No. _____

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

PETITION FOR WRIT OF CERTIORARI

ERIC S. SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor 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

QUESTIONS PRESENTED

In response to the pandemic-related economic downturn, Congress passed the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, 135 Stat. 4. ARPA provides Missouri with roughly $2.7 billion and a condition: The State cannot use those funds "to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation." §9901, 135 Stat. at 227 (codified at 42 U.S.C. §802(c)(2)(A)). The Department of the Treasury ("Treasury")—consistent with public comments by Secretary Yellen—reads the law as prohibiting revenue-reducing tax policies. Missouri interprets the law as prohibiting only the deliberate use of ARPA funds to pay for a tax cut, and the government's position as unconstitutional. The Eighth Circuit held Missouri lacked standing to seek judicial resolution of that difference.

The questions presented are:

1. Does the State of Missouri have standing to challenge Treasury's interpretation of the Tax Mandate as inconsistent with the law?
2. Does the Tax Mandate prohibit only the deliberate use of ARPA funds to pay for a tax cut?
3. If the Tax Mandate does more than prevent the deliberate use of ARPA funds to pay for a tax cut, is it constitutional under Article I, §8 and Tenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is the State of Missouri.

Respondents are 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; and the United States Department of the Treasury.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *State Missouri* 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; and the U.S. Department of the Treasury*, No. 21-2118 (8th Cir.) (opinion affirming the order of the district court dismissing the case issued July 14, 2022); and
- *State Missouri* 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; and the U.S. Department of the Treasury*, No. 4:21-cv-376 (E.D. Mo.) (order dismissing the case entered May 11, 2021).

There are no other proceedings in state or federal court or this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Last year, Congress passed ARPA to provide States—like Missouri—with billions of dollars to respond to the economic downturn caused by the COVID-induced shutdowns. Congress also attached a condition restricting the use of those funds, the Tax Mandate. The mandate provides that States cannot use ARPA funds "to either directly or indirectly offset a reduction in the net tax revenue of such State . . . ." 42 U.S.C. § 802(c)(2)(A).

What the Tax Mandate means is of great importance to Missouri, since it governs the use of $2.7 billion of ARPA aid and could affect the State's tax policy. Missouri reads the law as prohibiting only the deliberate use of ARPA funds to pay for a tax cut. Secretary Yellen and Treasury, however, read it more broadly. The law, according to them, requires States to implement a tax policy that increases tax revenue or, at the very least, is revenue-neutral (with a *de minimis* amount of wiggle room).

But the district court and the Eighth Circuit said Missouri has not suffered an injury-in-fact and so lacks standing to seek judicial review of that interpretive dispute. Analyzing Missouri's standing under this Court's pre-enforcement standing precedents, both courts faulted Missouri for failing to say it *will* violate the Tax Mandate as the government interprets it. But when it bought suit, the State alleged that it will take ARPA funds and intends to, and now is, cutting taxes—conduct that could violate Treasury's broad interpretation. That is enough. It is not, and never has been, the rule that a plaintiff must say it will violate the law in order to have standing. If it were, then plaintiffs like Missouri would be forced

to choose between judicial review—and the risks of an adverse judgment, such as the loss of ARPA funds—or forfeiting their rights.

Thus, Missouri has standing when viewing this case as a pre-enforcement challenge. But it is not just that. The Eighth Circuit's decision ignores Missouri's interests in ARPA and its sovereign interests. Using its Spending Clause power, Congress can attach conditions to federal funds to achieve goals it could not accomplish directly. But to protect the States from being commandeered by Congress, the Constitution mandates that spending conditions be unambiguous, related to the federal interest of the program, and not coercive. Thus, Treasury's broad interpretation has already harmed Missouri's interests. Under Missouri's reading of the law, Treasury altered the constitutional conditions which Congress had attached to ARPA, and so trenched on Missouri's right to a spending offer with clear and non-coercive terms. Similarly, for the State's alternative constitutional challenge, if Treasury properly interpreted the Tax Mandate, the law infringes Missouri's right, rooted in its sovereignty, to constitutional spending conditions. Highlighting the need to enforce those constitutionally-mandated limits is Missouri's other sovereign harm: Treasury's broad interpretation of the law (or the law itself, if Treasury is correct) commandeers the State's tax policy by punishing it for exercising its sovereign right to cut taxes.

Missouri has therefore suffered two species of harm, and so has standing. Indeed, the Ninth Circuit held that Arizona has standing to challenge the Tax Mandate's constitutionality under essentially the same theories. *Arizona* v. *Yellen*, 34 F.4th 841 (2022).

Certiorari is warranted to resolve that clear circuit split on an important issue. How a State can seek review of spending conditions absent a violation of those conditions matters a great deal. This case, for example, involves billions of dollars of federal aid to help the States handle the aftermath of the pandemic—which is not an atypical example of how Congress exercises its Spending Clause authority. Review is appropriate to clarify how and when States may challenge conditions attached to federal funding.

The Court should also review the merits. The law, and Treasury's interpretation of it, governs $195 billion of ARPA funds, and every State is subject to the restriction. Whether Treasury properly interpreted the Tax Mandate, and whether it is constitutional, are issues of constitutional and nationwide importance. Moreover, of all the cases challenging the Tax Mandate, this is the only one that presents an alternative statutory interpretation of the law that avoids the constitutional problems. All the other cases just argue that the Tax Mandate is unconstitutional. Thus, this is the only case that presents the full range of interpretative and constitutional issues to the Court.

OPINIONS BELOW

The district court's opinion is reported at 538 F. Supp. 3d 906 (E.D. Mo. 2021), and reprinted at 14a–27a of the Appendix.

The Eighth Circuit's opinion is reported at 39 F.4th 1063 (2022), and reprinted at 1a–13a of the Appendix.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals issued its decision on July 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause of the U.S. Constitution, Article I, § 8, clause 1 is reproduced at App. 28a.

The Tenth Amendment of the U.S. Constitution is reproduced at App. 29a.

Title 42, section 802 of the U.S. Code is reproduced at App. 30a–41a.

Title 31, part 35.8 of the Code of Federal Regulations is reproduced at App. 42a–44a.

STATEMENT OF THE CASE

I. The Tax Mandate.

In response to the COVID-19 pandemic, the country shutdown; in response to the shutdown, the economy shrank and the States lost revenue; and in response to that shrinkage, Congress passed the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. ARPA provides $195.3 billion to the States generally, and $2.7 billion to Missouri specifically, to respond to the COVID pandemic. *See* U.S. Dep't of the Treasury, *Coronavirus State and Local Fiscal Recovery Funds*, https://bit.ly/2SGyFZ9 (last visited Oct. 12, 2022) (allocation chart hyperlink located under "Allocation Information"). That represents between thirteen and fourteen percent of Missouri's annual general revenue expenditures for fiscal years 2019 and 2020. *Compare id.*, *with* C.A. App. 17 (providing Missouri's general revenue expenditures for fiscal years 2019 and 2020).

Congress also limited how States could use ARPA funds. The relevant limitation here is the Tax Mandate (also called the "offset provision"):

> A State or territory shall not use the funds provided under this section . . . to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

§ 802(c)(2)(A).

Starting March 3, 2021, the Tax Mandate applies to States that accept ARPA funds and runs through December 31, 2024, at the latest. *See* § 802(c)(2)(A), (g)(1). To enforce the Tax Mandate, Congress authorized the Department of the Treasury to recoup or to withhold ARPA funds equal to the violation. *See* § 802(e).

During the litigation, Missouri received its ARPA funds, *see* Press Release, Scott Fitzpatrick Mo. State Treasurer, *Missouri Receives $1.3 Billion Payment of American Rescue Plan Funds* (Aug. 5, 2021), https://bit.ly/3vfivEV, as it alleged in the Complaint it would do, *see* C.A. App. 16, 23.

II. The Dispute Over the Tax Mandate's Meaning.

The Tax Mandate was immediately controversial. Attorneys General of twenty-one States, including Missouri, sent Secretary Yellen a letter noting two possible readings of the law. One interpretation—the one that concerned the States—was that the Tax Mandate penalized States for cutting taxes for any reason. *See* C.A. App. 73. Such an interpretation, the States noted, "would amount to an unprecedented and unconstitutional intrusion on the separate sovereignty of the States . . . ." *Id.* To avoid those issues, the States offered a narrow interpretation of the law: That it only "precludes *express* use of [ARPA funds] for direct tax cuts rather than for the purposes specified by the Act." C.A. App. 78.

In response, Secretary Yellen rejected the States' interpretation. Instead, she signaled her belief in the broad interpretation: "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." C.A. App. 81 (emphasis added). She reiterated her position before the U.S. Senate Committee on Banking, Housing, and Urban Affairs. When asked 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." *See 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; *see also* C.A. App. 538 (discussing the testimony). As the States pointed out in their letter, money's "fungibility" only matters under the broad interpretation of the Tax Mandate. *See* C.A. App. 74.

Right before the district court ruled on the State's motion for a preliminary injunction, Treasury issued an interim final rule (IFR) adopting Secretary Yellen's broad reading of the Tax Mandate with minor modifications. *See* Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786, 26,786 (May 17, 2021). The IFR provides a four-step process, codified at 31 C.F.R. § 35.8(b), to determine if a State violates Treasury's interpretation of the Tax Mandate:

1) Treasury first determines if a State makes a "covered change"—"a change in law, regulation, or administrative interpretation," that does, or is projected to, reduce tax revenue.

2) Next, Treasury sums all covered changes to determine if they "exceed[] 1 percent of the State's" tax baseline, which is the State's fiscal year 2019 tax revenue adjusted for inflation.

3) Treasury then determines if a State's actual tax revenue is below that baseline.

4) Finally, Treasury sees if the State increased taxes or cut spending in areas where the State is not using ARPA funds.

Any reduction "not covered by [sources identified in Step 4] will be considered to have been offset by Fiscal Recovery Funds, in contravention of the offset provision." 86 Fed. Reg. at 26,807. Thus, the IFR measures a violation by looking at a State's entire tax policy, not whether the State actually uses ARPA funds to pay for a tax cut.

Before the Eighth Circuit rendered its decision, Treasury issued a Final Rule implementing the Tax Mandate. The Final Rule, insofar as Tax Mandate is concerned, is substantively the same as the IFR. *See* Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338, 4,424 (Jan. 27, 2022) ("Treasury is finalizing its implementation of the offset provision largely without change.").

III. Lower Court Proceedings.

Because Treasury's interpretation of the Tax Mandate limits Missouri's ability to receive ARPA funds and to cut taxes as it wished, the State filed suit on March 29, 2021. C.A. App. 25. Missouri brought only federal claims, so jurisdiction was proper under 28 U.S.C. § 1331.

While Missouri's suit pre-dated the IFR and Final Rule, it did not predate the effective date of the Tax Mandate—March 3, 2021. 42 U.S.C. § 802(c)(2)(A), (g)(1). Because turning down the funds was not a realistic choice, *see* C.A. App. 16, 23, the State knew it

would be subject to the Tax Mandate and Treasury's interpretation of it. And when Missouri sued, its legislature was in session and considering eight tax-reduction proposals. *See* C.A. App. 17–18.

