No. 21-2118

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI,

Plaintiff-Appellant,

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,

Defendants-Appellees.

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

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

SAYLER A. FLEMING
United States Attorney

MARK B. STERN
ALISA B. KLEIN
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 305-8849

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

In this case, Missouri asked the district court to reject a hypothetical interpretation of a federal grant condition that is contrary to the statutory provision's text and that the federal government itself had disavowed. Missouri did not allege any intent to take actions that would implicate the grant condition as correctly construed. The district court thus dismissed Missouri's complaint for lack of an Article III controversy. The federal government believes that the judgment should be affirmed without oral argument but stands ready to present argument if the Court would find it helpful.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

STATEMENT OF ISSUES

The American Rescue Plan Act provides nearly $200 billion in new federal grants to help States "mitigate the fiscal effects" of the COVID-19 pandemic. 42 U.S.C. § 802(a)(1). The Act gives States considerable flexibility in determining how to use these funds but specifies that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from changes in state tax law during the covered period. *Id.* § 802(c)(2)(A) (the Offset Provision).

Missouri contends that the Offset Provision would be unconstitutional if it were broadly interpreted to "deny[] States the ability to cut taxes in any manner whatsoever." Opening Brief (Br.) 6. The district court dismissed the action for lack of an Article III controversy, explaining that the federal government had disavowed that broad reading as contrary to the Offset Provision's plain text and that Missouri did not allege an intent to take any action that would be inconsistent with the Offset Provision as correctly construed. The questions presented are:

1. Whether Missouri failed to establish an Article III controversy.

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014)

Arizona v. Yellen, 2021 WL 3089103 (D. Ariz. July 22, 2021), *appeal pending*, No. 21-16227 (9th Cir.)

2. Whether Missouri also failed to establish the prerequisites for a preliminary injunction, as other courts considering the same provision have found.

West Virginia v. U.S. Department of the Treasury, 2021 WL 2952863 (N.D. Ala. July 14, 2021)

Ohio v. Yellen, 2021 WL 1903908 (S.D. Ohio May 12, 2021)

STATEMENT OF THE CASE

A. Statutory Background

In the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, Congress created a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. § 802. The Fund provides nearly $200 billion in new federal grants to help States and the District of Columbia "mitigate the fiscal effects" of the COVID-19 pandemic. *Id.* § 802(a)(1); *see id.* § 803(b)(3)(A). Section 802 allows States to use Fiscal Recovery Funds to cover broadly defined categories of costs incurred through 2024, including to provide assistance to households, businesses, and industries affected by the pandemic; to provide premium pay to workers performing essential work during the pandemic; to pay for state government services to the extent of revenue losses due to the pandemic; and to make necessary investments in water, sewer, or broadband infrastructure. *Id.* § 802(c)(1).

In addition to delimiting the permissible uses of Fiscal Recovery Funds, Section 802 includes two "[f]urther restriction[s]" on the use of the funds. 42 U.S.C. § 802(c)(2). One is that a State may not deposit the funds into a pension fund. *Id.*

§ 802(c)(2)(B). The other, which is at issue here, provides that a State "shall not use the funds … to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from a change in state law during a covered time period. *Id.* § 802(c)(2)(A).[1]

A State can receive its grant after providing "a certification" that it "requires the payment … to carry out the activities specified in" § 802(c) and that it "will use any payment … in compliance with" that provision. 42 U.S.C. § 802(d)(1). If a State uses its Fiscal Recovery Funds for impermissible purposes, it may be required to repay an amount equal to the funds misused. *Id.* § 801(e).

B. District Court Proceedings

Missouri filed this action in March 2021, several weeks after Congress enacted the American Rescue Plan Act. The complaint alleged that the Offset Provision—which Missouri dubbed the "Tax Mandate"—should not be broadly interpreted to "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." JA9 ¶ 7 (Missouri's emphasis). In the alternative, Missouri asked that the broad interpretation be enjoined as unconstitutional. JA24 ¶ 80.

[1] The covered period began on March 3, 2021, and ends on the last day of the state fiscal year "in which all funds received by the State … have been expended or returned to, or recovered by," the Treasury Department. 42 U.S.C. § 802(g)(1).

