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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Douglas A. Ducey, Governor of the State of Arizona, in his official capacity,

Plaintiff,

v.

Janet Yellen, Secretary of the Treasury, in her official capacity; Richard K. Delmar, Acting Inspector General of the Department of Treasury, in his official capacity; and U.S. Department of the Treasury,

Defendants.

No. 2:22-cv-00112-SPL

Alleged Related Case: 2:21-cv-00514-DJH

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO TRANSFER

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I. INTRODUCTION

Defendants' Motion to Transfer ("Motion") *Ducey v. Yellen*, No. 2:22-cv-00112-SPL (D. Ariz.), to Judge Humetawa demonstrates the crux of the underlying case—Defendants' inability to stay within the bounds of the statutory and regulatory confines placed first by Congress and now the courts. Here, Defendants' Motion fails because the clear language of LRCiv 42.1(a) only permits a transfer motion "when two or more cases *are pending* before different Judges [of the district court]." LRCiv 42.1(a) (emphasis added). Additionally, even if there were a question about whether both cases were "pending," Defendants have failed to demonstrate that the factors needed to support the transfer of a case are present. Although Defendants may be hoping that a transfer of *Ducey v. Yellen* would result in another dismissal based on standing, the standing analysis that was dispositive in *Arizona v. Yellen*, 2:21-cv-00514-DJH (D. Ariz.) arose out of completely different facts and has no bearing on *Ducey v. Yellen*. Thus, transfer would not further judicial economy, and the Motion must be denied.

II. ARGUMENT

A. Because *Arizona v. Yellen* is Not "Pending" in the District of Arizona, LRCiv 42.1 Does Not Authorize Transfer.

The Motion fails at the outset because LRCiv 42.1(a) limits transfers to when "two or more cases are *pending* before different Judges." (emphasis added). Here, the case that Defendants contend is related to *Ducey v. Yellen* and supports transfer—*Arizona v. Yellen*—is *not* pending before any Judge of this Court. On July 22, 2021, Judge Humetewa dismissed that case on standing grounds, and the Clerk entered judgment. *See Arizona v. Yellen*, --- F.Supp.3d ---, 2021 WL 3089103, at *6 (D. Ariz. July 22, 2021); [*see also* Judgment of Dismissal in a Civil Case, *Arizona v. Yellen*, 2:21-cv-00514-DJH (July 22, 2021) (Doc. 62).] The State has appealed. [State's Notice of Appeal, *Arizona v. Yellen*, 2:21-cv-00514-DJH (July 23, 2021) (Doc. 63).] Due to the appeal, the District Court no longer has jurisdiction in that case, further demonstrating that the matter is not "pending" in this Court.

LRCiv 3.7(a)(1) mandates that a case be randomly assigned "in a manner so that neither the Clerk nor any parties or their attorneys will be able to make a deliberate choice of a particular Judge."[1] This is to ensure integrity in the process and any perception that a Judge has a preconceived opinion on a case. Here, there are no pending matters in *Arizona v. Yellen*, 2:21-cv-00514-DJH (D. Ariz.), and thus Defendants' Motion does not meet the requirements of LRCiv 42.1(a) and fails.

B. The LRCiv 42.1(a) Factors Do Not Support Transfer.

Assuming *arguendo* that *Arizona v. Yellen* was still pending before Judge Humetewa, Defendants' Motion still does not support transfer. Defendants misstate the test, insinuating (at 1-2) that transfer is proper if they establish *any* of the five factors described in LRCiv 42.1(a). This is not correct. The text of LRCiv 42.1(a) instead makes clear that the presence of at least one of these factors is a prerequisite to *filing* a transfer motion:

> When two or more cases are pending before different Judges, a party in any of those cases *may file a motion to transfer the case* or cases to a single Judge on the ground that the cases: (1) arise from substantially the same transaction or event; (2) involve substantially the same parties or property; (3) involve the same patent, trademark, or copyright; (4) call for determination of substantially the same questions of law; or (5) for any other reason would entail substantial duplication of labor if heard by different Judges.

LRCiv 42.1(a) (emphasis added).

