SC96903

IN THE SUPREME COURT OF MISSOURI

MYRON GREEN CORPORATION,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission of Missouri
The Honorable Audrey Hanson McIntosh, Commissioner

RESPONSE BRIEF OF THE RESPONDENT, THE DIRECTOR OF REVENUE

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INTRODUCTION

The Administrative Hearing Commission correctly held that Myron Green Corporation, the third-party food services provider who runs the cafeteria located in the Kansas City Federal Reserve Bank (the "Bank"), must pay Missouri sales tax on cafeteria purchases by Bank employees and guests.

Federal Reserve Banks, as quasi-governmental entities, are exempt from state sales tax, but that exemption does not extend to third-party contractors or to employees' personal purchases. A tax exemption applies only if the "legal incidence" of the tax falls on the exempt party. Missouri taxes sellers, not purchasers. In cafeteria transactions, Myron Green is the seller, so it must pay sales tax. The Michigan Supreme Court reached the same conclusion under similar facts. Even if Missouri taxed purchasers, as some states do, the legal incidence of the tax would fall on cafeteria customers. Either way, the Bank's exemption does not apply.

Myron Green says the exemption applies because all cafeteria transactions were with the Bank itself, not with individual employees. The Commission found this contention factually inaccurate, and its findings are supported by substantial evidence. It is true that the Bank agreed to cover any cafeteria "shortfall" (where costs exceed sales), but shortfall payments by definition are made *after* sales transactions occur. At the time of the sales transaction, Myron Green owns the products purchased, and it receives cash or electronic payment in exchange. Electronic payment is facilitated by the Bank's payroll system, but that pass-through transaction does not allow Myron Green or cafeteria customers to take advantage of the Bank's tax exemption. That is not the purpose of the

Bank's tax exemption, and if Congress means to exempt third-party contractors from state taxation it must do so plainly.

Alternatively, Myron Green argues that Missouri's sales tax does not apply to it. Missouri taxes all sellers engaged in selling a product to the public, in particular, food or drink "regularly served to the public." In the corporate-cafeteria context, an employer engaged in *some other* business, like insurance, can sell food and drinks tax-free to its employees. But if the employer hires a third-party vendor for the corporate cafeteria, that third-party must pay sales tax. Unlike the employer itself, a third-party vendor like Myron Green is in the business of selling food. That dividing line is black-letter law in this Court. Again, it is true that the Bank makes a shortfall payment to cover the cafeteria's losses. That payment may alter the *Bank's* relationship with its employees, but that relationship cannot be imputed to Myron Green.

Finally, Myron Green suggests that any decision affirming the Commission should apply only prospectively under RSMo § 143.903.1, because it would allegedly require overruling this Court's prior decisions or invaliding statutes. Not at all. If the Court rejects Myron Green's preceding arguments, then it should reject this argument on the same grounds.

STATEMENT OF FACTS

I. Factual Background.

A. Myron Green operates cafeterias in many corporate buildings, including the cafeteria within the Bank.

Myron Green offers professional food services to hundreds of clients across the Midwest and employs more than 1,400 people. Pet. Ex. 3, MG00400. At the time of the hearing in this case, it operated at least 39 cafeterias for companies within the Kansas City metropolitan area alone. Tr. 21:4-7; LF2 ¶ 2. Three of those cafeterias are located on the property of the Kansas City Federal Reserve Bank, and one of those—the Kansas City location—is at issue in this suit. Tr. 76:3-8.

In many ways, Myron Green operates like any other food-services provider with multiple locations. It buys food in bulk and receives volume discounts, then ships its inventory to each facility. Tr. 128:13-17. Myron Green itself pays for all food invoices, and clients like the Bank do not. Tr. 90:4-13. Myron Green also shifts its inventory from one location to another to meet demand. *See* Tr. 32:8-23; Tr. 96:10-22. Myron Green hires and trains hundreds of employees, Tr. 96:2-6; Pet. Ex. 3, MG00398; operates detailed benefit and leave policies for them, Pet. Ex. 3, MG00407; and moves employees around to different locations as demand dictates, Tr. 95:24-96:1.

In other ways, its business model looks different: it has both corporate "clients" and individual "customers." Pet. Ex. 3, MG00398. As a cafeteria provider, Myron Green does not pay for premium locations in high-traffic areas; it targets low-traffic areas where its employer-clients are willing to pay them to operate. Because employer-clients subsidize

Myron Green's operations, an employer like the Bank often has input on cafeteria hours and pricing. LF2 ¶ 6. At some locations, like those at the Bank, Myron Green's employees must pass a security screening process and background check. Pet. Ex. 2, MG00294-295. Myron Green, also, has "thousands of customers"—those who actually buy and consume its products every day. Pet. Ex. 3, MG00398.

Still, Myron Green and its employees are wholly independent of clients like the Bank. Myron Green and its employees are not and cannot hold themselves out to be employees or agents of the Bank. Tr. 42:3-7; 101:17-22. Myron Green employees must pay for parking at the Bank, Tr. 103:6-11, and their security badges mark them as "vendors," not employees, Pet. Ex. 2, MG00294-295.

