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July 19, 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: Response to Rule 28(j) supplemental citation of authority in *Kentucky v. Yellen*, No. 21-6108

Dear Ms. Hunt:

Pursuant to Rule 28(j), the States respond to the Treasury Defendants' Rule 28(j) letter concerning the Eighth Circuit's decision in *Missouri v. Yellen*, No. 21-2118, 2022 WL 2719929 (8th Cir. July 14, 2022).

In *Missouri*, the Eighth Circuit held that Missouri lacked standing to pursue its unique claim related to the Tax Mandate. *Id.* at *1. The Treasury Defendants contend that the same analysis applies here. But that conclusion is rejected by the Eighth Circuit in the very opinion the Treasury Defendants cite. As the Eighth Circuit recognized, Missouri's suit over the Tax Mandate differed in kind from those filed by other States. *Id.* at *3 n.5. Specifically, Missouri did not challenge the constitutionality of the provision "as written." *Id.* Rather, Missouri sought a declaratory judgment as to the meaning of the Tax Mandate, and it agreed that

there was at least one constitutional way to interpret the provision. *Id.* at *3, n.5. The Eighth Circuit concluded that Missouri did not have standing because the federal government had not adopted the “hypothetical” interpretation that Missouri objected to. *Id.*

This lawsuit is nothing like that. Unlike Missouri, Kentucky and Tennessee have challenged the constitutionality of the Tax Mandate “as written.” *Id.* There is no interpretation of the Tax Mandate that saves it from its constitutional defects. And so that makes this suit more like *Arizona v. Yellen*, No. 21-16227, 2022 WL 1574217 (May 19, 2022), in which the Ninth Circuit held that Arizona has standing to challenge the Tax Mandate 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. The same is true here, and so the Eighth Circuit’s decision in *Missouri* is distinguishable for the same reasons that the Eighth Circuit itself explained. *See Missouri*, 2022 WL 2719929, at *3 n.5.

Best regards,

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

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

cc: Counsel of record