However, this Court still has "broad discretion in deciding a motion to transfer under Local Rule 42.1(a)," including by balancing the five factors and in light of LRCiv 3.7(a)(1). *Addington v. US Airline Pilots Ass'n*, No. CV-08-01633-PHX-NVW, 2010 WL 4117216, at *1 (D. Ariz. Oct. 19, 2010). Here, Defendants' Motion seeks transfer to a Judge that heard another case that arose out of a different event, involves different parties, and raises entirely

[1] Unless the Rules specifically indicate otherwise, when the Local Rules use the capitalized terms "Judge" or "Judges," as in LRCiv 3.7 or LRCiv 42.1, they are referring to District Court or Magistrate Judges. *See e.g.* LRCiv 3.2(a) (requiring case numbers to end "with the initials of the Judge to whom the case is assigned"); LRCiv 3.7(a)(1) (requiring the Clerk of Court to "assign civil cases to Judges within each division by automated random selection"); LRCiv. 5.3 ("Where, pursuant to law, an action must be heard by a District Court composed of three Judges . . .").

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different legal issues. Should this Court adopt Defendants' position, it is unclear when transfer would ***not*** be applicable.

More specifically, *Arizona v. Yellen* asserts a constitutional challenge to a discrete provision in the American Rescue Plan Act ("ARPA") that prohibits states from using State and Local Fiscal Recovery Funds ("SLFRF") to "either directly or indirectly offset a reduction" in net tax revenues "resulting from a change in law, regulation, or administrative interpretation" that reduces state taxes (the so-called "Tax Mandate"). 42 U.S.C. § 802(c)(2)(A). *Arizona v. Yellen* did *not* raise any claims that Treasury had exceeded its delegated authority under ARPA. Moreover, in *Arizona v. Yellen*, the State claimed injury based on how potential applications of the Tax Mandate might impact the State's ability to implement tax cuts.

Ducey v. Yellen is fundamentally different. It does not challenge the Tax Mandate. Rather, at its core, *Ducey v. Yellen* challenges whether ARPA gave the U.S. Treasury Department ("Treasury") rulemaking authority to adopt a non-sensical Final Rule that imposes additional restrictions on the use of funds distributed under the SLFRF program—beyond those that Congress included in the statute and that are inconsistent with the statutory text. Plaintiff Douglas A. Ducey, Governor of the State of Arizona—who is not a party in *Arizona v. Yellen*—has a unique, direct, and concrete interest in this issue because: (1) he is the State official authorized to accept and expend funds received from the federal government, [Doc. 1 at ¶ 11]; and (2) in this role, he has properly expended SLFRF funds on two critical programs designed to mitigate the long-term economic effects from the adverse educational impacts of COVID-19, particularly on low-income students. [*id.* at ¶¶ 36-45, 57-63.] Treasury's Final Rule seeks to directly unravel the Governor's programs through after-the-fact, extra-statutory restrictions. Indeed, Treasury has explicitly told the Governor's Office, in writing, that this Final Rule prohibits the two programs and allegedly authorizes Treasury to recoup prior SLFRF distributions utilized by Governor Ducey or to withhold future distributions. Nothing about this harm is conjectural or theoretical.

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A "principal factor" in the Court's inquiry here is "whether party economy or judicial economy is *substantially* served by transfer to another judge." *City of Phoenix v. First State Ins. Co.*, No. CV-15-00511-PHX-NVW, 2016 WL 4591906, at *20 (D. Ariz. Sept. 2, 2016) (emphasis added). The five factors in LRCiv 42.1(a) do not favor a transfer here.

1. The Two Cases Do Not Arise from Substantially the Same "Transaction or Event."

Defendants' argument (at 3) that both cases arise out of ARPA is an oversimplification of *Ducey v. Yellen*—and an inaccurate one. Although *Ducey v. Yellen* would not exist but for ARPA, Congress's passage of that legislation in March 2021 did not precipitate the filing of the Complaint in *Ducey v. Yellen* approximately nine months later.

To the contrary, *Ducey v. Yellen* arose out of Treasury's subsequent *administrative actions* in implementing the SLFRF. In particular, in the Fall of 2021, Treasury took the position that two of Governor Ducey's SLFRF programs—the Education Plus-Up Grant ("Plus-Up") and COVID-19 Educational Recovery Benefit ("ERB")—were impermissible because, in Treasury's non-expert view, they "undermined" efforts to stop the spread of COVID-19. [Doc. 1 at ¶¶ 46-48.] Treasury could not cite anything in the actual text of ARPA or its own "Interim Final Rule" to support this position. [*Id.* at ¶¶ 48-50.][2] Treasury instead adopted a "Final Rule" a few months later, in January 2022, that added new restrictions on the use of SLFRF funds, restrictions that are untethered to the actual text of ARPA. [*Id*. at ¶¶ 57-60.] Shortly thereafter, Treasury informed the Governor's Office that even though the Final Rule does not become effective until April 1, 2022, this Rule prohibits the Plus-Up and the ERB programs and purportedly authorizes Treasury to recoup or