B. Myron Green sold food services to the Bank.

The Bank and Myron Green's umbrella company contracted for four services: cafeteria, catering, dining, and vending. *See* Pet. Ex. 2, MG00295-296. The total value of the three-year contract was $ 5.7 million, Pet. Ex. 4, MG00359, based on Myron Green's projected costs. During those years, Myron Green provided the Bank with a monthly invoice for costs and services provided, which the Bank paid within 30 days. Pet. Ex. 2, MG00292.

As one part of that broader contract, the Bank agreed to pay Myron Green to run cafeterias in its offices. Cafeteria services included "the preparation, service and sale of" food and beverages during breakfast, lunch, and break periods. *Id*. at MG00295. Monthly financial reports listed "sales income" against "labor costs, food costs, supplies costs, administrative and management fees, [and] miscellaneous costs." *Id.* at MG00300. The

Bank then made a monthly shortfall payment, determined by subtracting the cafeteria's total sales income from its total costs. *E.g.*, Pet. Ex. 3, MG00406 (showing total sales, total expenses, and the shortfall); Tr. 35:13-19; Tr. 85:11-20. The Bank had to make this costs-minus-sales payment within 30 days of the invoice, either by corporate credit card or Automated Clearinghouse (ACH). *See* Pet. Ex. 2, at MG00300.

C. Myron Green sold food and drinks to Bank employees and guests.

The cafeteria sold food and drink to Bank employees and guests. Myron Green purchased food and beverage products in bulk and had them shipped to each of its cafeteria locations. Tr. 79:23-25. Myron Green's corporate office paid the bills for those products. Tr. 90:4-13, 95:4-13. At each location, Myron Green's employees took the products to the kitchen. Myron Green's cafeteria manager and chef devised the menu. Tr. 79:17-18. Myron Green's employees prepared the meals, Tr. 81:11-13, using equipment owned by the Bank, Tr. 45:21. Myron Green's employees filled orders and ran the cash registers. Tr. 96:9.

Twenty percent of cafeteria customers paid Myron Green with cash. LF5 ¶ 21. Cash payments went directly from the customer to Myron Green's bank account; they did not pass through the Bank's hands. Tr. 94:18-22.

The Bank did, however, facilitate swipe-card transactions, which were used in eighty percent of purchases. Tr. 129:23-130:5; LF5 ¶ 21. Myron Green tracked all such charges for each Bank employee. Tr. 130:12-16. The Bank did not use its own funds to reimburse Myron Green immediately for these charges. Tr. 63:5-12. Instead, twice a month, Myron Green submitted a list of swipe-card transactions to the Bank, and the

Bank's human-resources department took the payments out of each employee's after-tax paycheck. Tr. 90:19-22; Tr. 130:12-16; Tr. 138:16. These paycheck withholdings were then placed in a holding account, and the Bank paid the total amount to Myron Green on its corporate credit card. Tr. 131:13-21.

These payments, taken from the salaries of Bank employees, followed the twice-a-month schedule of the Bank's human resources department. Tr. 130:12-131:5. Payments made by the Bank for services rendered (the "shortfall" payment) followed the monthly schedule laid out by the Bank's contract with Myron Green. Pet. Ex. 2, MG00292; Tr. 131:3-5.

The Bank's initial request for bids took the position that services would not be taxable. Pet. Ex. 2, MG00283. Later amendments instructed Myron Green to "collect and remit sales and use taxes on all meals and services rendered on or from a Bank office in accordance with the Bank's instructions as to the taxability of such sales." Pet. Ex. 4, MG00360.

D. A tax audit concluded that Myron Green owed sales tax on all transactions with Bank employees and guests.

A sales-tax audit found that Myron Green owed tax for cafeteria sales it made to Bank employees and guests. Tr. 25:18-20. The audit period covered July 1, 2010 through June 30, 2013. The audit found that Myron Green treated the cafeteria's inventory as its own: some unit control sheets showed negative numbers for some food items, demonstrating that Myron Green transferred inventory among its facilities. *See* Tr. 31:11-32:23. The audit found that Myron Green did *not* owe sales tax on the Bank's shortfall

payment, or on its catering sales, because those sales were made directly to the Bank and were paid directly by the Bank. Tr. 35:20-36:5; 66:16-19. Myron Green's sales tax liability for July 2010-June 2013 was $217,266.97 plus interest. Tr. 25:1-2. The audit also found that Myron Green owed use tax. Myron Green did not contest that judgment. Tr. 31:2-5. But it filed a complaint challenging its sales tax liability.

II. The Administrative Hearing Commission affirmed the tax audit findings.

The Commission's findings of fact explained that the Bank's employees and guests made "purchases" "from Myron Green" at the cafeteria cash register on a "point-of-sale system." LF4 ¶ 20. "After the cashier totaled a purchase, an employee would scan their badge in payment or pay cash." *Id.* "Myron Green provided the Bank with a summary of purchases by employees from Myron Green." *Id.* The Bank made three monthly payments. LF5 ¶ 22. Twice a month, it passed on "employee payments collected from the employee payroll deductions." *Id*. Once a month, it made a "shortfall" payment to Myron Green to cover the cafeteria's remaining costs. LF5 ¶ 23.