Missouri moved for a preliminary injunction and asked the district court to rule by May 3, in light of "the impending conclusion of the Missouri General Assembly's legislative session on May 28, 2021." JA50. The government argued in opposition (among other issues) that Missouri had failed to establish a justiciable controversy. JA509-513.

The district court accepted that threshold argument and dismissed the suit for lack of jurisdiction. *Missouri v. Yellen*, 2021 WL 1889867 (E.D. Mo. May 11, 2021). The court explained that, by its plain terms, the Offset Provision "does not prohibit States from proposing, enacting, or implementing legislation that cuts taxes for [their] citizens and businesses"; it "'merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue.'" *Id.* at *4. And the court accordingly held that Missouri did not plead a "credible threat" of enforcement of the Offset Provision because any recoupment of federal funds would be triggered not by a tax cut but by the "State's use of federal recovery fund[s] to offset a reduction in its net tax revenue." *Id.* The court thus concluded that Missouri's claims rested "upon contingent future events that may not occur," and that to "determine the scope of the" provision "well in advance of any adverse effect and in a wholly[] non-action-able hypothetical context" would be "'too remote and abstract an inquiry for the proper exercise of the judicial function.'" *Id.* at *5.

C. Treasury's Issuance of Regulations

Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" the Fiscal Recovery Fund. 42 U.S.C. § 802(f). On May 10, the day before the district court issued its decision, the Department published on its website an Interim Final Rule explaining how it would implement Section 802, including the Offset Provision. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021) (codified at 31 C.F.R. § 35.1 *et seq.*); *see id.* at 26,815.

SUMMARY OF ARGUMENT

In the American Rescue Plan Act, Congress appropriated nearly $200 billion for new grants to help States mitigate the fiscal impacts of the COVID-19 pandemic. Congress gave States considerable latitude to determine how to use their grants, but it specified in the Offset Provision that the grants may not be used to directly or indirectly offset a reduction in a State's net tax revenue resulting from changes in state law during the covered period.

The district court correctly dismissed this challenge to the Offset Provision for lack of a justiciable controversy. The premise of this suit is that the Treasury Department might broadly interpret the Offset Provision to "'deny[] States the ability to cut taxes in any manner whatsoever.'" Br. 6. But that interpretation is contrary to the plain text of Offset Provision, and the government has repeatedly disavowed it. The statute establishes, and the Department's implementing regulations confirm, that tax cuts alone do not contravene the Offset Provision. Rather, the provision restricts only the use of

Fiscal Recovery Funds to offset the revenue effects of tax cuts. Thus, the provision is not implicated if States use other means to offset tax cuts, including increases in other taxes, revenue derived from macroeconomic growth, or spending cuts in areas where the State is not spending Fiscal Recovery Funds. Missouri did not allege or show that it intended to take any action that would reduce its net tax revenue, much less that it intended to use Fiscal Recovery Funds to fill such a (hypothetical) revenue hole.

Even if the district court had jurisdiction, moreover, it would have been correct to deny Missouri's motion for a preliminary injunction. As the other courts to address the issue have explained, a preliminary injunction would not prevent any irreparable harm attributable to the Offset Provision during the pendency of district court proceedings. *See West Virginia v. U.S. Dep't of the Treasury*, 2021 WL 2952863 (N.D. Ala. July 14, 2021); *Ohio v. Yellen*, 2021 WL 1903908 (S.D. Ohio May 12, 2021). And the Offset Provision is easily within Congress's constitutional authority to specify the permissible uses of federal grants.

ARGUMENT

STANDARD OF REVIEW

This Court reviews de novo the grant of a motion to dismiss for lack of subject matter jurisdiction. *E.g.*, *Sanzone v. Mercy Health*, 954 F.3d 1031, 1037 (8th Cir. 2020). This Court reviews the denial of a preliminary injunction for abuse of discretion. *E.g.*, *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 698-699 (8th Cir. 2021).

