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May 20, 2022

Deborah Hunt  
Clerk, United States Court of Appeals for the Sixth Circuit  
540 Potter Stewart United States Courthouse  
100 E. Fifth Street  
Cincinnati, Ohio 45202

*Filed Electronically*

Re: Rule 28(j) supplemental citation of authority in *Kentucky v. Yellen*,  
No. 21-6108

Dear Ms. Hunt:

Pursuant to Rule 28(j), the Appellees notify the Court of the Ninth Circuit's recent decision in *Arizona v. Yellen*, No. 21-16227, 2022 WL 1574217 (May 19, 2022).

Like the Appellees here, Arizona challenged the constitutionality of 42 U.S.C. § 802(c)(2)(A)—the Tax Mandate. And like the Appellants here, the federal defendants in the Ninth Circuit argued that Arizona lacked standing. The Ninth Circuit rejected that argument and held that Arizona has standing for many of the same reasons that the Appellees have standing here. Specifically, the Ninth Circuit held that there is “a sufficiently credible threat of enforcement to bring a pre-enforcement challenge to ARPA’s [Tax Mandate].” *Arizona*, 2022 WL 1574217, at \*7. The Ninth Circuit also held that States have standing to challenge a spending

condition when Congress “extends a federal grant with ambiguous or coercive terms to the States” because the mere offer of an unconstitutional condition on spending “offends state sovereignty and gives rise to a cognizable injury in fact.” *Id.* at \*9. In reaching this decision, the Ninth Circuit faulted the district court for conflating its view of the merits with whether Arizona has standing. *Id.* at \*6, \*9. The Appellants make that same error here. *See* Appellees’ Br. at 22–23.

The Appellees here have standing for another reason as well: the Tax Mandate imposes compliance costs on Tennessee. The Ninth Circuit held that Arizona’s compliance costs did not amount to an injury-in-fact under Article III. *Arizona*, 2022 WL 1574217, at \*5. But that was because Arizona’s compliance costs were traceable to “the reporting requirements in the Treasury’s [Interim Final Rule],” not the statute. *Id.* By contrast, the uncontroverted evidence here demonstrates that the Tax Mandate itself—not the Interim Final Rule—imposes compliance costs on Tennessee, and those costs are independent from any reporting requirements in other parts of the statute. *See* Appellees’ Br. at 16–19; R.25-3, PageID#229–32.

Best regards,

/s/ Brett R. Nolan  
*Counsel for Commonwealth of Kentucky*

/s/ Andrée S. Blumstein  
*Counsel for State of Tennessee*

cc: Counsel of record