The Commission made three conclusions of law. *First*, it found that Myron Green's cafeteria in the Bank's building regularly served meals and drinks to the public within the meaning of RSMo § 144.020.1(6). LF10-16. *Second*, the Commission held that two letters exempting the Bank from sales tax, dating from 1962 and 2002, did not apply to sales transactions between Myron Green and cafeteria customers. LF16-19. "[T]he incidence of taxation is determined by law," and such letters cannot change the law. LF17. Both letters were also factually distinguishable: the 1963 letter applied to meals served by the Bank, not by a contractor, *id.*; and the 2002 letter applied only to the *Bank's* purchases, not

to third-party contractors or the personal purchases of individual employees, LF17-18. *Third*, the Commission held that its decision was not unexpected, as it was based on this Court's decisions and the limitations on the Bank's exemption outlined in the 2002 letter. LF19-20.

This appeal followed. Although re-ordered, Myron Green raises the same three issues on appeal.

STANDARD OF REVIEW

This Court upholds decisions of the Administrative Hearing Commission "when authorized by law and supported by competent and substantial evidence upon the whole record." RSMo § 621.193. This means the Commission's "interpretations of the state's revenue laws are reviewed de novo." *Mackey v. Director of Revenue*, 200 S.W.3d 521, 523 (Mo. banc 2006). "Substantial evidence is evidence that if true has probative force; it is evidence from which the trier of fact reasonably could find the issues in harmony therewith." *Id.* The Court does not "determine the weight of the evidence or substitute its discretion for that of the administrative body." *Id.*

A tax exemption is "strictly construed against the taxpayer." *Cook Tractor Co., Inc. v. Director of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006). "'An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it.'" *Brinker Missouri, Inc. v. Director of Revenue*, 319 S.W.3d 433, 437 (Mo. banc 2010) (citation omitted).

ARGUMENT

Missouri law imposes a sales tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail," including meals or drinks regularly served to the public. RSMo § 144.020.1(6). But it exempts "any retail sale which" federal law prohibits Missouri from taxing. RSMo § 144.030.1. Federal law provides that "Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate." 12 U.S.C. § 531.

To identify the meaning of these statutes, this Court looks first to the statute's plain language and examines its ordinary and public meaning. *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). If the Act's text is clear, this Court will give it effect, and that is the end of the matter.

In Missouri, "[w]ords and phrases shall be taken in their plain or ordinary and usual sense." RSMo § 1.090. A statute has a plain and ordinary meaning when the words are '"plain and clear to a person of ordinary intelligence."' *State v. Daniel*, 103 S.W.3d 822, 826 (Mo. App. W.D. 2003) (citation omitted).

Myron Green offers two reasons why these provisions exempt it from paying sales tax. *First*, it argues that the Bank's federally-provided tax exemption should be extended to Myron Green and cafeteria customers. *Second*, Myron Green argues that the Bank's "special relationship" with its employees should extend to Myron Green's sales tax liability. RSMo § 144.020.1(6). Both arguments wrongly substitute Myron Green for the Bank.

I. Congress has exempted the Bank from state sales tax, but it has not extended that exemption to food-service contractors like Myron Green or to the Bank's employees. (Responds to Point I)

The Commission found that Bank employees and guests made "purchases," "from Myron Green," at the point of sale. *See* LF4 ¶ 20. State and federal law do not exempt such transactions from Missouri's sales tax.

A. Missouri taxes sellers, not purchasers, so the legal incidence of the tax falls on Myron Green, and the Bank's tax exemption should not be extended to it.

Statutory interpretation starts with the statutes' plain text. *See Parktown Imports*, 278 S.W.3d at 672. First, 12 U.S.C. § 531 exempts federal reserve banks from most state taxation. It says nothing about the *contractors* of such banks. The Bank is not even a named party to this suit, because Missouri's sales tax applies to sellers, not to purchasers. RSMo § 144.020.1. State and federal law, therefore, do not exempt Myron Green from paying Missouri sales tax.

Under similar facts, the Michigan Supreme Court held that Michigan retailers had to pay sales tax on purchases made by a federal reserve bank. *Fed. Reserve Bank of Chicago v. Dep't of Revenue of State*, 64 N.W.2d 639, 642 (Mich. 1954). In Michigan, "it is the retailer, not the purchaser, who is legally obligated to pay" sales tax. *Id.* at 642. The sales tax was imposed "for the privilege of engaging in the retail business." *Id.* at 644. The bank's "immunity and exemption privileges" under 12 U.S.C. § 531 did not apply to a retailer's tax obligations, even if the "proceeds derived from sales to" the bank. *Id.* at 642. Which party bore the "economic burden" of the tax was irrelevant—the "*legal incident* of the tax" fell on the retailor. *Id.* at 643-44 (emphasis added).

