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Via CM/ECF

Deborah S. Hunt, Clerk of Court
U.S. Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

RE: *Kentucky v. Yellen*, No. 21-6108

Dear Ms. Hunt:

We respond to plaintiffs’ letter concerning the Ninth Circuit’s decision in *Arizona v. Yellen*, 2022 WL 1574217 (May 19, 2022). “Viewing the Offset Provision through Arizona’s eyes,” that court “accept[ed]—for standing purposes—its allegations that the condition is unconstitutionally ambiguous and coercive.” *Id.* at *6. The majority found standing on that basis but expressed no view on the merits. *Id.* at *9-10. The majority also rejected Arizona’s theory of standing based on alleged compliance costs. *Id.* at *5. Judge Nelson concurred in part but explained that Arizona’s enactment of a tax cut was insufficient to show any reasonable fear of enforcement of the Offset Provision. *Id.* at *12.

Arizona lends plaintiffs no support. This case was not decided at the pleading stage; the district court entered a permanent injunction. Thus, whereas the Ninth Circuit relied on Arizona’s having “alleged sufficiently concrete and particularized harms to its ability to exercise its sovereign prerogatives” as a result of the Offset Provision, *id.* at *9, plaintiffs bore the burden to establish such harms through evidence. They did not.

In any event, as our briefs note, plaintiffs’ constitutional claims rest on an incorrect reading of the Offset Provision. Judge Nelson’s opinion explains why: “A tax cut, on its own, does not fall within the Offset Provision’s ambit.” *Id.* at *12. Because the Offset Provision does not bar tax cuts, but merely restricts the use of new federal grants to pay for them, it does not raise any coercion concern.

And the provision cannot be held facially invalid based on speculation that it might be construed as a bar on tax cuts—particularly when, as Judge Nelson observed, the Treasury Department “has explicitly disavowed any” such interpretation. *Id.* To the extent there are open questions about how the Offset Provision will be applied, the *Pennhurst* principle is a tool for resolving the provision’s meaning in concrete disputes, as in the Supreme Court’s recent decision in *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022).

Sincerely,

/s/ Daniel Winik

Daniel Winik

cc: All counsel (via CM/ECF)