No. 21-2118

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 et al.,

Defendant-Appellees,

Appeal from the United States District Court, Eastern District of Missouri, The Honorable Henry E. Autrey

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICI

Amici curiae—the States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kentucky, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia—all have a compelling interest in protecting their sovereign powers under the Constitution and our federal system of dual sovereigns. Indeed, "[t]he federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (citation omitted). "For this reason, 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.' Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *National Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 577 (2012) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

To these ends, the States have a compelling interest in ensuring that States can challenge federal statutes which unconstitutionally

infringe on their sovereign rights and violate the federal principles of the Constitution. Moreover, these States have a strong interest in being able to enact their own tax policy without federal interference. As explained below, Missouri's interest in doing so amply supports Article III standing here.

INTRODUCTION

This case involves a straightforward, recurrent, and fundamentally important question: whether federal courts have authority under Article III to protect important State interests from federal encroachment. The Supreme Court has long ago settled that question, by repeatedly intervening to ensure that federal legislation does not "undermine the status of the States as independent sovereigns in our federal system." *NFIB*, 567 U.S. at 577; *accord Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 188. The district court contravened these precedents (and others) when it erroneously dismissed Missouri's suit for lack of Article III jurisdiction. That clear error should be reversed.

This case involves a challenge brought by the State of Missouri to a provision of the American Rescue Plan Act (hereinafter, the "Tax

Mandate"), which prohibits the States from using ARPA moneys to "either directly or indirectly offset" any reduction in net tax revenue as a result of a tax policy change. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 9901 (2021) (adding § 602(c)(2)(A) to the Social Security Act (42 U.S.C. § 801 *et seq.*)). Any state that violates this provision is required to repay funds to the Treasury. *Id.*

Although Congress may impose conditions on the States in exchange for the receipt of federal money, this power is limited. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Missouri has correctly argued that this provision coerces their agreement and is fatally ambiguous. As Missouri has explained, because States cannot voluntarily and knowingly accept the Tax Mandate, it is unconstitutional.

In a series of lawsuits filed around the nation, a number of other states—including several Amici here—have challenged the Tax Mandate in cases similar to Missouri's challenge. In the only other two cases to have reached a decision, District Courts in Alabama and Ohio concluded—contrary to the decision below—that States had standing to challenge the constitutionality of the Tax Mandate. *See West Virginia v. Department of Treasury*, 21-cv-00465, 2021 WL 2952863, at

*7 (D. Ala. Jul. 14, 2021); *Ohio v. Yellen*, No. 1:21-CV-181, 2021 WL 2712220, at *2 (S.D. Ohio Jul. 1, 2021). This Court should follow the persuasive standing reasoning of those Courts and conclude that Missouri has standing.

ARGUMENT

The district court committed three fundamental errors in holding Missouri lacked Article III standing. First, the Court relied entirely on *enforcement* of the Tax Mandate as the only source of Missouri's injury-in-fact. This narrow focus overlooked numerous other ways in which Missouri has already suffered (and continues to suffer) concrete injury from the Tax Mandate, and unduly narrows state standing to bring challenges to unconstitutional federal encroachment upon state sovereignty. Second, the Court wrongly concluded that Missouri had no constitutional interest in ARPA funds and no reason to fear enforcement of the Tax Mandate. This conclusion is divorced from governing case law and common sense and, if upheld, would serve to reduce federal court jurisdiction to consider a wide variety of pre-enforcement challenges. Third, the district court failed to consider any of the costs Missouri faces from the Tax Mandate, particularly

compliance costs. These direct costs stem in part from the provision's unconstitutional ambiguity, and alone suffice to show injury-in-fact.

I. A State Suffers Immediate, Cognizable Injury When It Is Presented With Ambiguous Conditions

A plaintiff has standing if he can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. 2104, 2113 (2021). The existence of that injury depends on "the facts *as they exist when the complaint is filed*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). For purposes of evaluating whether jurisdiction exists, this Court "must assume *arguendo* the merits of [the State's] legal claim." *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007).

As noted, Congress's authority under the Spending Clause is subject to several specific limitations and requirements, including that conditions placed on federal grants to states not be ambiguous, and that the federal government may not coerce States to agree to conditions. *See Dole*, 483 U.S. at 207-08. In *NFIB*, the Supreme Court explained that the ability of States to "voluntarily and knowingly" accept spending conditions "is critical to ensuring that Spending Clause legislation" respects the constitutionally enshrined separate sovereignty of the

States. *NFIB*, 567 U.S. at 577. Under this federal system, Congress may neither "command[] a State to regulate or indirectly coerce[] a State to adopt a federal regulatory system as its own." *Id.* at 578. As in *NFIB* itself, the Supreme Court has repeatedly rebuked Congress for attempting to "commandeer" or for "undermining" the status of States. *Id.* (citing cases). This system serves several important interests, including protecting political accountability and enhancing individual liberty. *Id.* at 578.