In support of this reasoning, the Michigan court cited a series of U.S. Supreme Court decisions on the government's constitutional immunity from state taxation: "In each of those cases . . . [s]tate taxes or regulations imposed on the contractors in connection with" performance of United States' contracts "were held valid despite the fact that the economic burden thereof was passed on by the contractors to the United States." *Id.* at 644 (relying on *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *State of Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *Penn Dairies v. Milk Control Comm. of Penn.*, 318 U.S. 261 (1943); *Esso Std. Oil Co. v. Evans*, 345 U.S. 495 (1953)). Following these decisions, § 531 does not extend to a bank's contractors; as "worded," it exempts only the bank. *Id.*

Like Michigan, Missouri places the legal incidence of the tax on sellers like Myron Green. Missouri taxes "all *sellers*," RSMo § 144.020.1 (emphasis added), not purchasers. Also like Michigan, the "purpose and intent" of the statute is "to impose a tax upon the privilege of engaging in the business." RSMo § 144.021.1. So "the primary tax burden is placed upon the seller," *id.*, and the seller has the ultimate "obligation to pay" even if they cannot collect from the purchaser. RSMo § 144.080.4.

Relying on this text, this Court's "cases have consistently maintained that the sales tax is a gross receipts tax *paid by the seller* to the state of Missouri." *Centerre Bank of Crane v. Director of Revenue*, 744 S.W.2d 754, 759 (Mo. banc 1988); *see also Glickert v. Loop Trolley Transp. Dev. Dist.*, No. 4:13-cv-2170, 2014 WL 1672005, at *5 (E.D. Mo. Apr. 28, 2014) (following *Centerre Bank*). "The fact that the purchaser bears the economic burden of the sales tax does not alter the statutory scheme which imposes the sales tax on

sellers." *Centerre Bank*, 744 S.W.2d at 759 (citing RSMo § 144.021). When *Centerre Bank* was decided in 1988, this Court invited the state legislature to change the statute if it disagreed with the holding. "[W]e have said[ ] the seller is the taxpayer. . . . The legislature is presumed to be aware of the interpretation." *Id.* at 760. The legislature's inaction in the thirty years since is strong evidence of legislative intent to tax sellers. *Id.*

Here, Myron Green is the seller. Myron Green is the party engaged in selling food products and services. 12 U.S.C. § 531 does not exempt it. The facts closely track the Michigan case, and demand the same result. *See Fed. Reserve Bank of Chicago*, 64 N.W.2d at 642. Indeed, this case is *easier* than the Michigan case in one aspect. By the logic of that case, Missouri could collect sales tax from Myron Green on *all* of its gross revenue, even if the economic burden of the tax was ultimately passed on to the Bank. *Id.* at 644. But the Director asks for much less: the Director required Myron Green *only* to pay sales tax on goods purchased by Bank employees and guests. As to those sales, not even the tax's economic burden falls on the Bank.

True, the Eighth Circuit has ruled for constitutional tax purposes that Missouri's tax falls on the purchaser. *United States v. Lohman*, 74 F.3d 863, 867 (8th Cir. 1996). But *Lohman* is not binding, and it conflicts with this Court's reading of Missouri's revenue statutes. *Id.* at 867. What is more, each of *Lohman*'s arguments is doubtful under the statute today. *Id*. First, *Lohman* relied on the fact that a purchaser commits a misdemeanor if they fail to pay sales tax to the seller, *id.*, but *Centerre Bank* said that "[i]t is the manner of operation which determines the nature of a tax, not the sanctions imposed for failure to pay it," 744 S.W.2d at 758. Second, *Lohman* noted that sellers must collect sales tax from

purchasers, 74 F.3d. at 867, but sellers still bear the legal incidence of the tax. 1998 clarifying amendments emphasized that "*the seller's* inability to collect any part or all of the tax does not relieve *the seller* of the obligation to pay to the state the tax imposed." RSMo § 144.080.4 (1998); 1998 Mo. Legis. Serv. H.B. 1301 (alterations emphasized). Third, *Lohman* relied on RSMo § 144.080.5 (1996), which at the time prohibited a seller from advertising that it would absorb the cost of the tax. 74 F.3d at 867. Today, that subsection says the exact opposite. *See* RSMo § 144.080.5 (2018); 2015 Mo. Legis. Serv. H.B. 517 & 754.

B. Even if Missouri law taxes purchasers, the legal incidence and economic impact of the tax falls on cafeteria customers, and the Bank's exemption cannot be extended to personal purchases.

Even if Missouri law taxed purchasers, the legal and economic incidence of the tax would fall on the cafeteria's customers not on the Bank. Bank employees and guests, after all, are the ones making purchases, and their purchases are not exempt from Missouri's sales tax.

The Commission got the facts right: cash and card-swipe sales occur between Myron Green and cafeteria customers. LF4 ¶ 20. Those findings were reasonable and supported by substantial evidence. Start with cash transactions. Twenty percent of Myron Green's cafeteria customers paid with cash and received food and drink in return. LF5 ¶ 21. These sales went directly into Myron Green's bank account. Tr. 94:18-22. This is a classic exchange of cash for goods. Any transaction between the Bank and Myron Green, according to the service contract, did not occur until the end of the month, and only

covered the shortfall. Pet. Ex. 2, MG00292; LF5 ¶ 23 & n.3. In the meantime, the customer should have paid the sales tax, and Myron Green should have collected it.