Missouri brought two alternative claims: First, that the Tax Mandate prohibits only the deliberate and express use of ARPA funds to pay for tax cuts, and thus Treasury's broad interpretation is wrong. C.A. App. 18–20.[1] Second, that if Treasury's interpretation is correct, the Tax Mandate exceeds Congress's power under the Spending Clause and violates the Tenth Amendment. C.A. App. 20–24.

The State then moved for a preliminary injunction. The government argued that the State lacked standing. *See* C.A. App. 509–13. On May 11, 2021, the district court dismissed the case for lack of standing and because the State's claims were not ripe. App. 27a. The State timely appealed. C.A. App. 753.

The Eighth Circuit affirmed.[2] App. 2a. The panel's holding rests on the theory that Missouri had to allege it will violate Treasury's interpretation of the law: "Missouri has not alleged any intent to engage in conduct that is proscribed by the Offset Restriction on its face or the Secretary's interpretation of it." App. 11a. That is so, the court said, because "tax-reduction policies … do not violate ARPA or" Treasury's interpretation of it. *Id.* Instead, "[t]he Offset

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[1] Missouri's suit was premised, in part, on comments Secretary Yellen made. *See* C.A. App. 15. The State uses "Treasury" because Secretary Yellen was speaking in her official capacity.

[2] The Eighth Circuit did not address the district court's ripeness holding. App. 13a.

Restriction simply prohibits states from cutting taxes in a way that reduces net revenue more than a *de minimis* amount and then failing to account for that reduction through non-ARPA sources." *Id.* Thus, the Eighth Circuit held, Missouri needed to allege "that [the] tax cuts [its legislature was considering] would reduce net revenue and that [the State] would fail to offset the reduction through permissible means." *Id.* The State's failure to do so meant that it "has only alleged a conjectural or hypothetical injury, not one that is actual or imminent. It has also not alleged a future injury that is certainly impending or even likely to occur." App. 12a (footnote, citations, and quotations omitted).

Missouri timely filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Congress, through ARPA, provided States with $195.3 billion to ameliorate the economic downturn following the COVID-19-driven shutdown. Missouri's share of those funds constitutes thirteen to fourteen percent of the State's general fund expenditures in the two years preceding the passage of ARPA. But how much of that money Missouri receives depends on the State's compliance with the Tax Mandate.

Thus, what the Tax Mandate means, and whether it is constitutional, matters a great deal—as does the antecedent question of what a State must do to challenge the law or how Treasury implements it. The best evidence of that is current litigation involving the Tax Mandate. Including this case, twenty-one states have brought suit in six different courts in five

circuits.[3] To date, two circuits have analyzed a State's standing to challenge the Tax Mandate or its implementation. The Ninth Circuit ruled that Arizona has standing to challenge the Tax Mandate's constitutionality—a decision that is consistent with the decisions of four district courts. The Eighth Circuit concluded otherwise here.

That was error. Missouri's position is simple: The Tax Mandate prohibits only the deliberate use of ARPA funds to pay for a tax cut; if it sweeps more broadly, the law is unconstitutional. At the time Missouri filed suit, Secretary Yellen's stated view was that the Tax Mandate swept more broadly, *i.e.*, that it mandated a revenue-neutral or revenue-enhancing tax policy. Since then, Treasury adopted her view via the IFR and Final Rule, which determine whether a State violates the Tax Mandate by looking at a State's fiscal policy as a whole. If the policy is revenue-reducing (subject to a *de minimis* exception), there is a violation; if it is revenue-neutral or revenue-enhancing, there is no violation. Thus, from the outset of the litigation, there has been a bona fide dispute between Missouri and Treasury about the Tax Mandate's scope and legality. Yet the Eighth Circuit concluded Missouri lacks standing because the State

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[3] *Texas* v. *Yellen*, 2022 WL 1063088 (N.D. Tex. Apr. 8, 2022), *appeal docketed* No. 22-10560 (5th Cir.); *West Virginia* v. *U.S. Dep't of Treasury*, 571 F. Supp. 3d 1229 (N.D. Ala. 2021), *appeal docketed* No. 22-10168 (11th Cir.); *Kentucky* v. *Yellen*, 563 F. Supp. 3d 647 (E.D. Ky. 2021), *appeal docketed* No. 21-6108 (6th Cir.); *Arizona* v. *Yellen*, 550 F. Supp. 3d 791 (D. Ariz. 2021), *rev'd* 34 F.4th 841 (9th Cir. 2022); *Ohio* v. *Yellen*, 547 F. Supp. 3d 713 (S.D. Ohio 2021), *appeal docketed* No. 21-3787 (6th Cir.).

did not allege it will violate Treasury's interpretation of the law.

Article III, however, does not require plaintiffs to declare they will violate the law in order to receive judicial review. This Court's precedents make that plain. So, too, does logic. The Eighth Circuit's analysis requires Missouri to place ARPA funds at risk to challenge Treasury's interpretation or to preserve those funds by complying with a more onerous, unconstitutional condition that limits its authority to set tax policy. Given the importance of federal funds to the States—ARPA, for example, provides the States billions of dollars of aid to offset the economic effects of the pandemic response—the Eighth Circuit's rule will result in States rejecting the gamble and accepting unlawful spending conditions. That is the very coercion that Missouri challenges.

There is a second problem with the Eighth Circuit's holding. As this Court has recognized, the Constitution mandates that conditions on federal funding meet certain criteria to protect the States' status as separate sovereigns. That is, the Constitution gives the States a right to a certain type of spending condition. Missouri argues that Treasury altered the Tax Mandate to the State's detriment, thus depriving Missouri of its constitutional right to a constitutional spending condition. That itself is a cognizable injury. It also means that Missouri has standing to raise its constitutional claim that if Treasury properly interpreted the Tax Mandate, the law is unconstitutionally ambiguous, unrelated to the federal interests in ARPA, and coercive. In that case, Congress failed to respect Missouri's constitutional entitlement to a spending condition that meets certain

conditions, and so harmed the State's sovereign interest in being able to knowingly and voluntarily accept the Tax Mandate.

That illustrates the importance of permitting challenges like Missouri's. Treasury's broad reading of the Tax Mandate punishes States that implement certain tax reduction policies. But the ability of a State to set its own tax rules is "indispensable" to its existence. *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1868). So Treasury's interpretation (or, in the alternative, the Tax Mandate) causes harm to Missouri's sovereign authority. Judicial review is therefore necessary to correct that harm and to vindicate the federal system.

The Ninth Circuit was thus correct when it held that Arizona has standing to challenge the Tax Mandate's constitutionality using the same theories Missouri advances here. This case presents the ideal vehicle to resolve that split and to clarify when a State may bring suit to challenge a spending restriction or the Executive Branch's interpretation of one. Moreover, because the Eighth Circuit's analysis implicitly resolved the meaning and constitutionality of the Tax Mandate, this case is also a proper vehicle to address those issues. Indeed, it is the ideal vehicle. All the other challenges to the Tax Mandate percolating through the lower courts challenge the constitutionality of the law. This is the only case that presents a constitutional interpretation of the Tax Mandate, and so the only case that preserves the law as Congress intended.

I. The Eighth Circuit's Decision Conflicts with the Ninth Circuit's Holding that Arizona Has Standing to Challenge the Tax Mandate's Constitutionality.

A. The Ninth Circuit's Decision.

Arizona v. Yellen, 34 F.4th 841 (9th Cir. 2022), involves the State of Arizona's challenge to the Tax Mandate on the basis "that [it] violates the Spending Clause and the Tenth Amendment" because the law "is unconstitutionally ambiguous under the Spending Clause" and is "unduly coercive and unconstitutionally commander[s Arizona's] sovereign power to set its own tax policy in violation of the Tenth Amendment." *Id.* at 847. Arizona raised three standing theories: (1) "that it has standing because of the compliance costs imposed by the Treasury Department's IFR," (2) that it had standing to bring a pre-enforcement challenge to the Tax Mandate, and (3) that the Tax Mandate "inflicts cognizable sovereign injuries upon the States by being unconstitutionally ambiguous and coercive." *Id.* at 848. The Ninth Circuit rejected the first, *see id.*, but held that the latter two are viable.

Pre-enforcement Standing: In analyzing whether Arizona has pre-enforcement standing, the Ninth Circuit considered whether the State alleged "(1) an 'intention to engage in a courts of conduct arguably affected with a constitutional interest,' (2) 'but proscribed by statute'" and (3) whether there was "'a credible threat of prosecution' . . . ." *Id.* at 849 (quoting *Susan B. Anthony List* v. *Driehaus (SBA List)*, 573 U.S. 149 (2014)).

As to the first factor, the Ninth Circuit concluded Arizona alleged that it intended "to do an act arguably

affected by a constitutional interest"—the coerced acceptance of ARPA funds with an ambiguous condition. *Id.* at 849 (quotations omitted).

As to the second factor, the Ninth Circuit noted that "Arizona has accepted ARPA funds, certified that it will meet ARPA's conditions, and passed a $1.9 billion tax cut." *Id.* The panel majority rejected the claim that Arizona also needed to allege that its tax cut "will result in a reduction in its 'net tax revenue,'" and that the State intended to use "ARPA funds to offset the tax cut." *Id.* Requiring such allegations "approximates requiring Arizona to admit to violating a law in order to have standing to challenge it, a prerequisite the Supreme Court has repeatedly rejected." *Id.* Judge Nelson disagreed, saying that Arizona's needed to "allege that it has (or plans to) directly or indirectly offset a reduction in net tax revenue." *Id.* at 856 (Nelson, J., concurring).

As to the third factor, the panel majority analyzed "(1) whether the plaintiffs have articulated a concrete plan' to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute." *Id.* at 850 (quotations omitted) (quoting *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). But because the Tax Mandate "is new," the court said, "the history of past enforcement carries little, if any weight." *Id.*

That left the first two considerations. As to the first, the panel majority found it sufficient that the State recently passed a tax cut. *See id.* As to the second, the panel majority found three facts

relevant—"[t]hat the federal government has not disavowed enforcement of the Offset Provision," that Secretary Yellen "wrote a letter confirming that the [Tax Mandate] will be enforced," and that the IFR provided a "detailed and specific process that will be used to recoup funds from States that violate the" Tax Mandate. *Id.* Judge Nelson again disagreed, saying "Treasury has explicitly disavowed any prohibition against states enacting tax cuts," and so the threat of enforcement was speculative. *Id.* at 856 (Nelson, J., concurring).

Because, the panel majority concluded, Arizona "has done everything short of confessing a desire to use ARPA funds 'directly or indirectly' to offset the tax cut it passed," there was "a realistic danger" of recoupment. *Id.* at 850–51. The State could bring a pre-enforcement challenge. *See id.*

Sovereign Injuries: For its theory of injury to its sovereign interests, Arizona argued "that the [Tax Mandate's] ambiguity prevents Arizona from being able to exercise its choice voluntarily to accept ARPA funds and understand the consequences of agreeing to ARPA's conditions. Arizona also contended that by coercing the States into accepting the Offset Provision, ARPA threatens Arizona's sovereign prerogative to 'tax its residents as it sees fit.'" *Id.* at 851.