The district court in this case largely ignored these limits, and explicitly limited its standing analysis to the question of whether the State had suffered injury-in-fact under the rubric of "pre-enforcement review of a threatened government action as set out in *Susan B. Anthony List*." *State v. Yellen*, No. 4:21CV376 HEA, 2021 WL 1889867, at *3 (E.D. Mo. May 11, 2021). In *Susan B. Anthony List*, the Supreme Court addressed the "recurring issue" of when "threatened enforcement of a law" creates injury-in-fact. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). As the district court explained, *Susan B. Anthony List* sets forth a three-part test for establishing pre-enforcement review: (1) an "intention to engage in a course of conduct

arguably affected with a constitutional interest"; (2) future conduct "arguably … proscribed by a statute;" and (3) a "credible threat" of "future enforcement." *Id.* at 160, 163.

But *Susan B. Anthony List* is not the only framework under which Missouri could establish standing because the Tax Mandate, at the time the complaint was filed, inflicted an actual and ongoing—not merely imminent—injury on the States. The purpose of the three-part analysis in *Susan B. Anthony List* is to address whether plaintiffs who fear enforcement have demonstrated "a sufficiently imminent injury" to give rise to a case or controversy under Article III. *Id.* at 152. But the Tax Mandate inflicted *actual* injuries on the States at the time of its passing by undermining States' sovereign rights.

The Tax Mandate inflicts actual injuries on Missouri by undermining the State's sovereign authority in at least two ways. First, the ambiguity in the Tax Mandate threatens the State's "sovereign prerogative" to be presented with unambiguous terms in conditional federal grants, so it can exercise its choice "voluntarily and knowingly." *See Ohio v. Yellen*, 2021 WL 2712220, at *4. That ambiguous conditions harm States at the time they are offered is consistent with common

sense: if a State cannot even understand what an offer means at the time that it can make a choice to accept, that injures the State. Under this framework that the Supreme Court has repeatedly recognized, the States' injury was an accomplished fact when the ARPA was signed into law and the States were presented with a choice that could impose enforceable (if ambiguous) conditions on their exercise of their sovereign powers. The fact that the State had a nominal choice in the matter does not preclude a constitutional violation.

Second, as Missouri explained in its Opening Brief (at 50-52), the States were coerced into taking these funds and accepting this unconstitutional condition. In *NFIB*, the Court addressed Medicaid spending which "account[ed] for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *NFIB*, 567 U.S. at 581. The ARPA funds loom similarly large in their scale, and the pandemic additionally created unique economic pressures, making this money especially important to State budgets and leaving the States particularly vulnerable to federal coercion.

In sum, Missouri's injury in this case is the same injury that gives plaintiffs standing in every unconstitutional-conditions case: being

forced to choose between exercising its constitutional rights and receiving a government benefit. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52–53 & n.2 (2006). The *West Virginia* court correctly recognized as much: "Their injury in fact is having to choose between forgoing a benefit (federal funds) or accepting that benefit on unconstitutional terms." *West Virginia*, 2021 WL 2952863 at *7.

The justiciability of Missouri's injuries at this stage is underscored by the Supreme Court's decision in *NFIB* itself. *NFIB* involved a challenge brought by several states under the Spending Clause to a provision of the Affordable Care Act that did not go into effect until *4 years* after the challenge was filed. *See NFIB*, 567 U.S. at 539. Yet not one of the several opinions of the Supreme Court Justices raised any concern over whether a State could bring this pre-enforcement challenge. Instead, all nine Justices apparently viewed the States' standing as so obvious that it did not merit discussion. *NFIB* therefore strongly implies that standing exists here as well, where the unconstitutional condition is being imposed immediately—rather than set to go into effect four years later.

II. Missouri Suffers An Imminent Injury From The Threatened Enforcement Of The Tax Mandate

In any event, even if satisfying the *Susan B. Anthony* test for pre-enforcement challenges was the sole avenue for Missouri to establish standing, the district court's holding is still untenable.