Card-swipe sales were procedurally more complicated, but analytically the same. To pay from their paychecks, employees swiped their employee-ID badge. Tr. 90:19-22; 129:23-130:5. Again, cash was exchanged for goods. The employee's decision to use an electronic form of payment does not change that. The Bank's human resources department took the money out of the employee's after-tax pay check and placed it in a holding account. Tr. 138:16. The Bank then paid those amounts to Myron Green by credit card. Tr. 131:13-21. Once again, the Bank did not bear the tax's legal incidence.

Indeed, cafeteria sales *reduce* the Bank's liability. If the cafeteria made so many sales that it covered all costs, then the Bank would pay nothing out of pocket, and would pay no sales tax. If the cafeteria made no sales, the Bank would pay all costs, but still no sales tax. The same is true of all intermediate options: sales count as a credit against the Bank's "shortfall" payment. As such, they decrease the Bank's liability, not increase it.

But assume for a moment that the Commission got the facts wrong (although it did not), and that Myron Green's "two-transactions" theory is right (even though such facts were neither pled nor proven, *see* LF16). Under that theory, Myron Green sold goods and services to the Bank, and the Bank sold those goods and services to cafeteria customers. If the legal incidence of Missouri's tax falls on the *seller*, then Myron Green could still be held liable for the transaction between it and the Bank, as in the Michigan case. If the legal incidence of Missouri's tax falls on the *purchaser*, then the legal incidence of the tax would fall on cafeteria customers, who are also not exempt.

Under either factual reading, the Court should be cautious about allowing Bank employees and guests to use the Bank's tax exemption for personal purchases. Even in their heyday, governmental tax exemptions never extended to sales tax on the personal purchases of government employees, even for goods used in connection with the performance of government work. *See Dravo Contracting*, 302 U.S. at 162 n.5. The Bank's limited tax exemption certificate says as much: the exemption applies only to the Bank's "exempt functions and activities"; it expressly does not reach to "[i]ndividuals making personal purchases." *See* Resp. Ex. E.

C. Extending the Bank's tax exemption to food-service contractors or cafeteria customers does not advance the purpose of that exemption.

The Court also should not extend the Bank's immunity for a related reason: it would not advance the purpose of the Bank's immunity. As the D.C. Circuit explained when it imposed sales tax on similar cafeteria transactions within an exempt bank, "[i]mposing the tax on [the food services vendor] will not impermissibly intrude on the Bank's freedom from local government control." *Int'l Bank for Reconstruction and Dev. v. District of Columbia*, 171 F.3d 687, 694 (D.C. Cir. 1999).

Imposing sales tax is no different from many other areas where governmental tax exemptions do not come into play. An outside contractor running a cafeteria in a courthouse would still have to pay sales tax. *Id*. at 690. A janitorial service in a state office building still must comply with the National Labor Relations Act. *Id.* And federal employees must still pay state income taxes. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 812 (1989). In each of these instances, the tax at issue has, at best, "only a remote

influence on governmental functions." *Int'l Bank*, 171 F.3d at 693. If that is true for actual government agencies, then it is certainly true for organizations like the Bank who have only statutory immunity. At most, "imposing the tax will merely require the Bank to take an additional factor into account when it negotiates its food-service contract." *Id.* at 694.

Tax exemption guards the Bank's statutory independence from state government. Non-discriminatory state taxes on the Bank's third-party vendors or the Bank's employees do not threaten that independence.

D. Congress must make its intent clear before the Bank's tax exemption will extend to food-service contractors or cafeteria customers.

If this Court finds the statutes ambiguous, it should construe them in favor of Missouri, in accordance with the U.S. Supreme Court's plain-statement rule for tax immunity. The ability to tax is a core sovereign function. *See United States v. New Mexico*, 455 U.S. 720, 735-36 (1982). "[T]he States' power to tax can be denied only under 'the clearest constitutional mandate.'" *Id.* at 738 (citation omitted). So denying that power by *statutory* mandate requires at least as much clarity. This plain-statement rule guards against unintended federal encroachment on States' sovereign prerogatives. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

The Supreme Court has recently taken a "narrow approach" to the scope of governmental tax immunity. *Arizona Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32, 35 (1999). It applies only '"when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.'" *Id.*

(citation omitted). Under this rule, federal reserve banks likely would not receive tax immunity if 12 U.S.C. § 531 did not exist, because they are likely not federal agencies. *See Scott v. Fed. Reserve Bank of Kansas City*, 406 F.3d 532, 534 (8th Cir. 2005) (finding that a federal reserve bank is not a federal agency).