I. MISSOURI FAILED TO ESTABLISH AN ARTICLE III CONTROVERSY

The premise of this suit is that the Offset Provision would be unconstitutional if it were broadly interpreted to "'deny[] States the ability to cut taxes in any manner whatsoever.'" Missouri Br. 6. As the district court explained, however, the federal government has repeatedly disclaimed that interpretation of the Offset Provision, and it is inconsistent with the provision's plain text. The provision "'does not prohibit a State from cutting taxes; it merely restricts a State's ability to use *federal funds* distributed under the [Fiscal Recovery Fund] to offset a reduction in net tax revenue.'" *Missouri v. Yellen*, 2021 WL 1889867, at *4 (E.D. Mo. May 11, 2021).

The "broad construction" that Missouri posits is thus a figment of its imagination. It bears no resemblance to the statute or the Treasury Department's implementing regulations. To the contrary, those regulations explicitly recognize that the Offset Provision is not implicated if a State cuts taxes but offsets any resulting reduction in revenue with spending cuts in areas where it is not spending Fiscal Recovery Funds, increases in other taxes, or revenue derived from macroeconomic growth. *See* 86 Fed. Reg. at 26,810.

Missouri is equally mistaken, however, in asserting that the Offset Provision is implicated only by the "deliberate and express use of [Fiscal Recovery] funds to pay for tax cuts." Br. 8. The Offset Provision does not use the phrase "deliberate and express," and the Supreme Court has rejected the contention that the "misuse[]" of federal funds depends "on any subjective intent attributable to grant recipients." *Bennett v. Kentucky*

Dep't of Educ., 470 U.S. 656, 664-665 (1985) (discussing *Bell v. New Jersey*, 461 U.S. 773, 790-791 (1983)).

Missouri's concerns about a "broad interpretation" draw no support from Secretary Yellen's public statements concerning the Offset Provision, which emphasized that the provision "is not implicated," even when States "lower certain taxes," so long as they "do not use" Fiscal Recovery Funds "to offset those cuts," JA81. Even if Missouri did not misread those statements, moreover, the meaning of the Offset Provision is governed by the statutory text and the implementing regulations, not by the Secretary's public statements. The regulations reject both the broad interpretation that Missouri fears and the atextually narrow interpretation it prefers, instead confirming the common-sense implementation of the plain statutory text.

Missouri failed to demonstrate an Article III controversy over the actual terms of the Offset Provision, as opposed to the untenable "broad interpretation" that it claims to fear. When a plaintiff seeks to challenge the "threatened enforcement of a law," as Missouri does, 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 "a credible threat" that the statute will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159 (2014) (quotation marks omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) ("[T]hreatened injury must be 'certainly impending.'").

Missouri made no such allegations. Missouri's complaint alleged that its legislature was considering "tax-reduction policies." JA17 ¶ 48. Its motion for a preliminary injunction attached illustrative proposals, JA83-191, and asked the district court to rule by May 3 in light of "the impending" May 28 "conclusion of the Missouri General Assembly's legislative session," JA50. As the district court explained, however, the Offset Provision "does not prohibit States from proposing, enacting, or implementing legislation that cuts taxes for [their] citizens and businesses." 2021 WL 1889867, at *4. Thus, even if the legislative proposals appended to Missouri's motion had actually been enacted—which Missouri does not claim—that would not suffice to establish a concrete controversy regarding the Offset Provision. A controversy sufficient to satisfy Article III would not arise unless Missouri imminently intended both to cut taxes and also to use Fiscal Recovery Funds, as opposed to permissible means, to offset any resulting reduction in net tax revenue. That is why another court recently dismissed Arizona's challenge to the Offset Provision, even though Arizona had recently "passed a $1.9 billion tax cut." *Arizona v. Yellen*, 2021 WL 3089103, at *5 (D. Ariz. July 22, 2021), *appeal pending*, No. 21-16227 (9th Cir.). The court explained that there was no justiciable controversy because Arizona did not "claim to have directly or indirectly used" Fiscal Recovery Funds to offset a reduction in its net tax revenue arising from the tax cut. *Id.* The district court here likewise lacked jurisdiction to entertain Missouri's challenge to the hypothetical future enforcement of the Offset Provision.