The full panel agreed. Examining Arizona's "sovereign injury theory for standing through the lens of Spending Clause legislation being 'in the nature of a contract,'" *id.* (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981)), the court noted that the Constitution imposes "inherent limitations on Congress's power" under the Spending

Clause, *id.* at 851–52. Analogizing to contract suits involving ambiguous terms or duress, the Ninth Circuit reasoned that "the quasi-contractual funding offer at issue here can be challenged by Arizona at the outset for offering conditions that are unconstitutionally ambiguous or coercive." *Id.* at 852. Such an offer "offends state sovereignty and gives rise to a cognizable injury in fact." *Id.* "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." *Id.* at 853. That sufficed for standing.

B. The Eighth Circuit's Conflicting Decision.

As to pre-enforcement standing, the Eighth Circuit's analysis is no different from Judge Nelson's. The Eighth Circuit concluded that Missouri had to allege it was going to violate the Tax Mandate—as interpreted by Secretary Yellen and Treasury—to have standing: "[A]lthough Missouri may have alleged that it intends to accept ARPA funds and that it is considering tax cuts, it has not alleged that those tax cuts would reduce net revenue and that it would fail to offset the reduction through permissible means." App. 11a. *Compare id.*, *with Arizona*, 34 F.4th at 856 (Nelson, J., concurring) ("A tax cut, on its own, does not fall within the Offset Provision's ambit. Without more, we cannot infer both (1) a reduction in net tax revenue and (2) conduct that might count as an 'offset.'"). The conflict is plain.

Indeed, it is plainer than ever. Like Arizona, *see Arizona*, 34 F.4th at 847, Missouri has now cut taxes.

In September, the State implemented two tax cuts. One is a reduction in income tax rates that the State Department of Revenue estimates could reduce revenue by over $130 million in fiscal year 2023 and over $330 million in fiscal year 2024.[4] Comm. Legislative Research, L.R. No. 5974S.05P, Fiscal Note 1, 4 (2022). The other is a tax credit program that is estimated to cost roughly $40 million in fiscal year 2024. Comm. Legislative Research, L.R. No. 5969H.03P, Fiscal Note 1 (2022).[5] This case and *Arizona* are thus factually similar, and the different holdings are irreconcilable.

This case, to be sure, involves differing interpretations of the Tax Mandate as well as a constitutional challenge while *Arizona* involves just a constitutional challenge, but that does not render the two decisions compatible. Indeed, that Missouri raises the same constitutional arguments as Arizona in support of its interpretation and, alternatively, its constitutional challenge to the Tax Mandate show that the cases are indistinguishable.

And, to be clear, there are interpretative differences—the Eighth Circuit's claim that "the Secretary has never endorsed or adopted the broad interpretation," App. 10a, notwithstanding. Even though Treasury has not said that the Tax Mandate categorically bars tax cuts, *see id.*, it has conceded that its reading of the Tax Mandate is broader than

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[4] The difference is due to the fact the reduction affects part of fiscal year 2023.

[5] The Tax Mandate applies to tax credits. 42 U.S.C. § 802(c)(2)(A).

Missouri's. *See* Br. for Appellees at 7 (calling Missouri's interpretation "mistaken"). In all events, the Eighth Circuit's statement is a red-herring, for the court still said that for Missouri to have standing, it needed to allege that it will violate Treasury's reading of the law—the exact rule the Ninth Circuit rejected. *See Arizona* 34 F.4th at 850. Indeed, the Eighth Circuit's view even on this front mirrors Judge Nelson's. In his partial dissent, he said there was no realistic chance of enforcement because "Treasury has explicitly disavowed any prohibition against states enacting tax cuts." *Arizona*, 34 F.4th at 856. The majority rejected the claim. While Treasury may have "disavowed enforcing the law in the way Arizona fears," it still intended to enforce it. *Id.* at 850. Similarly here—even if Treasury is not enforcing an interpretation of the Tax Mandate that bars all tax cuts, it is enforcing 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. That's what matters.[6] *See Arizona*, 34 F.4th at 850 (saying, under such circumstances, Arizona need not "allege an intention

[6] The Eight Circuit seemed to believe that Missouri challenges "a specific potential interpretation . . . ." App. 9a. As the complaint makes clear, however, Missouri challenges Secretary Yellen's and Treasury's failure "to adopt the narrow, correct, and constitutional interpretation of the Tax Mandate . . . ." C.A. App. 20; *see also* C.A. App. 19 (providing reasons why "[a] broader interpretation of the Tax Mandate" violates clear-statement rules); C.A. App. 50 (asking the district court to enjoin Treasury from "enforcing any interpretation of the Tax Mandate . . . that is broader than prohibiting the deliberate and express use of the Act's relief funds to offset revenue losses from a specific tax cut").

to use ARPA funds 'directly or indirectly' to offset the resulting net revenue reduction from its tax cut").

The Eighth and Ninth Circuits also diverge in analyzing the sovereign interests at stake. Like Arizona, Missouri pointed to its "interest in the offer Congress provided to the State," App. 9a—that is, the State's interest in accepting ARPA funds on Congress's constitutional terms, not Treasury's unconstitutional interpretation. Both States therefore advance the same thesis—unconstitutional spending restrictions "offend[] state sovereignty and give rise to a cognizable injury in fact." *Arizona*, 34 F.4th at 852.

The *Arizona* decision did deal with the claim that Congress exceeded its constitutional authority, while Missouri's argument here is that Treasury's interpretation of a law is improper—and the Eighth Circuit distinguished the two cases on that basis. *See* App. 9a n.5. But the principles animating the Ninth Circuit's reasoning in *Arizona*—"the inherent limitations on Congress's power" under the Spending Clause which "create constitutionally-imposed and enforceable criteria that 'contractual' funding offers from the federal government must meet," *Arizona*, 34 F.4th at 852—animate Missouri's statutory analysis, which relies, in part, on the unconstitutionality of the a broad reading of the Tax Mandate. *See e.g.*, C.A. App. 19, 474–75. And in all events, because Missouri claims, in the alternative, that if Treasury properly interpreted the law, the Tax Mandate is unconstitutional, *see*, *e.g.*, C.A. App. 20–24, the State *does* raise the same claims, and the same theory of standing, as Arizona.

Thus, the Eighth Circuit was wrong when it said Missouri "develop[ed] no argument as to how it has suffered a concrete injury under either of these theories, nor has it explained how such an injury could still exist after it has accepted the funds." App. 9a n.5. The State did; they are the ones the Ninth Circuit identified: The violations of the constitutionally mandated criteria for spending conditions, which "offends state sovereignty," *Arizona*, 34 F.4th at 852, and the loss of "control over its taxing policies" as a result of Treasury's broad reading of the Tax Mandate, *id.* at 853.

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Thus, the Eighth Circuit and Ninth Circuit reached contrary conclusions when faced with the same basic facts and legal theories. The two decisions are irreconcilable. Certiorari is warranted to resolve this clear circuit split.[7]

II. The Eighth Circuit's Decision Is Wrong.

Certiorari is also necessary because the Eighth Circuit's decision is wrong. Treasury's broad reading of the Tax Mandate inflicts five injuries on the State that fall into three categories. *See* App. 9a (summarizing them). All are sufficient.

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[7] While the Eighth and Ninth Circuits are the only appellate courts to have discussed this issue, four district courts have found standing based on the same, or similar, reasoning. *See Texas* v. *Yellen*, 2022 WL 989733, at *4–*5, *6 (N.D. Tex. Mar. 4, 2022); *Kentucky*, 563 F. Supp. 3d at 652–53; *West Virginia* v. *U.S. Dep't of Treasury*, 2021 WL 2952863, at *6–*7 (N.D. Ala. July 14, 2021); *Ohio*, 547 F. Supp. 3d at 723. Those decisions are on appeal, and their resolution will only deepen this split.

First, are pocketbook injuries, such as costs Missouri will face to comply with a broad interpretation of the Tax Mandate and the increased risk the State will lose ARPA funds under the broad interpretation. *See Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("[A] loss of even a small amount of money is ordinarily an 'injury.'"); *City and County of San Francisco* v. *Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (finding standing if enforcement of federal law results in the loss of federal funds).

Second, Missouri has standing under the Court's pre-enforcement standing analysis. At the time it filed suit, Missouri alleged it must take ARPA funds, *see* C.A. App. 16, and was considering tax cuts that could violate a broad interpretation of the Tax Mandate, *see* C.A. App. 17–18, 466–67. The State has now cut taxes. *See* S.B. 3 & 5, 101st Gen. Assemb., 1st Spec. Sess. (Mo. 2022); H.B. 3, 101st Gen. Assemb., 1st Spec. Sess. (Mo. 2022). Accepting Congress's spending offers and cutting taxes constitutes conduct "arguably affected with a constitutional interest." *SBA List*, 573 U.S. at 159 (quotations omitted). And, based on Treasury's interpretation of the Tax Mandate, it is conduct that could lead to recoupment.

That suffices. "Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law." *SBA List*, 573 U.S. at 163; *see Free Enter. Fund* v. *Pub. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (Article III does not "require plaintiffs to 'bet the farm ... by taking the violative action' before 'testing the validity of the law.'" (quoting *MedImmune, Inc.* v. *Genetech, Inc.*, 549 U.S. 118, 129 (2007)).

Yet that is what the Eighth Circuit demanded. The Court faulted Missouri for failing to allege that the tax cuts it pointed to "would reduce net revenue and that [the State] would fail to offset the reduction through permissible means." App. 11a. The court's claim notwithstanding, *see id.*, that requires Missouri to "confess that [it] will in fact violate the law," *SBA List*, 573 U.S. at 163. The Ninth Circuit correctly rejected such a requirement. *See Arizona*, 34 F.4th at 849 (rejecting the district court's "reasoning [which] approximates requiring Arizona to admit to violating a law in order to have standing to challenge it."). Indeed, now that Missouri has passed significant tax cuts, *see* Mo. S.B. 3 & 5; Mo. H.B. 3, the State has clearly done "everything short of confessing a desire to use ARPA funds 'directly or indirectly' to offset a tax cut it passed," *Arizona*, 34 F.4th at 850. That is sufficient here, just as it was sufficient in *Arizona*. *See id.* at 850–51.

Finally, Treasury intends to enforce its broader reading of the Tax Mandate. The Final Rule codifies an interpretation broader than Missouri's, which Secretary Yellen publicly rejected, *see* C.A. App. 81–82. That evidence established Arizona's standing to challenge the Tax Mandate, *see Arizona*, 34 F.4th at 850, and establishes injury here. Indeed, Treasury is actively looking for ARPA violations. *See Ducey v. Yellen*, 2022 WL 2817710, at *2 (D. Ariz. July 19, 2022), *appeal docketed* No. 22-16101 (9th Cir.). There is thus no reason to believe Treasury will abstain from enforcing its version of the Tax Mandate. *See*, *e.g.*, *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (Standing exists because "[t]he State has not suggested that the newly enacted law will not be enforced.").