The Court has repeatedly upheld taxes where "the legal incident of the taxes fell on" a third-party contractor. *See, e.g., Az. Dep't of Rev.*, 526 U.S. at 36; *New Mexico*, 455 U.S. at 734; *Alabama*, 314 U.S. at 9. The Government's tax immunity cannot be extended "to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Alabama*, 314 U.S. at 9. Indeed, a state tax applies even if the tax must be paid "with government funds" under an advance funding arrangement, *New Mexico*, 455 U.S. at 735, or if the Government were "directly liable to vendors for the purchase price" and tax, *id.* at 743.

This background sheds light on the statute at issue here, 12 U.S.C. § 531. If Congress intends to grant derivative immunity to the Bank's contractors or employees, then "Congress must 'take responsibility for the decision, by [doing] so *expressly*." *Az. Dep't of Revenue*, 526 U.S. at 35-36 (emphasis original). Congress must even specify the "particular form" such contracts can take. *Id.* at 36. Particularity is required precisely so that third-parties cannot attempt to contract around liability. *See New Mexico*, 455 U.S. at 737 (explaining that a plain-statement rule should "forestall . . . manipulation" of contracts and noting that tax exemption should not turn on "technical considerations"). So while Myron Green argues that employee payroll deductions are technically passed through a

Bank holding account before reaching Myron Green (see below), Congress has not expressly said that this pass through extends the Bank's immunity to Myron Green.

The D.C. Circuit applied similar reasoning to a bank food-services vendor. *Int'l Bank*, 171 F.3d at 692-94. After closely examining the statutory text, it looked to the U.S. Supreme Court's tax-immunity cases to confirm its reading and resolve any ambiguity. *Id*. The U.S. Supreme Court has also read statutory exemptions against the backdrop of constitutional immunity. *See Davis*, 489 U.S. at 813 (noting the "similarity of . . . purpose").

Here, too, the U.S. Supreme Court's tax-immunity cases confirm what the plain language of the statute says. The Bank is exempt from sales tax. Myron Green and Bank employees and guests are not.

E. Myron Green's contrary arguments are factually and legally mistaken.

In response, Myron Green argues that no sales occurred between Myron Green and cafeteria customers, because Myron Green sold food and food services to the Bank, and the Bank sold them to cafeteria customers. Apt. Br. 11-19. The Commission rejected these factual "two-transaction" arguments, finding that "[t]here was no evidence presented in the pleadings or at hearing that any such resale occurred." LF16. Even if the factual claims are accurate (and they are not), they do not support any legal argument for extending the Bank's tax exemption to Myron Green or to the Bank's employees.

Myron Green's first factual theory seems to be that the Bank owned all food products by the time cafeteria customers purchased them. Apt. Br. at 13 ("Myron Green agreed to provide, prepare, and serve food in the Bank's cafeteria in exchange for the

Bank's payment to Myron Green of all its costs to do so."), *see also id.* at 12, 16-17. This gets the timeline wrong. The Bank agreed in advance to cover any shortfall, but the amount of any shortfall was not determined until the end of each month. *See* Pet. Ex. 2, MG00300. In the meantime, food purchase invoices were paid by Myron Green's corporate headquarters, not by the Bank. *See* Tr. 90:4-13. Myron Green's practice of moving inventory among its facilities confirms its ownership. *See* Tr. 31:11–32:23. It had no legal right to move inventory it did not own. Thus, Myron Green owned all food products at the time cafeteria customers purchased them. *See* LF4 ¶ 20 (finding purchases were made "from Myron Green").

Myron Green's second factual theory seems to be that customers made cash and payroll-deduction payments to the Bank not to Myron Green. Apt. Br. at 13 ("Put another way, Myron Green sold the Bank food and food services, which were purchased for consideration by the Bank via three monthly payments"). This is certainly wrong for cash transactions; Myron Green deposited all cash payments directly in its own bank account. Tr. 94:16-22. And card-swipe transactions are no different. *See* LF4 ¶ 20. The Bank's payment schedule provides strong evidence of this: the Bank made *separate* payments to Myron Green to cover all salary-deductions, and those payments followed the twice-a-month payroll schedule, not the monthly schedule of the food-services contract. Tr. 130:12-131:5; Pet. Ex. 2, MG00292. A credit or debit card issued by a third party does not break the contractual relationship between buyer and seller, it only facilitates payment. The same is true here. By swiping their employee-ID card, employees instruct the Bank's human resources department to make payment to Myron Green on their behalf out of the

customer's after-tax paycheck. That those funds pass through the Bank's holding accounts is not enough to extend the Bank's immunity.

If the Court accepts these factual arguments, Myron Green says that this case is legally indistinguishable from dining facilities at a retirement home, Apt. Br. at 13, 15, school cafeterias, *id.* at 16 n.14, a variety of supply-chain scenarios, *id.* at 15, and an employer's purchases at a grocery store, *id*. at 17. But the factual predicate is wrong, so the analogies fall apart. In each of the cited cases, the third party purchased the food in advance and then resold it to the ultimate consumer. *See, e.g. Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 756 (Mo. banc 1980). Here, there was a direct transaction between Myron Green and the Bank's employees. The Commission found that employees made purchases "from Myron Green" not from the Bank, and this factual finding is supported by substantial evidence. LF4-5 ¶¶ 20-21.