Equally unpersuasive are Missouri's various attempts to recast its theory of jurisdiction in terms of current injuries as opposed to a threat of future enforcement. Br. 28-34. Missouri's opening brief attacks a straw man in arguing that the "broad interpretation" of the Offset Provision "penalizes Missouri for reducing taxes, alters [the American Rescue Plan Act]'s conditions, imposes extra compliance costs, jeopardizes [American Rescue Plan Act] funds, and creates uncertainty that affects the State's tax policy discussions—all concrete injuries." Br. 27; *see* Br. 27-38. As explained above, the "broad interpretation" of the Offset Provision is foreclosed by the provision's plain text and contrary to the Treasury Department's implementing regulations. And absent evidence that Missouri intends to take action that contravenes the Offset Provision as written, the State's vague reference to "uncertainty" about the scope of the Offset Provision, Br. 27, is a "conjectural and hypothetical injur[y]" that does not establish standing. *Arizona*, 2021 WL 3089103, at *4. Like Arizona, Missouri "offered no concrete facts" showing how it is harmed by its supposed uncertainty about the scope of the Offset Provision. *Id.* That is for good reason: The statute, and the Treasury Department's regulations, give Missouri extensive information about how the restrictions on federal funds will be implemented.

Missouri's pronouncement that "the broad interpretation of the" Offset Provision "injures the State's sovereign rights," Br. 28, is irrelevant because the "broad interpretation" is contrary to the provision's text and the Treasury Department's implementing regulations. Moreover, the Supreme Court has explained that "[r]equiring States to

honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell*, 461 U.S. at 790. And it is long established, more generally, that federal courts "are without jurisdiction … to adjudicate … abstract questions" of political power or "sovereignty." *Massachusetts v. Mellon*, 262 U.S. 447, 484-485 (1923). Thus, the Supreme Court held that Massachusetts lacked standing to challenge a federal statute's conditions on grants, *see id.* at 479, without showing how its sovereignty was "actually invaded or threatened" by the "actual or threatened operation of the statute," *id.* at 484-485. And in *Texas v. United States*, the Supreme Court likewise held that the federal courts lacked jurisdiction over Texas's request for a declaratory judgment that the Voting Rights Act's preclearance requirement did not apply to certain provisions of state law because Texas's claim to "suffer[] the immediate hardship of a 'threat to federalism'" was an "abstraction." 523 U.S. 296, 297, 301-302 (1998). Missouri's claimed injury to its sovereignty is no less abstract than in those cases.

Missouri tries to circumvent Article III's requirement of a concrete dispute on the theory that this suit presents "a purely legal issue: the meaning and constitutionality of" the Offset Provision, Br. 40. But federal courts cannot resolve even purely legal issues outside the context of a concrete controversy; to do so would be to offer a quintessential advisory opinion. *See, e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical

state of facts.'"). As the Supreme Court has emphasized, the "'[d]etermination 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.

Missouri's claim that it will be injured by the Treasury Department's regulations is doubly misplaced, both because the State did not challenge the regulations in this action and because the regulations simply track the statute. For example, Missouri argues that it had "an interest in the offer Congress provided" in enacting the Fiscal Recovery Fund, and that the Treasury Department "harm[ed] that interest" when its regulations supposedly "embrace[d] … the broad interpretation" of the Offset Provision. Br. 30-31. But as noted above, the regulations simply implement the condition that Congress prescribed: "A recipient government would only be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue … if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery Funds to offset the reduction in net tax revenue." 86 Fed. Reg. at 26,807. For the same reason, Missouri cannot establish standing on the basis of the "increased chance it loses" Fiscal Recovery Fund grants "under the broad interpretation" supposedly adopted by the regulations (Br. 33). And, as the *Arizona* court held, 2021 WL 3089103, at *4, Missouri cannot base its standing on potential "compliance costs" created by the regulation's requirement to "report actual net tax revenue, the value of changes in tax policy, and spending cuts with documentation showing that the

cuts can cover a tax revenue decrease" (Br. 32). Regardless of how the Offset Provision is interpreted, a different provision of the statute requires States accepting Fiscal Recovery Funds to submit "reports providing a detailed accounting of … all modifications to [their] tax revenue sources." 42 U.S.C. § 802(d)(2)(A); *see Arizona*, 2021 WL 3089103, at *4.

