Tax Mandate—and, by extension, when States have standing to challenge a spending condition, *see* Pet. 31–33. That split spans three circuits, four cases, and has resulted in six opinions. It is therefore a well-defined split that makes certiorari review appropriate.

III. The Court should review the meaning and constitutionality of the Tax Mandate.

Finally, Treasury argues that the Court should not address the meaning and constitutionality of the Tax Mandate. *See* Opp. 13–15. That is not because the Tax Mandate's meaning and constitutionality are unimportant; they plainly are. *See* Sup. Ct. R. 10(c); Pet. 33. The agency's main argument is that the Eighth and Ninth Circuits "resolved the case on threshold grounds." Opp. 13–14 (citing *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012)).

That ignores that the Eighth Circuit's standing analysis (like Treasury's opposition, *see* Opp. 9–10) conflates the merits with standing. *See*, *e.g.*, App. 11a; *see also* Pet. 27–28, 34. Both issues are therefore fairly before the Court. Furthermore, the Court now has the benefit of the Sixth Circuit's constitutional analysis of the Tax Mandate. *See Kentucky*, 54 F.4th at 346–57. Thus, unlike in *Zivotofsky*, there are "lower court opinions to guide [the] analysis of the merits." *Zivotofsky*, 566 U.S. at 201.[4]

---

[4] Given that, this case's procedural posture is irrelevant. *Contra* Opp. 14.

Nor does Missouri's statutory argument render review inappropriate. *But see* Opp. 14. To the contrary, Missouri's statutory claim shows that review is appropriate. Only Missouri has provided a constitutional interpretation of the Tax Mandate. Every other case challenging the law—including the two Treasury mentions, *see* Opp. 15—has held that the law is constitutionally deficient. *See*, *e.g.*, *Kentucky*, 54 F.4th at 347 (concluding that, because the Tax Mandate is vague, Tennessee cannot be forced to comply with Treasury's regulations); *Texas* v. *Yellen*, 597 F. Supp. 3d 1005, 1012–15 (N.D. Tex. 2022), *appeal docketed* No. 22-10560 (5th Cir.); *West Virginia* v. *U.S. Dep't of Treasury*, 571 F. Supp. 3d 1229, 1248–55 (N.D. Ala. 2021), *appeal docketed* No. 22-10168 (11th Cir.). That means further percolation is unnecessary, *contra* Opp. 14–15, because no other case will bring Missouri's statutory argument to the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ANDREW BAILEY
Missouri Attorney General
D. JOHN SAUER
Deputy Attorney General
MICHAEL E. TALENT
Deputy Solicitor General
Counsel of Record
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(314) 340-4869
Michael.Talent@ago.mo.gov

January 4, 2023