Myron Green is also legally mistaken to assume that the Bank's tax exemption would apply even if its factual arguments were correct. Again, if Missouri's sales tax applies to sellers, then Myron Green must pay sales tax on purchases by the Bank, which, under Myron Green's theory, includes all cafeteria purchases. If Missouri's sales tax applies to purchasers, then cafeteria customers must pay sales tax on their purchases. Under either circumstance, the complete transaction is taxable, and the legal incidence of the tax does not fall on the Bank.

II. Myron Green must pay sales tax because it offered its food services to the public. (Responds to Point II)

Alternatively, Myron Green argues that it should not have to pay sales tax on cafeteria purchases because the Bank subsidized the cafeteria and restricted access to it. Apt. Br. 19-23. Directly on-point precedent says otherwise. In *JB Vending Co., Inc. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), a third-party food services provider ran cafeterias in several corporate office buildings, just as Myron Green does here. This Court explained that the third-party vendor "holds itself out ready to contract for cafeteria services with any company that hires its services." *Id.* at 189. It therefore had to pay sales tax on all purchases. *Id.* The same is true here. An employer who provides incidental cafeteria services to its own employees may not be in the business of selling food, but a third-party vendor managing multiple locations certainly is in that business.

A. Missouri taxes sellers engaged in the business of selling a product to the public.

Missouri imposes a sales tax upon the following:

> [*A*]*ll sellers* for the privilege of *engaging in the business of selling* tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> . . .
>
> (6) A tax equivalent to four percent on the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist cabin, tourist camp *or other place in which rooms, meals or drinks are regularly served to the public*.

RSMo § 144.020.1(6) (emphases added). This Court's cases emphasize two aspects of this text.

First, the statute "clearly evinces a legislative intent to tax *all sellers* for the privilege of selling tangible personal property or rendering taxable retail service." *J.B. Vending Co.*, 54 S.W.3d at 188 (emphasis added). Reading the specific subsections to limit the general tax levy on all sellers, "would be inconsistent with" that intent. *Id*.

The statute's "all sellers" language is, however, limited to those taxpayers "engaging in the business of selling" a particular good or service. To determine the taxpayer's "business," this Court asks '"whether the taxpayer invited the trade of the public.'" *Shelter Mut. Ins. Co. v. Director of Revenue*, 107 S.W.3d 919, 921-22 (Mo. banc 2003) (internal brackets and ellipses omitted) (quoting *J.B. Vending*, 54 S.W.3d at 187). Thus, the food-services provider in *J.B. Vending* owed sales tax because it "[held] itself out ready to contract for cafeteria services with any company that hires its services." *J.B. Vending*, 54 S.W.3d at 189. Conversely, a '"college was not engaged in the business of'" selling food services '"as a commercial enterprise,'" and so did not have to pay sales tax on such services. *Shelter Mut. Ins. Co.*, 107 S.W.3d at 922 (quoting *Wellesley College v. Attorney General*, 49 N.E.2d 220 (Mass. 1943)). Similarly, the "primary business" of an insurance company was insurance, food sales it made to its own employees in its corporate cafeteria were only '"incidental'" to its primary business. *Id.* (citation omitted). Such incidental sales were not taxable. *Id.*

Second, the statute taxes meals and drinks "regularly served to the public." RSMo § 144.020.1(6). This means that the taxpayer "holds itself out to serve those members of the public who come into its establishment." *J.B. Vending*, 54 S.W.3d at 187. It does not matter if a *third party* "limits those who are able to reach that establishment." *Id.* "While

the word 'public' can refer to the entire populace," this Court explained, it takes a different meaning in this statute. *Id.* at 186 (quoting *Webster's New Int'l Dictionary* 2005 (2d Ed. 1952)); *Webster's Third New Int'l Dictionary* 1836 (1993); and *Black's Law Dictionary* 1227 (6th Ed. 1990)). A food-services provider still serves the public even if the general public has limited access to it. A concession stand at an arena or stadium, for instance, is still public. *Id.* at 188. A broader reading would undermine the statute's purpose. "Almost any business serving meals and drinks could create some access-limiting criterion and then argue that it was not open to the public." *Id.*

Still, food services might not be offered "to the public" if there is a "special relationship between the *taxpayer* and those to whom it serves meals and drinks." *Shelter Mut. Ins. Co.*, 107 S.W.3d at 921. In *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996), for instance, there was a "special relationship" between the taxpayer-club and its patrons. *Shelter Mut. Ins. Co.*, 107 S.W.3d at 921. There, the club's co-owners and patrons were the same persons, and so there was no actual sale. *Id.* at 921 & n.2. In *Shelter Mutual Insurance*, the employer itself provided food services to its employees, so there was a special relationship between the taxpayer-employer and its employees. *Id. at 922.* In contrast, there is no special relationship when the employer hires a third party to provide food services to its employees: J.B. Vending's "sales were not to its own employees, but [to] those of its client-companies." *Id.* at 921 (reconciling *J.B. Vending*'s holding).

