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August 8, 2022

**Via CM/ECF**

David J. Smith, Clerk of Court  
U.S. Court of Appeals for the Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

RE: *West Virginia v. U.S. Department of the Treasury*, No. 22-10168 (set  
for argument September 13, 2022)

Dear Mr. Smith:

I write to call to the Court's attention the Eighth Circuit's recent decision in *Missouri v. Yellen*, 39 F.4th 1063 (8th Cir. 2022), which affirms the dismissal of Missouri's similar challenge to the Offset Provision for lack of jurisdiction.

Missouri argued that it had established jurisdiction on essentially the same ground as plaintiffs here have argued, namely that the Offset Provision can be read to "prohibit[] a State" that accepts Fiscal Recovery Funds "from enacting any tax-reduction policy that would result in a net reduction of revenue." 39 F.4th at 1069; *see, e.g.*, Pls.' Br. 16 (arguing that the Offset Provision "restricts ... the States' taxing powers"). But as the opinion explains, that amounted to a request for "a quintessential advisory opinion" "enjoin[ing] a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without" Missouri's having "alleg[ed] any concrete, imminent injury from the Secretary's actual interpretation." 39 F.4th at 1070. As the opinion recognizes, "[t]he Offset Restriction simply prohibits states from cutting taxes in a way that reduces net revenue more than a de minimis amount and then failing to account for that reduction through non-ARPA sources, such as through organic economic growth, increases in revenue from other sources, or spending cuts in sectors not related to ARPA." *Id.* The opinion rightly explains that this sort of analysis is what States with balanced-budget requirements (including plaintiffs) do all the time; the Offset Provision simply precludes States from "us[ing] ARPA

funds as part of that balancing process.” *Id.* at 1070 n.6. Plaintiffs cannot establish jurisdiction over their constitutional challenges to a no-tax-cuts provision when Congress enacted, and the Treasury Department is applying, no such provision.

Sincerely,

/s/ Daniel Winik

Daniel Winik

cc: All counsel (via CM/ECF)