Third, there are the harms to Missouri's sovereign interests, which are intertwined with the State's interest in ARPA. The Eighth Circuit dismissed those harms, grouping them in its pre-enforcement standing analysis. *See* App. 9a–10a. That was error.

Spending clause legislation "is much in the nature of a contract," *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291, 296 (2006) (quotations omitted), so Treasury's alteration of the Tax Mandate by reading it broadly, and to Missouri's detriment, is a cognizable injury, *see*, *e.g.*, *Dominion Transmission, Inc.* v. *FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008) ("FERC's alteration of Dominion's obligations under the 2001 and 2005 Settlements" is an injury-in-fact); *see also Clinton* v. *City of New York*, 524 U.S. 417, 430–31 (1998) (using the line-item veto to impose liabilities Congress removed results in an injury-in-fact).

That also inflicts a concrete, particular injury to Missouri's constitutionally protected sovereignty. The Constitution requires spending conditions to meet certain criteria so that the conditions do "not undermine the status of the States as independent sovereigns . . . ." *NFIB* v. *Sebelius*, 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.); *see id.* at 675–76 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (making the same point). That is, the Constitution gives Missouri a constitutional right to a particular *type* of offer—an unambiguous, non-coercive one—as a means of protecting Missouri's sovereign status. *See South Dakota* v. *Dole*, 482 U.S. 203, 207–08 (1987) (listing conditions); *Pennhurst*, 451 U.S. at 17 ("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.") (quotations omitted). An offer that violates those conditions "offends state sovereignty and gives rise to a cognizable injury in fact." *Arizona*, 34 F.4th at 852. It follows that when an agency alters a spending condition to render it unconstitutional, as Missouri alleged here, the same injury occurs. Indeed, it is a double harm. The Constitution requires *Congress* to impose spending conditions. *See*, *e.g.*, *Tex. Educ. Agency* v. *U.S. Dep't of Educ.*, 992 F.3d 350, 361–62 (5th Cir. 2021) (noting that agencies cannot cure ambiguous spending clause conditions because Congress is the only actor empowered to act under the Spending Clause). It does not permit an agency, which is not accountable to the States in any way, to do so. *See* U.S. Const. art. II, § 1. So here, Treasury's interpretation harms Missouri's constitutional right to a certain type of injury and its right to have a particular federal actor create that condition.

Moreover, Treasury's reading turns a constitutional condition into an unconstitutional one. So even if the agency could alter spending clause conditions, and do so to Missouri's detriment, Missouri has standing to challenge the interpretation as unconstitutional. *See NFIB*, 567 U.S. at 575 (opinion of Roberts, C.J.), 624 (Ginsburg, J., concurring in part and dissenting in part), 671 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (addressing the States' Spending Clause challenge on the merits). The State is "the object" of the restriction and so—as with all regulated entities—"there is ordinarily little question that" the restriction on its ability to set tax policy on pain of losing ARPA funds "caused [it] injury." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992).

After all, Treasury's broader interpretation punishes Missouri for enacting certain tax and fiscal policies. The broad interpretation Treasury adopted essentially requires the State to maintain a revenue-neutral or revenue-enhancing tax policy by keying violations to reductions in total tax revenue (with a *de minimis* safe harbor). *See* 31 C.F.R. § 35.8(b). In essence, Treasury penalizes revenue-reducing tax policies. But a State's "taxation authority" is "central to" its sovereignty. *Dep't of Revenue of Or.* v. *ACF Indus.*, 510 U.S. 332, 345 (1994); *see*, *e.g.*, *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1868) ("[T]o the existence of the States, … the power of taxation is indispensable."). Missouri has "a judicially cognizable interest in the preservation of its own sovereignty" and thus standing to sue for "a diminishment of that sovereignty … ." *Bowen* v. *Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 50 n.17 (1986) (quoting the district court).

Finally, those standing theories apply to Missouri's challenge to Treasury's interpretation of the Tax Mandate and the State's constitutional claim. If the Tax Mandate is unconstitutional because Treasury's interpretation is correct, the costs it imposes on Missouri in terms of compliance and risk of loss of federal funds is a cognizable harm. If the Tax Mandate is unconstitutional because Treasury's interpretation is correct, it is an ambiguous, coercive offer, and Missouri has standing to challenge the harm to its constitutionally protected, sovereign right to a clear, non-coercive spending condition. And if the Tax Mandate is unconstitutional because Treasury's interpretation is correct, the law unlawfully commandeers Missouri's tax policy by penalizing the State for reducing tax revenue.

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At core, Missouri's standing stems from the fact that the State interprets the Tax Mandate to require it to act one way to preserve its ARPA funds and Treasury believes that the law requires more. So like a party to a contract who is unsure about the contract's terms, or a regulated entity who is unsure of what the law requires, Missouri has standing to seek clarity about the meaning of the Tax Mandate. *See*, *e.g.*, *MedImmune*, 549 U.S. at 129, 134–35. That the Constitution protects Missouri's sovereignty by requiring spending conditions to meet certain criteria means that Treasury's broad reading of the Tax Mandate—or, if Treasury is correct, the Tax Mandate itself—harms the State's constitutionally protected sovereign interests. Those are viable bases for standing.

III. The Court Should Address the Merits.

The Court should also grant certiorari to review the meaning and constitutionality of the Tax Mandate. Both are "important question[s] of federal law that [have] not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Both issues are fairly presented because the Eighth Circuit's standing analysis conflates (improperly, *see*, *e.g.*, *FEC* v. *Cruz*, 142 S. Ct. 1638, 1647–48 (2022)) the merits with standing. According to the Eighth Circuit, Missouri needed to allege that it will implement tax cuts that reduce net tax revenue and "fail to offset the reduction through permissible means" because "[t]he [Tax Mandate] simply prohibits states from cutting taxes in a way that reduces net revenue more than a *de minimis* amount and then failing to account for that reduction through non-

ARPA sources." App. 11a. That is, according to the Eighth Circuit, the Tax Mandate says what Treasury says it does. The issue is therefore wrapped up in, and can be reviewed concurrently with, Missouri's standing. Moreover, because the constitutionality of Treasury's interpretation of the Tax Mandate is integral to the law's meaning, *see*, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (discussing the canon of constitutional avoidance); *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001) (requiring clear congressional authorization when an agency's "interpretation of a statute invokes the outer limits of Congress' power"), Missouri's constitutional arguments are fairly encompassed in this issue.

Missouri's arguments are also meritorious. The Tax Mandate prohibits using ARPA funds "to either directly or indirectly *offset* a reduction in the net tax revenue of such State." 42 U.S.C. § 802(c)(2)(A) (emphasis added). "Offset" means "[t]o balance or calculate against; to compensate for." *Offset*, Black's Law Dictionary (11th ed. 2019); *see also Offset*, Webster's Third New International Dictionary (2002) ("counterbalance, compensate"). Because those definitions imply an intentional act, the Tax Mandate's plain terms prohibit only deliberately using ARPA funds to replace lost tax revenues. *See Yates* v. *United States*, 574 U.S. 528, 537 (2015) (plurality opinion) ("Ordinarily, a word's usage accords with its dictionary definition.").

That conclusion is consistent with the requirement that Congress speak clearly before upsetting "the 'usual balance of federal and state powers.'" *Bond* v. *United States*, 572 U.S. 844, 858 (2013) (quoting

Gregory v. *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting another source)). This Court applied—was, "in fact compel[led]" to apply—that principle in the tax context when it interpreted a provision of the Railroad Revitalization and Regulatory Reform Act (R-4 Act) narrowly to avoid limiting the States' ability to provide tax exemptions. *See ACF Indus.*, 510 U.S. at 344–45. So too here. Missouri's narrow, textually supported interpretation respects federalism. Treasury's does not.

Missouri's reading also follows from the canon that courts should avoid reading laws to render them unconstitutional, *see*, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005), and the requirement that Congress speak clearly before authorizing an agency to push constitutional boundaries, *see SWANCC*, 531 U.S. at 172. By contrast, Treasury's reading of the Tax Mandate renders the law an invalid exercise of Congress's spending power and unconstitutional under the Tenth Amendment.

First, Treasury's reading renders the law ambiguous. For example, if Treasury's reading is permissible, then the phrase "directly or indirectly offset" has no determinate meaning. Besides authorizing the Final Rule, it could also justify reading the Tax Mandate to apply to any tax cut because money is fungible, *see* C.A. App. 538, or even support Missouri's reading. Those "plausible alternative interpretation[s] of the law" would render it unconstitutionally ambiguous (and do, if Treasury's interpretation is valid). *Sch. Dist. of the City of Pontiac* v. *Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 284 (6th Cir. 2009) (en banc) (Sutton, J., concurring in the order) (emphasis omitted).

Second, there is a relatedness problem. *See Dole*, 483 U.S. at 207. Treasury's interpretation impermissibly leverages ARPA funds to regulate "conduct outside the scope of the federally funded program." *Rust* v. *Sullivan*, 500 U.S. 173, 196–97 (2000). In measuring a violation by considering a State's tax policy writ large, *see* at 31 C.F.R. § 35.8(b), Treasury's interpretation penalizes States for tax or fiscal decisions they make that are unrelated to the State's receipt of ARPA funds. So if Treasury is right, the Tax Mandate is "a means for bringing federal economic might to bear on a State's own choices of public policy," *Sabri* v. *United States*, 541 U.S. 600, 608 (2004), and not a means to ensure that the funds are "spent for the purposes for which they are authorized," *Rust*, 500 U.S. at 196.

Third, and relatedly, that would mean ARPA—via the Tax Mandate—unconstitutionally commandeers States by forcing them to implement revenue-neutral or revenue-enhancing tax policies. *See Murphy* v. *NCAA*, 138 S. Ct. 1461, 1478 (2018).

Finally, the Tax Mandate is coercive if it supports Treasury's interpretation. Treasury's interpretation would mean the Tax Mandate does more than "govern the use of [ARPA] funds," it is "a means of pressuring the States to" reject revenue-reducing tax policies. *NFIB*, 567 U.S. at 580 (opinion of Roberts, C.J.). Here, however, pressure has turned into compulsion. *Dole*, 483 U.S. at 211. The $2.7 billion the law provides the State is the equivalent of thirteen to fourteen percent of its annual general revenue expenditures from fiscal years 2019 and 2020. *See* Statement of the Case § I, *supra*. As the State alleged, it cannot realistically turn down that money—especially as it, like the rest

of the world, recovers from the COVID-19 pandemic. *See*, *e.g.*, C.A. App. 16. Given that, if the Tax Mandate is as broad as Treasury says it is, ARPA coerces States to accept the mandate and give up a portion of their sovereign taxing authority. *See NFIB*, 567 U.S. at 582 (opinion of Roberts, C.J.) ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.").