In short, the district court properly heeded the limits on its jurisdiction. "'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Clapper*, 568 U.S. at 408. "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," and the standing inquiry is "'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.* The district court correctly recognized that to "determine the scope of the" Offset Provision in a "hypothetical context" is not a "'proper exercise of the judicial function.'" 2021 WL 1889867, at *5.

II. MISSOURI FAILED TO ESTABLISH THE PREREQUISITES FOR A PRELIMINARY INJUNCTION

If this Court concludes that the district court had jurisdiction, it should remand for the district court to address the merits of Missouri's request for a preliminary in-

junction. This is "a court of appellate review, not of first view," and "remand is ordinarily the appropriate course of action when it would be beneficial for the district court to consider an … argument in the first instance." *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1021 (8th Cir. 2020) (quotation marks omitted). In any event, Missouri cannot carry its burden of justifying the "'extraordinary remedy'" of a preliminary injunction by showing that it "'is likely to suffer irreparable harm in the absence of preliminary relief,'" *id.* at 1015. Nor can it establish that it "'is likely to succeed on the merits,'" *id.*

A. Missouri Failed To Demonstrate Irreparable Harm

Even if Missouri had established standing, it failed to demonstrate that a preliminary injunction was necessary to prevent irreparable harm during the pendency of district court proceedings. "'A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant.'" *Turtle Island Foods*, 992 F.3d at 699. As other courts have explained in considering similar challenges to the Offset Provision, a preliminary injunction against the enforcement of the provision would not prevent any irreparable harm to States during the pendency of litigation. *See West Virginia v. U.S. Dep't of the Treasury*, 2021 WL 2952863 (N.D. Ala. July 14, 2021) (denying a preliminary injunction in an action brought by 13 States); *Ohio v. Yellen*, 2021 WL 1903908 (S.D. Ohio May 12, 2021) (*Ohio I*) (denying Ohio's motion for a preliminary injunction).

Irreparable harm must be "certain" and "of such imminence that there is a clear and present need for equitable relief." *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). And for harm to be "irreparable," the party suffering it must have "no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009).

Neither requirement is met here. As the *Ohio* court recognized, there is no realistic possibility that the Treasury Department would enforce the Offset Provision by instituting recoupment proceedings during the pendency of district court proceedings, since no such proceedings could occur until after a determination that a State had used Fiscal Recovery Funds for an impermissible purpose. *See Ohio I*, 2021 WL 1903908, at *14-15. And, in any event, recoupment would be a "quintessentially reparable injury," *West Virginia*, 2021 WL 2952863, at *9 (emphasis omitted), because States can obtain judicial review of recoupment determinations and those determinations can be set aside if they are held unlawful. Indeed, courts routinely review agency decisions requiring the repayment of federal funds. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 658 (explaining that "the dispute is whether the Secretary correctly demanded repayment based on a determination that Kentucky violated requirements that Title I funds be used to supplement, and not to supplant, state and local expenditures for education"); *Bennett v. New Jersey*, 470 U.S. 632, 637 (1985) (explaining that the dispute arose

out of the Secretary's final decision ordering repayment of specified federal education funds).

Nor can Missouri premise a claim of irreparable harm on the argument that a broad interpretation of the Offset Provision would interfere with its ability to set tax policy. Br. 59-60. As already explained, the Offset Provision is not amenable to the broad interpretation that Missouri fears. Moreover, as the *West Virginia* court observed, even if a preliminary injunction were entered, States would "still have to take into consideration" that their grants were "subject to possible recoupment" if the court "were to ultimately issue a merits decision declining to issue a permanent injunction," so a preliminary injunction would do "nothing to remedy" the alleged uncertainty. 2021 WL 2952863, at *9; *see also Ohio I*, 2021 WL 1903908, at *15 ("[A] preliminary injunction that stands no meaningful prospect of ever being enforced, as the Secretary is unlikely to be in a position to recoup funds while this suit is pending, adds nothing by way of clarity.").

