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December 23, 2020

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001-2866

Re: *State of New York, et al. v. United States Dep't of Labor, et al.*, No. 19-5125

Dear Mr. Langer:

This Office represents plaintiff-appellee the State of New York. We submit this letter on behalf of appellees in response to appellants' Fed. R. App. P. 28(j) letter, which discussed the standing ruling in *El Paso County v. Trump*, No. 19-51144 (5th Cir. Dec. 4, 2020).

That ruling provides no useful guidance for either of two reasons: first, it is incorrect; and second, its reasoning is in any event inapposite to this case.

This Court should decline to follow the Fifth Circuit's incorrect reasoning for the reasons set forth in both the dissent in *El Paso County* and in a related Ninth Circuit case, which correctly concluded that the government plaintiffs in their respective cases had established standing based on "a direct injury in the form of a loss of specific tax revenues" under *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992). *See El Paso County*, slip op. at 43-45 (dissenting op.); *Sierra Club v. Trump*, 977 F.3d 853, 870-72 (9th Cir. 2020).

In any event, *El Paso County* is inapposite. The majority held that the plaintiff county had alleged only that the challenged federal action "will have an economic impact on the local and state economy where the base is located and cause a reduction in *general* tax revenues." Slip op. at 12 (emphasis added). Because the county had not alleged "the loss of a specific tax revenue," the majority held that standing was absent. *Id.*

Here, by contrast, the plaintiff States identified, and the district court found, specific taxes on healthcare plans that the Rule in question would affect. *See* JA 191-192 & n.10. As we have explained (*see* Br. for Appellees 29), the Department of Labor itself identified this direct connection between its Rule and specific state revenues when it touted the avoidance of state taxes on premiums as a benefit of the Rule. *See* Final Rule 28,943 (JA 253). And the Department's explicit advertisement of the avoidance of these particular state taxes shows that appellees' injury was not "self-inflicted," but rather an intended effect of the Rule under review. *See* Br. for Appellees 24.

Sincerely,

/s/ Matthew W. Grieco

Matthew W. Grieco
Assistant Solicitor General
State of New York