B. Myron Green owes sales tax because it holds itself out to the public as offering food services.

Myron Green, like J.B. Vending, owes sales tax because it "holds itself out ready to contract for cafeteria services with any company that hires its services." *J.B. Vending*, 54 S.W.3d at 189. Myron Green operates dozens of corporate cafeterias like the one at issue in this case. LF2 ¶ 2. J.B. Vending had "contracted with thirteen employers . . . to sell meals and drinks to anyone who comes to J.B.'s cafeterias in those buildings," and held "itself out ready to contract" with more. *J.B. Vending*, 54 S.W.3d at 189. Both are unlike Wellesley College or Shelter Mutual Insurance, whose respective "primary business[es]" were education and insurance. *Shelter Mut. Ins.*, 107 S.W.3d at 922. Myron Green concedes as much. Apt. Br. at 21 (noting that unlike Shelter Mutual, "Myron Green does hold itself out to the public for cafeteria and related food services.").

Myron Green, like J.B. Vending, has no special relationship with its cafeteria customers. *J.B. Vending*, 54 S.W.3d at 187. "While it is true that those who eat at [Myron Green's] cafeterias are usually employees, they are not [Myron Green's] employees." *Id.* at 189; LF13. The "persons it sells meals and drinks to are . . . just those members of the public whom the building owners allow in the building." *J.B. Vending*, 54 S.W.3d at 189. The Bank may have a special relationship with Bank employees, but Bank employees have "no contractual or other special relationship" with Myron Green, *id.*, they simply buy food from it. *Id.* "In arguing otherwise," Myron Green "mixes its role with that of the employers who own the buildings in which it operates." *Id.*

C. Myron Green's contrary arguments mistake its role for that of the Bank.

Myron Green's contrary arguments fail for three reasons.

First, Myron Green is not the Bank. Myron Green cannot show a "special relationship" between itself and the employees of another company. Apt. Br. 20-21. *J.B. Vending* expressly rejected that argument. Again, "[i]n arguing otherwise, [Myron Green] improperly mixes its role with that of the employers who own the buildings in which it operates." 54 S.W.3d at 189.

Second, the Bank's separate shortfall payment is not relevant to the "special relationship" analysis. The "pricing and subsidy arrangement between the Bank and Myron Green," Myron Green argues, "created a unique relationship between Myron Green and individual bank employees." Apt. Br. at 21. Not so. Again, *J.B. Vending* expressly rejected the idea of a special relationship between a third-party vendor and another company's employees. 54 S.W.3d at 189. If a price-subsidy could create a "special relationship" at all, it would be between the Bank, which makes the shortfall payment, and its employees, who benefit from it. It would not be between Myron Green and Bank employees.

Myron Green says the Bank's shortfall payments makes this case more like *Shelter Mutual* than *J.B. Vending*. But subsidized pricing was only relevant in *Shelter Mutual* because it showed that Shelter Mutual was not engaged in the business of selling food products. 107 S.W.3d at 922. This case is not analogous, because Myron Green clearly *is* trying to make money by selling food products. Indeed, it concedes as much. Apt. Br. at 21. That concession makes this one factual similarity irrelevant. And there are many

factual *dissimilarities*. In *Shelter Insurance*, the employer owned and operated the cafeteria, sold to its own employees, was not the business of selling food products, and did not sell to the employees of other companies. 107 S.W.3d at 920, 922. Here, the third-party vendor operates the cafeteria, is in the business of selling food products, and sells only to the employees of other companies. The Director has agreed not to tax the Bank's shortfall payment. Beyond that, the shortfall payment does not alter the sales relationship between Myron Green and its customers.

Lastly, this Court has plainly held that it does not matter whether Myron Green's cafeteria is located in a limited-access building. The Bank insists that this case is different because the facility is "highly secured" rather than just secured, Apt. Br. at 22, but offers little legal explanation for why this matters. Myron Green's "cafeterias do not become nonpublic merely because the buildings in which they are located happen to restrict access to those buildings." *J.B. Vending*, 54 S.W.3d at 184.

III. The Commission's decision was not unexpected. (Responds to Point III)

Myron Green also argues that if this Court affirms the Commission's decision, it should apply only prospectively, because it would be an unexpected decision under RSMo § 143.903.1. Apt. Br. 24-25. As Myron Green notes, however, a decision is only unexpected if it "overrules a prior case or invalidates a previous statute, regulation, or policy of the director of revenue *and* the decision was not reasonable foreseeable." *Lloyd v. Director of Revenue*, 851 S.W.2d 519, 523 (Mo. banc 1993). That is not the case here for the reasons explained in the previous sections. *Centerre Bank* placed Myron Green on notice that the legal incidence of Missouri's sales tax falls on the seller, 744 S.W.2d at 759,

and federal and state law do not provide any basis to extend the Bank's exemption to its contractors. *Canteen* is factually distinguishable.

CONCLUSION

The Director of Revenue asks that this Court affirm the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Brief of Respondent was served electronically by Missouri CaseNet e-filing system on May 23, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 7,333 words.

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