[2] The Interim Final Rule instead recognized that "[w]here there has been a negative economic impact resulting from the public health emergency, States, local, and Tribal government have *broad latitude* to choose whether and how to use the Fiscal Recovery Funds to Respond to and address the negative economic impact." Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26794 (May 17, 2021) (emphasis added). Similarly, at various points, the Interim Final Rule explained that SLFRF could properly be used to address the adverse impacts on education from COVID-19. [Doc. 1 at ¶¶ 31-32.]

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withhold SLFRF distributions. [*Id*. at ¶¶ 64-70.] Treasury thus demanded that Governor Ducey disband or revise those two pre-existing programs. [*Id*. at ¶ 69.]

None of these administrative actions are at issue in *Arizona v. Yellen*. In fact, they had not even come into existence when the Complaint in *Arizona v. Yellen* was filed on March 25, 2021. [*See id.* at ¶¶ 57, 64.] Because one case (*Arizona v. Yellen*) arose solely out of legislation, while another (*Ducey v. Yellen*) arose directly out of agency action, the first factor in LRCiv 42.1(a) weighs against transfer.

2. <u>The Two Cases Do Not Involve the Substantially Same Parties.</u>

The lone plaintiff in *Ducey v. Yellen*, Governor Ducey, is not a party in *Arizona v. Yellen.* Still, Defendants contend (at 2) that the plaintiffs in both cases are substantially the same because they "both represent Arizona in an official and sovereign capacity." But this argument ignores the unique interests and direct injuries of Governor Ducey in *Ducey v. Yellen*.

Governor Ducey is the "official authorized to accept and expend funds received from the federal government or any agency thereof." [Doc. 1 at ¶ 11 (citing Ariz. Rev. Stat. § 41-101.01(A).] Moreover, "Governor Ducey serves as the sole State official responsible for communications between the State of Arizona and the federal government." [*Id.* (citing Ariz. Rev. Stat. § 41-101(A)(4)).] In accordance with this statutory authority, Governor Ducey, following the initial guidance in Treasury's Interim Rule on the use of SLFRF funds, developed the Plus-Up and ERB programs and properly used SLFRF funds to implement them. [*Id.* at ¶¶ 11, 36-45.] As discussed, however, Treasury changed this guidance to directly attack Governor Ducey's programs through its Final Rule as well as the ultimatum letter it subsequently sent to the Governor's Office. [*See id.* at ¶¶ 69-70.]

These facts materially distinguish *Arizona v. Yellen*, which did not involve any similar, specific harms to financial aid programs instituted by Governor Ducey and, thus, did not include Governor Ducey as a party. Further, *Arizona v. Yellen* involved state sovereignty issues under the Spending Clause that are not at issue here because the claims in this case do not involve the State's authority to determine its own tax policy.

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Although Defendants rely on (at 2) *Grand Canyon Skywalk Dev., LLC v. Sa Nyu Wa, Inc.*, 2012 WL 6101901 (D. Ariz. Nov. 21, 2012), that case is easily distinguished because there, the "pleadings largely treat[ed] the council members as surrogates for the Tribe or Tribal Council." *Grand Canyon Skywalk Dev., LLC*, 2012 WL 6101901 at *3. Here, by contrast, Governor Ducey's Complaint explains why he is a distinct party from the State of Arizona. [Doc. 1 at ¶ 11.] Additionally, in *Arizona v. Yellen*, the State of Arizona's interests as a whole were being represented due to the fact that state sovereignty was at the forefront of that case. Thus, because of the fundamental differences in plaintiffs in the two cases, the second factor in LRCiv 42.1(a) weighs against transfer.[3]

3. <u>The Two Cases Do Not Call for Resolution of Substantially the Same Issues of Law</u>.

Defendants assert (at 2-3) that the legal issues in *Ducey v. Yellen* and *Arizona v. Yellen* are substantially similar because both cases: (1) "ask[] the Court to interpret [ARPA]'s permissible and impermissible uses in 42 U.S.C. § 802(c)"; (2) raise issues under the Spending Clause of the U.S. Constitution; and (3) require the Court to determine whether standing exists. None of these arguments support transfer.