B. Missouri Failed To Demonstrate A Likelihood Of Success On The Merits Of Its Claims

Missouri's preliminary-injunction motion also failed to demonstrate a likelihood of success on the merits of its claims. As an initial matter, Missouri's constitutional challenges were explicitly premised on the assumption that the district court would adopt the "broad interpretation" of the Offset Provision. Missouri first argued that the "broad interpretation" should not be adopted, and then went on to argue, "[i]n the

alternative," that "if the Court were to adopt the broad interpretation of" the provision, "Missouri would then be likely to prevail on its constitutional challenge to" the provision. JA478; *see also* JA478-486 (setting out Missouri's arguments that the broad interpretation would render the Offset Provision unconstitutional). As discussed above, however, the "broad interpretation" that Missouri feared is not a permissible reading of the Offset Provision, and the district court did not adopt it. Thus, Missouri's constitutional claims were academic and the district court had no reason to address them.

As correctly construed, moreover, the Offset Provision is well within Congress's constitutional authority. Missouri first argues that the Offset Provision violates the Tenth Amendment by "commandeering" state tax policy. Br. 50-52. But as explained above, the Offset Provision does not forbid tax cuts; it simply bars a State from using Fiscal Recovery Funds to offset a reduction in net state tax revenue. That is a straightforward exercise of Congress's authority to attach conditions that "preserve its control over the use of federal funds." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012) (*NFIB*) (plurality opinion); *see, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). And, as noted above, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty." *Bell*, 461 U.S. at 790.

For the same reason, Missouri is wrong to argue (Br. 57-59) that the Offset Provision is unconstitutionally coercive. Although a majority of the Justices held in *NFIB* that Congress could not make a State's *preexisting* Medicaid funding contingent on the

State's agreement to use new federal funds to expand Medicaid eligibility, 567 U.S. at 580-585 (plurality opinion); *id.* at 681-689 (joint dissent), the same Justices left no doubt that Congress could make the *new* federal funds provided by the Affordable Care Act—totaling $100 billion per year, *see id.* at 576 (plurality opinion)—contingent on a State's using them for that purpose. *See id.* at 585; *id.* at 687-688 (joint dissent). Indeed, "[t]he power to keep a watchful eye on expenditures … is bound up with congressional authority to spend in the first place." *Sabri v. United States*, 541 U.S. 600, 608 (2004). Missouri therefore rightly concedes that "Congress may impose conditions that ensure public funds [are] spent for the purposes for which they were authorized," Br. 55-56 (quotation marks omitted); *see* Br. 57 (acknowledging that a coercion analysis applies only "[w]here … a condition does not 'govern the use of the funds'"). And that is exactly what Congress did here: it required States to use Fiscal Recovery Funds for the purposes authorized by Section 802(c)(1) and not for purposes that are impermissible under Section 802(c)(2).

Missouri is therefore also wrong to suggest (Br. 55-57) that the Offset Provision does not bear the necessary "relationship to the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992). As Missouri recognizes, the quintessential example of a condition related "to the purpose of the federal spending," *id.*, is one that ensures "that public funds [are] spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). Again, that is what the Offset Provision does.

The Offset Provision's limitation on the use of federal funds is similar to maintenance-of-effort requirements, a longstanding feature of Spending Clause legislation, which ensure that federal grants are used to supplement and not supplant state spending. *See, e.g.*, *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 659 (Title I of the Elementary and Secondary Education Act "prohibited the use of federal grants merely to replace state and local expenditures"); *Mayhew v. Burwell*, 772 F.3d 80, 82 (1st Cir. 2014) (upholding the Affordable Care Act's requirement that States accepting Medicaid funds maintain their Medicaid eligibility standards for children for a specified period); *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249, 252 (4th Cir. 2013) (describing the maintenance-of-effort requirement in the Individuals with Disabilities Education Act, which generally requires the Secretary to reduce a State's grant by the same amount by which the State has failed to maintain its expenditures for special education for children with disabilities). Maintenance-of-effort requirements implicate a State's spending power—a core state function—yet such requirements are unquestionably permissible tools to ensure that the funds appropriated by Congress are used for their intended purposes.

Finally, Missouri is wrong to argue (Br. 53-55) that the Offset Provision violates the principle that, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). As the *Arizona* court explained, the Supreme Court and courts of appeals have repeatedly rejected the contention that Spending Clause doctrine requires Congress to "make known every way in which States may violate a condition on the

receipt of funds." 2021 WL 3089103, at *3. On the contrary, the Supreme Court has emphasized that Congress need not and could not "prospectively resolve every possible ambiguity concerning particular applications of the requirements" of a Spending Clause program. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 669.