Thus, Missouri's reading, unlike Treasury's, avoids rendering the Tax Mandate unconstitutional,[8] and so is the better interpretation. Because it is also textually supported and consistent with this Court's clear statement rules, it is also the right reading. And, for the reasons noted above, if Missouri's interpretation is incorrect, the Tax Mandate is unconstitutional.

IV. The Questions Presented Are Important and Cleanly Presented.

With its spending power, Congress may exercise power over areas "not thought to be within Article I's 'enumerated legislative fields.'" *Dole*, 483 U.S. at 207 (quoting *United States* v. *Butler*, 297 U.S. 1, 65 (1936)). That gives Congress an incentive to use the federal government's vast resources to force States to implement federal policies. *See NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.) (noting that concern). "That insight has led this Court to strike down federal legislation that commandeers a State's legislative or

[8] In the alternative, establish that the Tax Mandate is unconstitutional if Treasury is correct.

administrative apparatus for federal purposes [and] to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.'" *Id.* (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

Requiring States—as the Eighth Circuit did here—to claim they will violate a spending restriction denies them "a 'meaningful' avenue of relief," and thus a means of ensuring the federal government does not use spending conditions to infringe on their sovereignty. *Free Enter. Fund*, 561 U.S. at 490 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 212 (1994)). Such a rule puts States "to the choice between abandoning [their] rights or risking" the loss of federal funds. *MedImmune*, 549 U.S. at 130. Here, for example, Missouri alleged it had "no real choice but to accept" ARPA funds in light of the pandemic-induced economic downturns. C.A. App. 23 (quotations and citation omitted). So under the Eighth Circuit's test, the State must either admit it will violate Treasury's reading of the law to seek judicial review—thus risking needed ARPA funds—or forfeit judicial review and part of its sovereignty to preserve them.

This is also an issue that is likely to recur. Congress routinely provides States funding subject to conditions. *See*, *e.g.*, 20 U.S.C. §1412 (IDEA); 42 U.S.C. §1396a (Medicaid); 42 U.S.C. §2000cc-1 (RLUIPA); *NFIB*, 567 U.S. at 575 (opinion of Roberts, C.J.) (Medicaid expansion). And federal agencies routinely have a role in implementing and interpreting those conditions. *See Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 660 (1985); *Tex. Educ. Agency*,

992 F.3d at 361. That will not stop any time soon. In fiscal year 2020, for example, twenty-one federal block grants provided States and localities "about $58.4 billion . . . ." Cong. Research Serv., R40486, *Block Grants: Perspectives and Controversies* 1 (2021). So the fact-pattern and legal issues this case presents will almost certainly recur, and determining when and how States may challenge spending conditions or an agency's interpretations of them is an issue that will arise again.

Equally important is the Tax Mandate's meaning and constitutionality. The Tax Mandate, and Treasury's interpretation of it, governs the use of $195 billion and affects tax policy in all fifty States and the District of Columbia. *See* Nat'l Ass'n of State Budget Officers, State Recovery Plans, https://bit.ly/3SOtmAD (last visited Oct. 12, 2022) (showing all the States and the District of Columbia provide ARPA-mandated reports). So what the Tax Mandate means—and whether it is constitutional—is "an important [question] of first impression" that justifies certiorari review. *Am. Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); *see Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999) (granting certiorari "in view of the importance of the question presented to the States"); *New York* v. *United States*, 326 U.S. 572, 574 (1946) ("The strong urging of New York for further clarification of the amenability of States to the taxing power of the United States led us to grant certiorari.").

This case is also the ideal vehicle to address those questions. On the standing front, the dueling opinions from the Eighth and Ninth Circuits, including the partial dissent by Judge Nelson in the Ninth Circuit,

render further percolation unnecessary. On the merits, the Eighth Circuit's decision rests—in large part—on the meaning of the Tax Mandate, which is a merits issue that implicates the constitutional issue. Thus, analyzing Missouri's standing will also involve the State's statutory and constitutional arguments. Both issues are also purely legal ones. The government did not raise a factual attack on Missouri's standing, and the meaning and constitutionality of the Tax Mandate are pure questions of law.

Finally, this case is the only one that provides a constitutional interpretation of the Tax Mandate. So far as Missouri is aware, all the other challenges to the Tax Mandate argue that the law is unconstitutional. Thus, this is the only case that preserves the law as Congress intended instead of putting the Court to the choice of finding the entire law unconstitutional or sanctioning an interpretation that would permit Treasury to penalize a State for exercising its sovereign right to reduce tax revenues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC S. SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor 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

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-2118

State of Missouri

Plaintiff – Appellee

v.

Janet L. Yellen, in her official capacity as Secretary of the Treasury; Richard Delmar, in his official capacity as acting inspector general of the Department of the Treasury; U.S. Department of the Treasury

Defendants – Appellees

Appeal from United States District Court
for the Eastern District of Missouri

Submitted: February 15, 2022
Filed: July 14, 2022

Before SMITH, Chief Judge, BENTON and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Missouri challenges the Secretary of the Treasury's implementation of the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, 135 Stat. 4. Missouri argues that the Secretary's "erroneously broad interpretation" of a provision in ARPA—the "Offset Restriction"—is unconstitutional. The district court[1] dismissed the case, finding that Missouri lacked standing and that Missouri's claims were not ripe for adjudication. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

ARPA, which was enacted in March 2021, appropriates over $200 billion to states, territories, and tribal governments to "mitigate the fiscal effects" of the COVID-19 pandemic. 42 U.S.C. § 802(a). Before an entity can receive funds, it must certify to the Secretary that it will comply with ARPA's provisions. *Id.* § 802(d)(1). ARPA funds must be used:

> (A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
>
> (B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to

[1] The Honorable Henry E. Autrey, United States District Judge for the Eastern District of Missouri.

> eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;
>
> (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1).

ARPA also identifies two specific restrictions on the use of allocated funds. At issue in this case,[2] the Act's "Offset Restriction" provides:

> A State or territory shall not use the funds provided under this section . . . *to either directly or indirectly offset* a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax . . . or delays the imposition of any tax or tax increase.

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[2] ARPA also prohibits states and territories from depositing ARPA funds into any pension fund. 42 U.S.C. § 802(c)(2)(B).

Id. § 802(c)(2)(A) (emphasis added). If a state violates the Offset Restriction, it "shall be required to repay the Secretary" an amount equal to the lesser of (1) "the amount of the applicable reduction to net tax revenue attributable to such violation," and (2) the amount of ARPA funds received by the state. *Id.* § 802(e).

On May 17, 2021, the Department of the Treasury issued an Interim Rule implementing the Offset Restriction, 86 Fed. Reg. 26,786 (May 17, 2021), and on January 27, 2022, it issued a Final Rule, which went into effect on April 1, 2022,[3] 87 Fed. Reg. 4338 (Jan. 27, 2022) (31 C.F.R. § 35.1 et seq.). The Final Rule states that Treasury will consider a recipient to have impermissibly used ARPA funds to offset a reduction in net tax revenue if it fails to offset that reduction through means unrelated to the ARPA funds. More specifically, the Offset Restriction is violated if: (1) the recipient implements a change in law or regulation that the recipient assesses has had or predicts to have the effect of reducing tax revenue; (2) the reduction caused by the change is more than de minimis, meaning it exceeds one percent of the recipient's baseline tax revenue for 2019, adjusted for inflation; (3) the recipient reports a reduction in net tax revenue; and (4) the aggregate reduction is greater than the sum of other changes. 31 C.F.R. § 35.8(b). The "other changes" considered under the fourth

[3] The Interim Rule and Final Rule are substantially the same, though the Final Rule adds a requirement for ARPA recipients to exhaust certain procedures before seeking judicial review of a recoupment decision and amends slightly the definition of a "Covered Change." *See* 31 C.F.R. §§ 35.10(e), 35.10(g), 35.3.

element include increases in tax revenue, spending cuts in departments that do not utilize ARPA funds, and—in departments that do use ARPA funds—spending cuts that are greater than the ARPA funds used. *Id.*

II.

Missouri filed suit on March 29, 2021, shortly after ARPA was enacted and before Treasury issued the Interim Rule implementing the Offset Restriction. In its complaint, Missouri describes two potential interpretations of the Offset Restriction. Under one, which it deems the "narrow" and "correct" interpretation, the Offset Restriction "merely prohibits the States from taking COVID-19 relief funds and deliberately applying them to offset a specific tax reduction of a similar amount." Under a second, "broad" interpretation, the Offset Restriction "would prohibit a State from enacting *any* tax-reduction policy that would result in a net reduction of revenue through 2024 or risk forfeiting its COVID-19 relief funds." Missouri alleges that several states contacted the Secretary for clarification about which interpretation Treasury would adopt. According to Missouri, the Secretary declined to endorse the narrow interpretation, and her response and subsequent public comments "generate[d] uncertainty, confusion, and doubt for state legislatures that are currently considering and debating tax-reduction policies."

Shortly after filing its complaint, Missouri moved for a preliminary injunction, asking the district court to enjoin any interpretation of the Offset Restriction "that is broader than prohibiting the deliberate and

express use of the Act's relief funds to offset revenue losses from a specific tax cut" or, alternatively, to enjoin enforcement of the Offset Restriction as unconstitutional under the Spending Clause and the Tenth Amendment because it is an unclear condition on a congressional appropriation. The district court held a hearing on Missouri's motion on May 4, 2021. A week later, the district court dismissed the case, concluding that Missouri lacked standing and that the case was not ripe for adjudication because Missouri's alleged harm was too speculative, abstract, and remote. Missouri has since been allocated approximately $2.7 billion through ARPA and has received at least some of that funding.

III.

We review de novo a district court's dismissal of a case on standing or ripeness grounds. *City of Kennett* v. *EPA*, 887 F.3d 424, 430 (8th Cir. 2018).

We begin with standing. "Federal court jurisdiction is restricted to 'cases and controversies.'" *Wieland* v. *U.S. Dep't of Health & Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 94 (1968)). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). In keeping with this purpose, the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was

unconstitutional." *Id.* (quoting *Raines* v. *Byrd*, 521 U.S. 811, 819–20 (1997)).

"'The irreducible constitutional minimum of standing' requires: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that a favorable decision will redress the injury." *Carson* v. *Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (per curiam) (cleaned up) (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Standing is to be determined as of the commencement of the suit," *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 869 (8th Cir. 2013) (cleaned up) (quoting *Lujan*, 504 U.S. at 570 n.5), and it is the plaintiff's burden to establish these elements. *Wieland*, 793 F.3d at 954. However, the extent of that burden varies depending on the stage of litigation. At the dismissal stage, "the plaintiffs must allege sufficient facts to support a reasonable inference that they can satisfy the elements of standing." *Animal Legal Def. Fund* v. *Vaught*, 8 F.4th 714, 718 (8th Cir. 2021).

The district court concluded that Missouri had failed to allege an injury in fact. For this element, "a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Carson*, 978 F.3d at 1057 (cleaned up) (quoting *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 339 (2016)). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5). Thus, a plaintiff may still have standing to

challenge the threatened enforcement of the law. Under this so-called "pre-enforcement test," the plaintiff must "allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt* v. *Farm Workers*, 442 U.S. 289, 298 (1979)).