<u>First</u>, Defendants' superficial argument that both cases require some interpretation of 42 U.S.C. § 802(c) fails to appreciate the fundamental differences in: (1) the specific statutory text that the respective plaintiffs in each case are asking the Court to interpret; and (2) how such interpretation relates to the specific (and different) legal claims at issue in each case. In *Ducey v. Yellen*, statutory interpretation is necessary to determine the scope of rulemaking authority that Congress granted to Treasury both under ARPA and Treasury's enabling statutes—*i.e.*, when Congress has specifically detailed four permissible uses of SLFRF funds (in 42 U.S.C. § 802(c)(1)) and included two restrictions on such use (in 42 U.S.C. § 802(c)(2)), can Treasury adopt rules adding new restrictions not found or contemplated in the statute? [*See*, *e.g.*, Doc. 1 at ¶ 78.] Similarly, when Congress has said

[3] Neither *Arizona v. Yellen* nor *Ducey v. Yellen* involves patents, trademarks, or copyrights. Thus, the third factor identified in LRCiv 42.1 does not support transfer.

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that SLFRF funds can be used "to respond to the public health emergency with respect to [COVID-19] *or* its negative economic impacts," 42 U.S.C. § 802(c)(1)(A) (emphasis added), does Treasury have authority to read the "or" out of this text by requiring that programs expressly designed to address the negative economic impacts of COVID-19 also be designed in such a way that, in Treasury's non-expert view, are consistent with COVID-19 mitigation efforts? [*See*, *e.g.*, Doc. 1 at ¶ 79.]

By contrast, *Arizona v. Yellen* does not require any interpretation of 42 U.S.C. § 802(c)**(1)** and does not raise any arguments that Treasury exceeded its delegated authority.[4] *Arizona v. Yellen* only seeks an evaluation of the meaning of the Tax Mandate in 42 U.S.C. § 802(c)**(2)(A)** and only for purposes of determining whether that specific provision violates the Spending Clause or the Tenth Amendment. [*See* Compl. for Declaratory and Injunctive Relief at ¶¶ 51-70, *Arizona v. Yellen*, No. 2:21-cv-00514-DJH (March 25, 2021) (Doc. 1).] This is far different from *Ducey v. Yellen*, which does not challenge the Tax Mandate and does not include any Tenth Amendment claim.

Second, Defendants' statement that both cases implicate the Spending Clause once again ignores important differences between the two cases. The Spending Clause claim in *Ducey v. Yellen* has only been raised as an alternative legal theory, a theory that requires resolution in the (unlikely) event that Treasury's new-found mandate that SLFRF funds be used in a manner that Treasury believes is consistent with COVID-19 mitigation is somehow authorized by 42 U.S.C. § 802(c)**(1)**. [*See* Doc. 1 at ¶¶ 97, 103.][5] By comparison, the Spending Clause claim in *Arizona v. Yellen* concerns the very different issue of whether the Tax Mandate—a different part of ARPA—violates that Clause. [*See* Compl. for Declaratory and Injunctive Relief at ¶¶ 51-61, *Arizona*, No. 2:21-cv-00514-DJH (Doc. 1).]

[4] The only specific acts of Treasury referenced in the Complaint in *Arizona v. Yellen* concern statements by Treasury about how it believes the Tax Mandate should be interpreted. [*See* Compl. for Declaratory and Injunctive Relief at ¶¶ 46-49, *Arizona v. Yellen*, 2:21-cv-00514-DJH (March 25, 2021) (Doc. 1).]

[5] Governor Ducey similarly raises the non-delegation doctrine as an alternative legal theory in *Ducey v. Yellen*. [Doc. 1 at ¶¶ 101-05.] By contrast, *Arizona v. Yellen* does not include any non-delegation claim.

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In any event, any alleged similarities here are mitigated by the fact that the Court in *Arizona v. Yellen* dismissed that case on standing grounds before wading into the merits of the Spending Clause claim.

Third, because Article III standing is a threshold jurisdictional requirement in *any* federal case, an overlap in this issue hardly justifies transfer. That is particularly true here, where the standing analyses in *Ducey v. Yellen* and *Arizona v. Yellen* are nothing alike.