A. Missouri Has A Constitutionally Protected Interest In Accepting ARPA Funds

Missouri need only show that it has intent to engage in a course of conduct "arguably affected with a constitutional interest." *Susan B. Anthony List*, 573 U.S. at 158. The district court concluded the State had failed to show this interest with respect to accepting ARPA funds. *Missouri*, 2021 WL 1889867, at *3. In concluding that Missouri did not have such an interest, the district court distinguished cases which have recognized that a "loss of funds promised under federal law[] satisfies Article III's standing requirement." *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018). This distinction was based on the district court's faulty belief that there is a constitutionally relevant difference between offered funds and funds that are "appropriated" then "taken away" by some other act of the Executive Branch. *Missouri*, 2021 WL 1889867, at *3-4. But that is a distinction without a constitutional difference.

Missouri's constitutional interest in the funds offered under ARPA is not affected by whether those funds have been accepted for two reasons. *First*, generally speaking, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Where the conditions placed on funds are unconstitutional, as is the case here, a conclusion that Missouri lacked any constitutional interest prior to acceptance would effectively conclude that the State need expose itself to liability before it could sue.

Second, as explained above, Missouri argues that it was coerced into accepting these funds. The district court should have "assume[d] arguendo" the correctness of this claim. *See Parker*, 478 F.3d at 377. If the Court had done so, it would have recognized that Missouri is not in a different situation prior to accepting the funds than it would be had it accepted the funding and then challenged the unconstitutionally of the government's condition. In either case, it faced the withdrawal of funds on an unconstitutional basis.

B. Missouri Faces A Realistic Danger Of Enforcement

Missouri next needed to show that it faced "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *See California*, 141 S. Ct. at 2114 (*quoting Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)). This standard was easily met here, as the district court should have recognized. Instead, the district court wrongly adopted Defendants' interpretation that the Tax Mandate was only triggered by a volitional use of ARPA funds. *Missouri*, 2021 WL 1889867, at *4. The district court's decision came down before Treasury's Interim Final Rule put the lie to this claim. In fact, under Treasury's regulations, the Tax Mandate explicitly extends to inadvertent decreases in tax revenue and contemplates Treasury will effectively review past conduct for indirect offsets through 2024. *See Coronavirus State and Local Fiscal Recovery Funds,* 86 Fed. Reg. 26,786 (May 17, 2021), https://www.federalregister.gov/d/2021-10283/p-398 ("IFR" or "Rule").

Under that Interim Final Rule, Missouri has ample reason to fear that its tax policy could be undermined by the Tax Mandate. As Missouri has explained, the Rule sweeps quite broadly, and captures a

wide variety of tax changes. Opening Brief at 33-34. Furthermore, the Tax Mandate is impossible to understand to the point of being unconstitutionally ambiguous. Nor have Defendants disavowed bringing recoupment actions against States. This is just like *Babbitt*: there, the statute also had never been applied, and the State had not disavowed the intent to invoke the statute. *Babbitt*, 442 U.S. at 302. As the Court explained, standing existed there because "Appellees [we]re thus not without some reason in fearing prosecution." *Id.* So too here.

III. The Tax Mandate Imposes Significant Compliance Costs On The States

Apart from the threat of enforcement and the damage to Missouri's sovereignty, Missouri has standing to challenge the Tax Mandate because it directly imposes compliance costs on the State. Among other things, the Tax Mandate, as implemented in the Interim Final Rule, requires the States to break out and "identify any sources of funds that have been used to permissibly offset" tax changes. See IFR, https://www.federalregister.gov/d/2021-10283/p-393 (requiring the States to "identify and calculate the total value of changes that could pay for revenue reduction due to covered changes and sum these items" and describing the procedures for doing so). Nothing in the statute

apart from the Tax Mandate requires States to undertake this effort. Identifying revenue reduction sources and tracing offsets is not even arguably within the ambit of "the uses of [ARPA] funds" or "modifications to the State's … tax revenue sources." 42 U.S.C. § 802(d)(2). The breadth of the information demanded by Treasury's Rule is necessary because the Tax Mandate has such a broad and shifting meaning.

Nor is the size of the marginal compliance costs relevant to the standing inquiry: Injury that is "personal" and "concrete" suffices regardless of size. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (upholding jurisdiction, noting that injury of "perhaps only a dollar or two" would even be sufficient). The cost of Tax Mandate compliance is not minor, but even if it were, it would be sufficient to establish standing.

CONCLUSION

This Court should reverse the district court's judgment dismissing Missouri's action for lack of standing and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the Brief of *Amici Curiae* States of States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kentucky, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia is proportionately spaced, has a typeface of 14 point and contains 2,694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* States of States of Arizona, Alabama, Alaska, Arkansas, Idaho, Kentucky, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on July 21, 2021, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
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