In its complaint, Missouri alleges that it has standing because, "[u]nder the threatened broad interpretation," the Offset Restriction would "injure Missouri and other States by unconstitutionally intruding on their sovereign taxing authority, interfering with the orderly management of their fiscal affairs, interfering with state legislative functions, and creating the risk that the States may face forfeiture of billions of dollars in federal funds." Missouri also alleges that the broad interpretation "diminish[es] … Missouri's power to adopt tax policies as it sees fit." Finally, Missouri contends that "[t]he lack of clarity" provided by Secretary Yellen in her response to the inquiring states and in public comments about the Offset Restriction "inflicts immediate interference and irreparable injury" on Missouri's ability to dictate its tax policy and that her failure to embrace the narrow interpretation creates "uncertainty and confusion," which hampers Missouri's ability to consider tax-reduction proposals.[4]

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[4] Missouri's argument is essentially that the Secretary's early comments about the Offset Restriction created confusion about how Treasury would enforce the provision. The Secretary has since issued the Interim and Final Rules, which set forth clearly

On appeal, Missouri identifies five specific ways it has been injured: (1) the broad interpretation of the Offset Restriction punishes Missouri for exercising its constitutional right to set taxes; (2) the Secretary's "embrace of the broad interpretation" has harmed Missouri's interest in the offer Congress provided to the State; (3) Treasury's regulations make ARPA's requirement more onerous, leading to greater compliance costs; (4) under the broad interpretation, there is an increased chance Missouri will lose ARPA funds; and (5) under the pre-enforcement test, Missouri has alleged an intention to engage in conduct arguably affected with constitutional interest, but proscribed by statute, with a credible threat of enforcement hanging over it.

What Missouri's complaint and appeal make clear is that the State is not challenging the Offset Restriction as written, but rather a specific potential interpretation of the provision—the "broad interpretation."[5] In fact, Missouri explicitly states

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how Treasury will determine whether a recipient of ARPA funds has violated the Offset Restriction.

[5] After this case was argued and submitted, the Ninth Circuit held that Arizona had standing to challenge the Offset Restriction. See Arizona v. Yellen, 34 F.4th 841 (9th Cir. 2022). However, unlike Missouri, Arizona did not challenge a hypothetical "broad interpretation" of the Offset Restriction but instead argued that, *as written*, the Offset Restriction is unconstitutionally ambiguous and unduly coercive. Id. at 852. Missouri does briefly allege in its complaint that the Offset Restriction is unconstitutionally vague if it prohibits more than the deliberate use of ARPA funds to offset a specific tax reduction, and on appeal it asserts that it has a constitutional right to clarity regarding the conditions of congressional appropriations. But it develops no argument as to how it has

that its "suit challenges the threatened unconstitutional application" of the Offset Restriction. The problem for Missouri, however, is that there is no threatened application of the broad interpretation. The Secretary explained to the district court and to this court, and Treasury reiterated in the Interim and Final Rules, that the Secretary has never endorsed or adopted the broad interpretation.

Missouri's insistence to the contrary mischaracterizes the Interim and Final Rules and is premised on a shifting definition of the so-called "broad interpretation." In its complaint, Missouri defines the broad interpretation as "prohibit[ing] a State from enacting any tax-reduction policy that would result in a net reduction of revenue through 2024." Yet the letter that Missouri and other states sent to the Secretary urged her to reject a broad interpretation that would "prohibit tax cuts or relief of any stripe." Nevertheless, throughout this litigation, the Secretary has been clear that a recipient of ARPA funds will be deemed to have violated the Offset Restriction only if it cannot account for net revenue losses through non-ARPA sources. And contrary to Missouri's position on appeal, Treasury has not adopted either version of the "broad interpretation" in its regulations implementing ARPA.

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suffered a concrete injury under either of these theories, nor has it explained how such an injury could still exist after it has accepted the funds. Instead, Missouri repeatedly argues that it is injured by a "threatened" "broad interpretation" that has never been adopted

Moreover, although a plaintiff generally need not "confess that he will in fact violate [a] law" in order to challenge it, *see Susan B. Anthony List*, 573 U.S. at 163, a plaintiff must still allege "an intention to engage in a course of conduct . . . proscribed by a statute," *id.* at 159 (quotation omitted). Missouri has not alleged any intent to engage in conduct that is proscribed by the Offset Restriction on its face or the Secretary's interpretation of it. While Missouri's complaint alleges that its legislature was then considering tax-reduction policies, such policies alone do not violate ARPA or any interpretation of ARPA embraced by the Secretary. The Offset Restriction simply prohibits states from cutting taxes in a way that reduces net revenue more than a de minimis amount and then failing to account for that reduction through non-ARPA sources, such as through organic economic growth, increases in revenue from other sources, or spending cuts in sectors not related to ARPA. *See* 31 C.F.R. § 35.8(b). And although Missouri may have alleged that it intends to accept ARPA funds and that it is considering tax cuts, it has not alleged that those tax cuts would reduce net revenue and that it would fail to offset the reduction through permissible means.[6] Thus, it has not alleged

[6] In fact, Missouri acknowledges in its briefing that its legislature is required to balance the State's budget every year. This suggests that whenever the legislature anticipates revenue decreases, it must find a way within its own budget to offset those decreases. What Missouri cannot do is use ARPA funds as part of that balancing process, such as by taking an action that reduces net revenue, cutting spending in departments related to ARPA, and then using ARPA funds to replace that spending. Missouri has not alleged that it plans to use ARPA funds in this way, nor does it have a "constitutional interest" in doing so. *See*

any intent to engage in conduct that would likely subject it to recoupment of any ARPA funds.

Simply put, Missouri has only alleged a "conjectural or hypothetical" injury, not one that is actual or imminent.[7] *See Carson*, 978 F.3d at 1057 (quoting *Spokeo*, 578 U.S. at 339). It has also not alleged a future injury that is "certainly impending" or even likely to occur. *See Susan B. Anthony List*, 573 U.S. at 158. Instead, Missouri asks us to declare, in the abstract, what a statute does not mean. It asks us to enjoin a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without alleging any concrete, imminent injury from the Secretary's actual interpretation. That would be a quintessential advisory opinion. *See Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969) (explaining that federal courts "do not render advisory opinions. For adjudication of constitutional issues[,] concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of

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Susan B. Anthony List, 573 U.S. at 159 (quoting *Babbitt*, 442 U.S. at 298).

[7] Although the Supreme Court has suggested that "States are not normal litigants for the purposes of invoking federal jurisdiction," *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007), it has not eliminated the basic requirements for standing just because a state is the plaintiff, *see id.* at 521–23 (assessing injury, causation, and redressability and concluding that Massachusetts, which owns a substantial portion of its coastline, had alleged a concrete and particularized injury from sea level rise along its coast). Here, even if Missouri "is entitled to special solicitude" in this standing analysis, *see id.* at 520, it has still failed to allege any intent to take action that would subject it to recoupment under ARPA or Treasury regulations.

declaratory judgments as any other field" (cleaned up) (quoting *United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947))); *Ringo* v. *Lombardi*, 677 F.3d 793, 796 (8th Cir. 2012) ("A federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." (cleaned up) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975))). We thus conclude that Missouri has failed to establish that it has standing to bring its claims.

IV.

Because we conclude that Missouri has not alleged an injury in fact, we need not reach the question of whether its claims are ripe. *See Summers* v. *Earth Island Inst.*, 555 U.S. 488, 500–01 (2009). The judgment of the district court is affirmed.

APPENDIX B

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No.
	)	4:21CV376 HEA
	)	
JANET YELLEN, et al.,	)	
	)	
Defendants.	)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction, [Doc. No. 6]. The matter is fully briefed, and the court conducted a hearing on the Motion on May 4, 2021. After a thorough review of the pleadings and for the reasons discussed below, Plaintiff lacks standing, and this matter is not ripe for adjudication. The case will be dismissed for lack of jurisdiction.

Facts and Background

Plaintiff State of Missouri brought this case challenging "the threatened unconstitutional application" of section 9901 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9901 (codified at 42 U.S.C. §§ 802-805) (the "ARPA").

The ARPA's "Coronavirus State Fiscal Recovery Fund" allocates almost $220 billion "for making

payments under this section to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19)," with $195.3 billion reserved for the States and District of Columbia. 42 U.S.C. § 802(a)(1). Missouri estimates that it will receive almost $2.8 billion under ARPA, which represents about 14% of Missouri's general expenditures and is "sorely needed" as the state works through the COVID-19 pandemic.

The ARPA provides that through December 31, 2024, a State may use the recovery funds "to cover costs incurred":

> (A) to respond to the public health emergency with respect to the COVID–19 or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
>
> (B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;
>
> (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID– 19 public health

> emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
>
> (D) to make necessary investments in water, sewer, or broadband infrastructure.

Id. § 802(c)(1).

Section 802(c)(2)(A) of the ARPA prohibits a State from using the relief funds to "directly or indirectly offset a reduction in net tax revenue of such State [] resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise)," (the "Offset Restriction"). In the event a State does not comply with the Offset Restriction, it "shall be required to repay to the Secretary [of the Treasury] an amount equal to the amount of funds used in violation [thereof]." *Id.* § 802(e).

Missouri contends that two interpretations of the Offset Restriction exist, one correct and the other representing an unconstitutional intrusion by the federal government upon the States' sovereign power to set their own tax policies. The narrow interpretation only prohibits a state from taking COVID-19 recovery funds and deliberately applying them to offset a specific tax reduction of a similar amount; this is the interpretation Missouri argues is correct. The second, broad interpretation would prohibit a State from enacting any tax-reduction policy that would result in a net reduction of revenue through 2024 or risk forfeiting its COVID-19 relief funds. Missouri argues that application of the broad

interpretation would allow the federal government to coerce States to adopt federal rules and policy and to commandeer the States' taxing authority, in violation of the Tenth Amendment.

Missouri argues that some U.S. Senators have endorsed the broad interpretation of the Offset Restriction and that Defendant Secretary of the Treasury Janet Yellen has "carefully left open" the potential application of the broad interpretation. On March 16, 2021, the Attorneys General of Missouri and 20 other States sent a letter to Secretary Yellen, seeking her guarantee that the Department of the Treasury would apply the narrow interpretation to the Offset Restriction. On March 23, 2021, Secretary Yellen responded with a letter that Missouri reads as "declin[ing] to endorse the narrow and correct interpretation of the Tax Mandate" and "le[aving] open the possibility that the Department of the Treasury might require States receiving federal aid to 'replac[e] lost revenue by other means' if they choose to enact tax cuts." Missouri alleges that Secretary Yellen's response generates uncertainty, confusion, and doubt for the Missouri state legislature, which is currently considering and debating tax-reduction policies. The uncertainty and the possibility of the Treasury Department imposing the broad interpretation, Missouri argues, "threatens grave, immediate, and irreparable injury to the State of Missouri."