Thus, for example, the courts of appeals have uniformly rejected the argument that there is insufficient clarity in the grant conditions established by the Religious Land Use and Institutionalized Persons Act (RLUIPA), which bars any "program or activity that receives Federal financial assistance" from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution" unless doing so "is the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000cc-1(a), (b)(1). Obviously, difficult questions may arise as to whether a particular policy complies with that standard; this Court regularly confronts such disputes. But no court has regarded that sort of indeterminacy as a basis to invalidate the funding condition. Rather, this Court explained that "the statutory language of RLUIPA is sufficiently clear to satisfy" the requirement that "conditions on the receipt of federal funds be set forth unambiguously," and emphasized that it is "neither feasible nor required" for a statute to "set[] forth every conceivable variation" of how it is to be applied. *Van Wyhe v. Reisch*, 581 F.3d 639, 650-651 (8th Cir. 2009). The Ninth and Eleventh Circuits likewise explained in upholding RLUIPA that grant conditions established by statute may be "'largely indeterminate,' so long as the statute 'provid[es] clear

notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions].'" *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (quoting *Pennhurst*, 451 U.S. at 24-25); *see Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004) (similar). The Sixth Circuit similarly rejected the argument that Spending Clause legislation "'requires a level of specificity beyond that applicable to other legislation,'" *Cutter v. Wilkinson*, 423 F.3d 579, 586 (6th Cir. 2005), and the Seventh Circuit observed that Congress need not "delineate every instance in which a State may or may not comply with the least restrictive means test," *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003).

The Offset Provision easily satisfies the requirement of providing States with notice of the condition that they accept by choosing to receive Fiscal Recovery Funds. *See Arizona*, 2021 WL 3089103, at *4 ("Here, Congress has done at least as much as it did in RLUIPA. It made the existence of the condition upon which Arizona could accept funds 'explicitly obvious.'"). Missouri points to certain details that the statute does not address—for example, the baseline from which to measure whether a State experiences a "'reduction in [its] net tax revenue'" and whether that measurement reflects actual or projected tax revenues. Br. 54-55. But it is well settled that Congress may rely on agencies to specify such details in implementing statutory conditions on the use of federal funds. In *Bennett v. Kentucky Department of Education*, for example, the Supreme Court emphasized that, "[g]iven the structure of the grant program, the Fed-

eral Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I" of the Elementary and Secondary Education Act of 1965, and observed that "the fact that Title I was an ongoing, cooperative program meant that grant recipients had an opportunity to seek clarification of the program requirements." 470 U.S. at 669.

Indeed, the Supreme Court and courts of appeals have recognized that agency regulations interpreting grant conditions are entitled to deference. For example, in *Blum v. Bacon*, 457 U.S. 132 (1982), the Supreme Court held that a regulation establishing conditions on funding under the Aid to Families with Dependent Children (AFDC) program "clearly deserve[d] judicial deference" and preempted contrary state law. *Id.* at 141; *see also*, *e.g.*, *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-892 (1984) (applying regulations implementing conditions on grants to States under a federal education program); *Gorrie v. Bowen*, 809 F.2d 508, 516 (8th Cir. 1987) (deferring to an AFDC regulation); *Baptist Mem'l Hosp.-Golden Triangle, Inc. v. Azar*, 956 F.3d 689, 692-696 (5th Cir. 2020) (deferring to Medicaid regulations); *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019) (same); *United States v. Miami Univ.*, 294 F.3d 797, 814-815 (6th Cir. 2002) (deferring to regulations implementing conditions on federal education funds). The application of deference to regulations implementing funding conditions reflects the fact that agencies have authority to fill gaps in Spending Clause legislation just as they do in implementing other types of legislation. *See, e.g.*, *National Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (deference treats "ambiguities in statutes within an agency's jurisdiction to administer" as "delegations of authority to the agency to fill the statutory gap in reasonable fashion").