In *Ducey v. Yellen*, the standing inquiry is straightforward and easy, as there is a direct nexus between Treasury's actions and actual, particularized, and concrete harm to Governor Ducey. Exercising his statutory authority and the broad discretion that Treasury itself has acknowledged, Governor Ducey created two SLFRF programs that followed the text of ARPA and Treasury's Interim Final Rule. [Doc. 1 at ¶¶ 38-45, 52, 55.] Treasury later issued a Final Rule that purports to prohibit these same programs, at least as of April 1, 2022. [*Id*. at ¶¶ 57-63.] Moreover, Treasury has specifically cited that Final Rule to support its arbitrary ultimatum to Governor Ducey that the programs must be disbanded or else federal monies will be recouped and withheld. [*Id*. at ¶¶ 67-70.] Thus, Treasury has directly injured Governor Ducey's ability to expend SLFRF funds on programs designed to get Arizona school children back on track academically. On these facts, Governor Ducey has clear standing to challenge the Final Rule and Treasury's related ultimatum. *See*, *e.g.*, *Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014) ("[I]f a plaintiff is an object of a government regulation, then that plaintiff ordinarily has standing to challenge that regulation."); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 656 F.3d 580, 585-87 (7th Cir. 2011) (holding that truck drivers and trucking association had standing to bring pre-enforcement challenge to final administrative rule imposing penalties on motor carriers for failing to implement certain safety provisions).

By contrast, in *Arizona v. Yellen*, there was no administrative action by Treasury against the State under the Tax Mandate. In that case, the injury-in-fact component of standing required the Court to decide: (1) whether the Tax Mandate's "ambiguity" constituted sovereign injury to the State or harmed the State by placing lawmakers in an

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"uncertain position"; (2) whether "compliance costs" harmed the State; (3) whether there was a "realistic danger" that Treasury would recoup some ARPA funds based on a recent State tax cut; and (4) whether "ARPA's coercive pressure" injured the State. *Arizona*, 2021 WL 3089103, at *2-5. The Court held these harms were too theoretical to establish Article III standing. *See id.* But that holding has no relevance to *Ducey v. Yellen*, because Governor Ducey has no need to rely on the type of injuries raised in *Arizona v. Yellen*.

For all these reasons, the fourth factor in LRCiv 42.1(a) weighs against transfer.

4. Transfer Will Not Avoid Substantial Duplication of Labor.

Finally, the two cases will not "entail substantial duplication of labor if heard by different Judges." LRCiv 42.1(a). Because *Arizona v. Yellen* was dismissed in its early stages on standing grounds, the Court in that case did not address the merits of the State's Spending Clause or Tenth Amendment claims or interpret ARPA's text. *See Arizona*, 2021 WL 3089103, at *2-5. Moreover, for the reasons discussed, the standing analysis in *Arizona v. Yellen* will not be informative in *Ducey v. Yellen*. The fact that *Arizona v. Yellen* is no longer pending before any Judge of this Court further confirms that a transfer will not advance judicial economy. *See Cagle v. Ryan,* No. CV-16-03912-PHX-JAT(JFM), 2018 WL 2688775, at *2 (D. Ariz. June 5, 2018) ("Given the disparate stages and nature of the cases, consolidation provides no obvious benefits to the parties of either case" and would not prevent duplication of labor);[6] *Robert Kubicek Architects & Assocs., Inc. v. Bosley*, No. CV-11-02112-PHX-DGC, 2012 WL 6554396, at *8 (D. Ariz. Dec. 14, 2012) (finding consolidation improper despite common issues because cases were at "opposite stages of litigation"); *City of Phoenix*, 2016 WL 4591906, at *21 ("Finally, declining to transfer Berkshire's case would not create any substantial duplication of labor. The parties in this case cross-moved for summary judgment two months before Berkshire's case was even filed, and those motions have now been decided in a case-dispositive way").

***

[6] Similar to motions to transfer, motions to consolidate are evaluated under LRCiv 42.1. *See Cagle*, 2018 WL 2688775 at *1.

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In short, even if the LRCiv 42.1 balancing test is applicable, the five factors all favor *denying* the Motion.

III. CONCLUSION

That Defendants have even filed this Motion to begin with, despite the fact that transfer is not permitted under the plain text of LRCiv 42.1, is illustrative of Defendants' willingness to outright ignore plain language of ARPA and now the local procedural rules of this Court. Although Governor Ducey has full faith that either Judge Logan or Judge Humetewa would fairly decide *Ducey v. Yellen* on the merits, the text of LRCiv 42.1 does not authorize transfer here and the predicate upon which such transfer is based should be rejected. Accordingly, the Court must deny the Motion.

DATED this 15th day of February, 2022.

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CERTIFICATE OF SERVICE

I certify that, on February 15, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, which automatically sends a Notice of Electronic Filing to all counsel of record.

s/ Tracy Hobbs

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