In their response to Missouri's motion for preliminary injunction, the Defendants (Secretary Yellen, along with Inspector General of the Department of the Treasury Richard Delmar and the Department of the Treasury) assert that the basis of

Missouri's argument—the belief that the Treasury is poised to implement the broad interpretation of the Offset Restriction—is an "incorrect premise." The Defendants argue that the ARPA affords States considerable flexibility in setting their tax policies. Of the Offset Restriction, Defendants state:

> By its plain text, the offset provision addresses only a reduction in a State's "*net* tax revenues." 42 U.S.C. § 802(c)(2)(A) (emphasis added). A State is thus free to change its tax law as it believes appropriate, cutting some taxes and increasing others. And even if a State chooses to make changes that result in a reduction in net tax revenue, the Act bars a State only from using Rescue Plan funds—as opposed to other means—to offset that reduction. *Id.* The Act also makes clear that if a State chooses to use Rescue Plan funds to offset a reduction in net tax revenue resulting from changes in state law, the only consequence would be a loss of monies commensurate with the amount of federal funding used for that offset. *See id.* § 802(e).

Defendants argue that Missouri does not have standing to challenge the Offset Restriction because it has not enacted or alleged any hypothetical tax cut that would decrease net tax revenues, nor has Missouri alleged that it plans to use federal recovery funds in a way that would violate the ARPA. Defendants also argue that Missouri's challenge to the ARPA is not ripe because Missouri has not alleged conduct that has resulted in recoupment and the

Department of the Treasury has not indicated an imminent plan to recoup funds from Missouri.

Legal Standard

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Article III standing is a threshold question in every federal court case." *United States* v. *One Lincoln Navigator 1998*, 328 F .3d 1011, 1013 (8th Cir. 2003). The "irreducible constitutional minimum" of standing consists of three elements. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. The Supreme Court has explained that the injury in fact requirement means showing "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original). "[T]hreatened injury must be *certainly impending* to constitute injury in fact, allegations of *possible* future injury" are not sufficient." *Id.*

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the

judicial process from being used to usurp the powers of the political branches." *Id.* at 408. "Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 538 (2012) (internal quotation omitted). When a lawsuit seeks pre-enforcement review of a threatened government action, "a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014).

"The party invoking federal jurisdiction bears the burden of establishing standing." *Id.* at 158. "Each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Discussion

Missouri asks the Court to enjoin Defendants from enforcing any interpretation of the Offset Restriction that is broader than the narrow interpretation it advances and endorses. Missouri has failed to establish Article III standing or ripeness, especially considering that Missouri requests the Court preemptively bind its coordinate branches of government and the elected leaders of this Nation. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 537–38 ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise

nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.").

Standing

Missouri lacks standing because it has not shown that it has suffered an injury-in-fact. This determination is based on the three injury-in-fact requirements for pre-enforcement review of a threatened government action as set out in *Susan B. Anthony List*: (1) plaintiff alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) but proscribed by a statute, and (3) there exists a credible threat of prosecution thereunder. 573 U.S. at 159.

To the extent that Missouri alleges that its legislature intends to pass[1] tax-cut litigation, it has demonstrated an intention to engage in a course of conduct arguably affected with a State's constitutional interest in setting in its own tax policy. However, in its reply memorandum, Missouri cites "cutting taxes *and* accepting [ARPA] funds" as the conduct forming the first injury-in-fact requirement. (Emphasis added). Missouri does not have a constitutional interest in accepting ARPA funds. Its reliance on *City and County of San Francisco* v. *Trump*, 897 F.3d 1225 (9th Cir. 2018) for its

[1] This Court does not suggest that the legislature's mere proposal and discussion of such legislation satisfies the first pre-enforcement standing prong

contention that a scenario in which a State must choose between a state policy or federal funds constitutes injury-in-fact is misplaced. The *San Francisco* plaintiffs challenged an Executive Order that directed Executive Agency heads to refuse to disperse federal grants to any "sanctuary" jurisdictions. These federal grants represented money that was appropriated for the jurisdictions by acts of Congress. The Ninth Circuit stated that a "loss of funds *promised* under federal law satisfies Article III's standing requirement." 897 F.3d at 1235 (internal quotation marks and punctuation omitted) (emphasis added).

The facts of the instant case are readily and boldly distinguishable. The ARPA recovery funds were not "promised" to Missouri by Congress, then taken away by some other act of Congress or the Executive Branch. Rather, in passing the ARPA, Congress both appropriated recovery funds and placed a condition on a State's receipt of the funds. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 537 ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions."). Therefore, Missouri's interest in accepting the ARPA recovery funds does not establish standing and is not relevant to the injury-in-fact analysis.

Proceeding with Missouri's interest in setting its own tax policy, the second injury-in-fact requirement is not met. The ARPA does not prohibit States from proposing, enacting, or implementing legislation that cuts taxes for its citizens and businesses. As Defendants state in their memorandum in opposition to Missouri's motion:

> [T]o ensure that the new federal funds are used for those purposes and not others Congress chose not to support, the [ARPA] requires a State to agree that it will not use the federal funds to offset a reduction in net tax revenue resulting from changes to state law. 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 [ARPA] to offset a reduction in net tax revenue. No State has a sovereign interest in using federal funds for that purpose.

(Emphasis in original). In short, State tax cuts are not proscribed by the ARPA. Missouri's sovereign power to set its own tax policy is not implicated by the ARPA. The Missouri legislature is free to propose and pass tax cuts as it sees fit.

Relatedly, the third requirement for injury-in-fact, a credible threat of prosecution, is not met. Because the ARPA does not prohibit a State from implementing its own tax policy, Missouri does not face a credible threat of prosecution if it decides to pass tax cutting measures. Missouri disagrees, arguing that they stand to lose billions of federal recovery dollars if the State legislature enacts legislation that results in a net revenue reduction. However, recoupment is not triggered by a reduction in State tax revenue, it is triggered by a State's use of federal recovery fund to offset a reduction in its net tax

revenue. Again, Missouri's ability to set its own tax policy is not implicated.

Missouri has not alleged an injury-in-fact and therefore does not have Article III standing to bring the lawsuit. Additionally, this case is not ripe.

Ripeness

It is axiomatic that "[r]ipeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hosp. Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148–149 (1967)). "A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Iowa League of Cities* v. *E.P.A.*, 711 F.3d 844, 867 (8th Cir. 2013) (internal quotation omitted). "Both of these factors are weighed on a sliding scale, but each must be satisfied to at least aminimal degree." *Id.* (internal quotation omitted).

In *Texas* v. *United States*, 523 U.S. 296 (1998), Texas had sought administrative preclearance of a statute as required by Section 5 of the Voting Rights Act. The United States Assistant Attorney General in charge of preclearance did not object to two sections of the Texas statute, but cautioned that "under certain foreseeable circumstances their implementation may

result in a violation of Section 5 which would require preclearance." *Id.* at 298–99. Texas filed suit seeking a declaration that Section 5 did not apply to the two sections of the Texas statute. *Id.* at 299. The Supreme Court held that Texas's claim was not ripe. *Id.* First, the claim impermissibly "rest[ed] upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 300 (quoting *Thomas* v. *Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580–581 (1985)). Next, the issue was not fit for judicial decision because "determination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Texas*, 523 U.S. at 301 (ellipsis in original). As to hardship to the parties, the Supreme Court noted that "Texas [was] not required to engage in, or to refrain from, any conduct, unless and until it chooses to implement one of the noncleared remedies." *Id.* The Supreme Court even suggested that "[i]f Texas is confident that" the implementation of a noncleared remedy did not violate Section 5, "it should simply go ahead" with the implementation. *Id.* at 301-2. Finally, the Supreme Court held that "a threat to federalism" was an abstraction inadequate to support suit. *Id.* at 302.

The Supreme Court's findings in *Texas* are instructive here. As in *Texas*, Missouri's claim is based upon contingent future events that may not occur. These contingencies include: the passage of tax cuts by the State legislature, a decrease in net revenue due to those tax cuts, and the Department of the Treasury's recoupment of funds based on a broad

interpretation of the Offset Provision. Notably, Defendants, through counsel, have explicitly asserted that they do not agree with the "broad interpretation" proposed by Missouri, Hr'g Tr. 19:5-11 [Doc. No. 27], further attenuating Missouri's claim of the "threatened" broad interpretation.

As to fitness for review, Missouri asks the Court to determine the scope of the ARPA's Offset Restriction well in advance of any adverse effect and in a wholly, non-actionable hypothetical context. As in *Texas*, Missouri's request "involves too remote and abstract an inquiry for the proper exercise of the judicial function." 523 U.S. at 301. Additionally, "fitness rests primarily on whether a case would 'benefit from further factual development,' and therefore cases presenting purely legal questions are more likely to be fit for judicial review." *Id.* (quoting *Pub. Water Supply Dist. No. 10 of Cass Cnty.* v. *City of Peculiar,* 345 F.3d 570, 573 (8th Cir. 2003). Although Missouri asserts that this action presents the purely legal question of the correct interpretation of the Offset Restriction, it is readily apparent that this case would benefit from further factual development. For example, the Treasury Department has not yet promulgated regulations interpreting the ARPA's Offset Restriction. It is premature for the Court to interfere before Treasury can even promulgate regulations, much less have those regulation affect Missouri "in a concrete way." *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08.

The Court also finds that the hardship to the parties factor weighs against ripeness. The Offset Restriction does not require Missouri to engage in, or refrain from, any conduct, including legislative

conduct regarding tax policy. The alleged infringement on Missouri's sovereign right to set its own tax policy is an abstraction inadequate to support suit, since the Offset Restriction does not touch Missouri's "primary conduct." *Texas*, 523 U.S. at 301. Moreover, "[a]bstract injury is not enough [to satisfy the "hardship" factor]. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *Pub. Water Supply Dist.*, 345 F.3d at 573. Missouri's purported injuries to legislative proceedings and the prospect of recoupment of federal recovery funds are too abstract and remote to constitute significant hardship. Missouri's claim is not ripe for adjudication.

Conclusion

This Court lacks jurisdiction to hear this case. Missouri has failed to establish Article III standing, and its claim is not ripe for adjudication. The alleged harm to Missouri is too speculative, abstract, and remote to establish justiciability. The case will be dismissed.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is **DISMISSED.**

Dated this 11th day of May, 2021.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX C

U.S. Constitution
The Spending Clause, Article I, § 8, clause 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

APPENDIX D

U.S. Constitution
The Spending Clause, Article I, § 8, clause 1

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX E

42 U.S.C. § 802
Coronavirus State Fiscal Recovery Fund

(a) Appropriation

In addition to amounts otherwise available, there is appropriated for fiscal year 2021, out of any money in the Treasury not otherwise appropriated-

(1) $219,800,000,000, to remain available through December 31, 2024, for making payments under this section to States, territories, and Tribal governments to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19); and

(2) $50,000,000, to remain available until expended, for the costs of the Secretary for administration of the funds established under this subchapter.