Consistent with that long line of precedent, Congress vested the Treasury Department with authority to implement the Offset Provision. Section 802(f) expressly provides that the Secretary of the Treasury "shall have the authority to issue such regulations as may be necessary or appropriate to carry out" the Fiscal Recovery Fund. 42 U.S.C. § 802(f). And the regulations implementing the Offset Provision address the details that Missouri identifies, such as by identifying the baseline year.

Missouri relies heavily on the *Ohio* district court's permanent-injunction ruling, which interpreted Section 802(f)'s grant of rulemaking authority to exclude the Offset Provision, *Ohio v. Yellen*, 2021 WL 2712220, at *15-20 (S.D. Ohio July 1, 2021) (*Ohio II*), *appeal pending*, No. 21-3787 (6th Cir.). But the *Ohio* court's rationales for that conclusion were unsound. The fact that the Offset Provision affects "'billions of dollars in spending each year,'" *id.* at *19, does not support the conclusion that it should be excluded from the scope of the rulemaking provision; Section 802 in its entirety implicates nearly $200 billion in grant funding for States, yet there is no doubt that Congress authorized the Secretary to issue regulations that implement Section 802. It is likewise immaterial that the Offset Provision touches on "a core State function, the power to tax," *id.* It is common ground that Congress cannot dictate state tax policy, and the Offset Provision does not do so. The provision leaves States free to structure their tax laws as they

choose; it simply prevents them from using Fiscal Recovery Funds to offset a reduction in their net tax revenue caused by a tax cut. Moreover, assuming arguendo that ambiguity in the Offset Provision would present serious constitutional concerns without the additional specificity afforded by implementing regulations, it was the district court's duty to interpret the statute to allow such regulations. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The district court could not properly interpret Section 802 in a way that would render the Offset Provision a nullity.

The Supreme Court and Eighth Circuit authorities on which Missouri relies do not support its position. In *Pennhurst*, the Supreme Court did not address the specificity with which Congress must prescribe how a condition on the use of federal funds will be applied. It simply held that Congress did not make compliance with the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 a "mandatory" condition at all, emphasizing that it was "intended to be hortatory, not mandatory." 451 U.S. at 24; *see id.* at 13. In *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), the Supreme Court likewise held that the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), which allows a court to award "reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the IDEA, did not impose on States a condition of

paying the expert fees of prevailing parents. And in *Osseo Area Schools, Independent School District No. 279 v. M.N.B. by & through J.B.*, 970 F.3d 917 (8th Cir. 2020), this Court held that the IDEA does not require a school district to provide transportation between a nonresident student's home and the school district where her parent has chosen to enroll her; the statute did not address that issue at all, and the Court noted that the only agency pronouncement on the issue was a letter that was "not legally binding." *Id.* at 922-923. None of these cases remotely supports the conclusion that the Offset Provision can never be enforced.

The cases that Missouri cites from other circuits are likewise inapposite. In *Texas Education Agency v. U.S. Department of Education*, 992 F.3d 350 (5th Cir. 2021), the question was whether Congress had adequately specified a condition that States waive their sovereign immunity to accept federal grants—a particular type of condition not at issue here. And in *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), the court held that a regulation implementing the IDEA was contrary to the statute's plain language. *Id.* at 561. The *Riley* court also suggested in dicta that Spending Clause legislation cannot be implemented by regulations, but that dicta was contrary to the controlling Supreme Court precedent discussed above.

Here, Missouri did not even allege that the Treasury Department's regulations were contrary to, or unauthorized by, the statute. Indeed, Missouri's preliminary-injunction motion was fully briefed and heard before those regulations were issued, and the State thus made no reference to the regulations. Although Missouri now criticizes the

district court for issuing its ruling "before Missouri could file its analysis of the rule," Br. 16, Missouri had specifically asked the district court for a ruling by May 3 in light of "the impending" May 28 "conclusion of the Missouri General Assembly's legislative session." JA50. The district court cannot be faulted for accommodating the State's request for an expedited decision.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

SAYLER A. FLEMING
United States Attorney

MARK B. STERN
ALISA B. KLEIN

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
daniel.l.winik@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,529 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

Under Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses and is virus-free.

/s/ Daniel Winik
Daniel Winik