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November 22, 2021

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Arizona v. Yellen*, No. 21-16227
Set for Oral Argument on January 13, 2022

Dear Ms. Dwyer:

Pursuant to Rule 28(j), Appellant the State of Arizona respectfully submits the decision of the Northern District of Alabama in *West Virginia v. U.S. Dep't of Treasury*, No. 21-cv-465, 2021 WL 5300944 (N.D. Ala. Nov. 15, 2021), which permanently enjoined the Tax Mandate as to the 13 plaintiff states there. That decision supports Arizona's standing and merits arguments here.

First, *West Virginia's* holding that the state plaintiffs had standing in a virtually identical suit supports Arizona's standing here. The court explained that States have a constitutional right to "knowing acceptance" of the terms of any conditional spending grants and that the Tax Mandate deprives States of this right, thereby conferring standing. *Id.* at *7. In addition, the court properly rejected the Secretary's attempt to conflate standing and the merits, correctly concluded that arguments about what the Tax Mandate means/requires are *merits* issues, not jurisdictional ones. *Id.* at *8. But the court below here accepted that erroneous conflation.

Second, the *West Virginia* decision supports Arizona's merits claim that the Tax Mandate is unconstitutionally ambiguous. *See id.* at

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*13-19. The court concluded that the Tax Mandate’s prohibition on “direct or indirect” offsets alone rendered it unconstitutional. *Id.* Because “*any* ARPA funds that the [States] receive could be viewed as indirectly offsetting any reduction in net tax revenue from a change in state law or policy,” States could not “clearly understand their obligations.” *Id.* at *15 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (emphasis added)). The district court noted that this was particularly true as “Money is fungible.” *Id.* But the Secretary’s Answering Brief here *completely* fails to acknowledge the concept of fungibility. *See* Reply Br.1.

In addition, the court squarely rejected the Secretary’s analogy (also advanced here) to RLUIPA: “there is no question” what RLUIPA requires and “every lawyer is familiar” with strict scrutiny, which is what RLUIPA imposes. 2021 WL 5300944, at *16-18. By contrast, the Tax Mandate “provides *no guidance* on critical interpretive questions.” *Id.* at *17.

West Virginia thus provides further support for the State’s standing and merits arguments.

Sincerely,

s/ Drew C. Ensign
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Deputy Solicitor General
Counsel for the State of Arizona

cc: Mark B. Stern
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