(b) Authority to make payments

(1) Payments to territories

(A) In general

The Secretary shall reserve $4,500,000,000 of the amount appropriated under subsection (a)(1) to make payments to the territories.

(B) Allocation

Of the amount reserved under subparagraph (A)-

(i) 50 percent of such amount shall be allocated by the Secretary equally to each territory; and

(ii) 50 percent of such amount shall be allocated by the Secretary as an additional amount to each territory in an amount which bears the same proportion to ½ of the total amount reserved under subparagraph (A) as the population of the territory bears to the total population of all such territories.

(C) Payment

The Secretary shall pay each territory the total of the amounts allocated for the territory under subparagraph (B) in accordance with paragraph (6).

(2) Payments to Tribal governments

(A) In general

The Secretary shall reserve $20,000,000,000 of the amount appropriated under subsection (a)(1) to make payments to Tribal governments.

(B) Allocation

Of the amount reserved under subparagraph (A)-

(i) $1,000,000,000 shall be allocated by the Secretary equally among each of the Tribal governments; and

(ii) $19,000,000,000 shall be allocated by the Secretary to the Tribal governments in a manner determined by the Secretary.

(C) Payment

The Secretary shall pay each Tribal government the total of the amounts allocated for the Tribal government under subparagraph (B) in accordance with paragraph (6).

(3) Payments to each of the 50 States and the District of Columbia

(A) In general

The Secretary shall reserve $195,300,000,000 of the amount appropriated under subsection (a)(1) to make payments to each of the 50 States and the District of Columbia.

(B) Allocations

Of the amount reserved under subparagraph (A)-

(i) $25,500,000,000 of such amount shall be allocated by the Secretary equally among each of the 50 States and the District of Columbia;

(ii) an amount equal to $1,250,000,000 less the amount allocated for the District of Columbia pursuant to section 801(c)(6) of this title shall be allocated by the Secretary as an additional amount to the District of Columbia; and

(iii) an amount equal to the remainder of the amount reserved under subparagraph (A) after the application of clauses (i) and (ii) of this subparagraph shall be allocated by the Secretary as an additional amount to each of the 50 States and the District of Columbia in an amount which bears the same proportion to such remainder as the average estimated number of seasonally-adjusted unemployed individuals (as measured by the Bureau of Labor Statistics Local Area Unemployment Statistics program) in the State or District of Columbia over the 3-month period ending with December 2020 bears to the average estimated

number of seasonally-adjusted unemployed individuals in all of the 50 States and the District of Columbia over the same period.

(C) Payment

(i) In general

Subject to clause (ii), the Secretary shall pay each of the 50 States and the District of Columbia, from the amount reserved under subparagraph (A), the total of the amounts allocated for the State and District of Columbia under subparagraph (B) in accordance with paragraph (6).

(ii) Minimum payment requirement

(I) In general

The sum of-

(aa) the total amounts allocated for 1 of the 50 States or the District of Columbia under subparagraph (B) (as determined without regard to this clause); and

(bb) the amounts allocated under section 803 of this title to the State (for distribution by the State to nonentitlement units of local government in the State) and to metropolitan cities and counties in the State;

shall not be less than the amount allocated to the State or District of Columbia for fiscal year 2020 under section 801 of this title, including any amount paid directly

to a unit of local government in the State under such section.

(II) Pro rata adjustment

The Secretary shall adjust on a pro rata basis the amount of the allocations for each of the 50 States and the District of Columbia determined under subparagraph (B)(iii) (without regard to this clause) to the extent necessary to comply with the requirement of subclause (I).

(4) Pro rata adjustment authority

The amounts otherwise determined for allocation and payment under paragraphs (1), (2), and (3) may be adjusted by the Secretary on a pro rata basis to the extent necessary to ensure that all available funds are allocated to States, territories, and Tribal governments in accordance with the requirements specified in each such paragraph (as applicable).

(5) Population data

For purposes of determining allocations for a territory under this section, the population of the territory shall be determined based on the most recent data available from the Bureau of the Census.

(6) Timing

(A) States and territories

(i) In general

To the extent practicable, subject to clause (ii), with respect to each State and territory allocated a payment under this subsection, the

Secretary shall make the payment required for the State or territory not later than 60 days after the date on which the certification required under subsection (d)(1) is provided to the Secretary.

(ii) Authority to split payment

(I) In general

The Secretary shall have the authority to withhold payment of up to 50 percent of the amount allocated to each State and territory (other than payment of the amount allocated under paragraph (3)(B)(ii) to the District of Columbia) for a period of up to 12 months from the date on which the State or territory provides the certification required under subsection (d)(1). The Secretary shall exercise such authority with respect to a State or territory based on the unemployment rate in the State or territory as of such date.

(II) Payment of withheld amount

Before paying to a State or territory the remainder of an amount allocated to the State or territory (subject to subclause (III)) that has been withheld by the Secretary under subclause (I), the Secretary shall require the State or territory to submit a second certification under subsection (d)(1), in addition to such other information as the Secretary may require.

(III) Recovery of amounts subject to recoupment

If a State or territory is required under subsection (e) to repay funds for failing to comply with subsection (c), the Secretary may reduce the amount otherwise payable to the State or territory under subclause (II) by the amount that the State or territory would otherwise be required to repay under such subsection (e).

(B) Tribal governments

To the extent practicable, with respect to each Tribal government for which an amount is allocated under this subsection, the Secretary shall make the payment required for the Tribal government not later than 60 days after March 11, 2021.

(C) Initial payment to District of Columbia

The Secretary shall pay the amount allocated under paragraph (3)(B)(ii) to the District of Columbia not later than 15 days after March 11, 2021.

(c) Requirements

(1) Use of funds

Subject to paragraph (2), and except as provided in paragraph (3), a State, territory, or Tribal government shall only use the funds provided under a payment made under this section, or transferred pursuant to section 803(c)(4) of this title, to cover costs incurred by the State, territory, or Tribal government, by December 31, 2024-

(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

(2) Further restriction on use of funds

(A) In general

A State or territory shall not use the funds provided under this section or transferred pursuant to section 803(c)(4) of this title to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or

administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

(B) Pension funds

No State or territory may use funds made available under this section for deposit into any pension fund.

(3) Transfer authority

A State, territory, or Tribal government receiving a payment from funds made available under this section may transfer funds to a private nonprofit organization (as that term is defined in section 11360(17) of this title), a Tribal organization (as that term is defined in section 5304 of Title 25), a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government.

(4) Use of funds to satisfy non-Federal matching requirements for authorized Bureau of Reclamation water projects

Funds provided under this section for an authorized Bureau of Reclamation project may be used for purposes of satisfying any non-Federal matching requirement required for the project.

(d) Certifications and reports

(1) In general

In order for a State or territory to receive a payment under this section, or a transfer of funds under section 803(c)(4) of this title, the State or territory

shall provide the Secretary with a certification, signed by an authorized officer of such State or territory, that such State or territory requires the payment or transfer to carry out the activities specified in subsection (c) of this section and will use any payment under this section, or transfer of funds under section 803(c)(4) of this title, in compliance with subsection (c) of this section.

(2) Reporting

Any State, territory, or Tribal government receiving a payment under this section shall provide to the Secretary periodic reports providing a detailed accounting of-

(A) the uses of funds by such State, territory, or Tribal government, including, in the case of a State or a territory, all modifications to the State's or territory's tax revenue sources during the covered period; and

(B) such other information as the Secretary may require for the administration of this section.

(e) Recoupment

Any State, territory, or Tribal government that has failed to comply with subsection (c) shall be required to repay to the Secretary an amount equal to the amount of funds used in violation of such subsection, provided that, in the case of a violation of subsection (c)(2)(A), the amount the State or territory shall be required to repay shall be lesser of--

(1) the amount of the applicable reduction to net tax revenue attributable to such violation; and

(2) the amount of funds received by such State or territory pursuant to a payment made under this section or a transfer made under section 803(c)(4) of this title.

(f) Regulations

The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section.

(g) Definitions

In this section:

(1) Covered period

The term "covered period" means, with respect to a State, territory, or Tribal government, the period that-

(A) begins on March 3, 2021; and

(B) ends on the last day of the fiscal year of such State, territory, or Tribal government in which all funds received by the State, territory, or Tribal government from a payment made under this section or a transfer made under section 803(c)(4) of this title have been expended or returned to, or recovered by, the Secretary.

(2) Eligible workers

The term "eligible workers" means those workers needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as each Governor of a State or territory, or each Tribal government, may designate as critical to protect the health and well-being of the

residents of their State, territory, or Tribal government.

(3) Premium pay

The term "premium pay" means an amount of up to $13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency. Such amount may not exceed $25,000 with respect to any single eligible worker.

(4) Secretary

The term "Secretary" means the Secretary of the Treasury.

(5) State

The term "State" means each of the 50 States and the District of Columbia.

(6) Territory

The term "territory" means the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

(7) Tribal Government

The term "Tribal Government" means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of March 11, 2021, pursuant to section 5131 of Title 25.

APPENDIX F

31 C.F.R. § 35.8

(a) Restriction. A State or Territory shall not use funds to either directly or indirectly offset a reduction in the net tax revenue of the State or Territory resulting from a covered change during the covered period.

(b) Violation. Treasury will consider a State or Territory to have used funds to offset a reduction in net tax revenue if, during a reporting year:

(1) Covered change. The State or Territory has made a covered change that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of reducing tax revenue relative to current law;

(2) Exceeds the de minimis threshold. The aggregate amount of the measured or predicted reductions in tax revenue caused by covered changes identified under paragraph (b)(1) of this section, in the aggregate, exceeds 1 percent of the State's or Territory's baseline;

(3) Reduction in net tax revenue. The State or Territory reports a reduction in net tax revenue, measured as the difference between actual tax

revenue and the State's or Territory's baseline, each measured as of the end of the reporting year; and

(4) Consideration of other changes. The aggregate amount of measured or predicted reductions in tax revenue caused by covered changes is greater than the sum of the following, in each case, as calculated for the reporting year:

(i) The aggregate amount of the expected increases in tax revenue caused by one or more covered changes that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of increasing tax revenue; and

(ii) Reductions in spending, up to the amount of the State's or Territory's net reduction in total spending, that are in:

(A) Departments, agencies, or authorities in which the State or Territory is not using funds; and

(B) Departments, agencies, or authorities in which the State or Territory is using funds, in an amount equal to the value of the spending cuts in those departments, agencies, or authorities, minus funds used.

(c) Amount and revenue reduction cap. If a State or Territory is considered to be in violation pursuant to paragraph (b) of this section, the amount used in violation of paragraph (a) of this section is equal to the lesser of:

(1) The reduction in net tax revenue of the State or Territory for the reporting year, measured as the difference between the State's or Territory's baseline and its actual tax revenue, each measured as of the end of the reporting year; and,

(2) The aggregate amount of the reductions in tax revenues caused by covered changes identified in paragraph (b)(1) of this section, minus the sum of the amounts in identified in paragraphs (b)(4)(i) and (ii) of this section.