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

Filed Electronically

Re: Rule 28(j) supplemental citation of authority in *Commonwealth of Kentucky v. Biden*, No. 21-6147 (6th Cir.)

Dear Ms. Hunt:

The Appellees notify the Court of *West Virginia v. Environmental Protection Agency*, --- S. Ct. ---, 2022 WL 2347278 (June 30, 2022). There, the Supreme Court applied the major-questions doctrine to reject the EPA's attempt to "substantially restructure the American energy market" based on a "vague statutory grant." *Id.* at *13, 17. For at least four reasons, *West Virginia* shows that this is one of the "particular and recurring" instances in which the major-questions doctrine applies. *See id.* at *13; *see also* Appellees' Br. at 19–28.

First, the Government's argument that the Procurement Act authorizes the contractor mandate would accomplish a "fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind." 2022 WL 2347278, at *15 (citation omitted) (cleaned up). In the Government's view, a statute about federal procurement now concerns public health, which involves a "very different kind of policy judgment." *See id.*

Second, it is "highly unlikely that Congress would leave" to the executive branch's "discretion" the ability to require approximately one-fifth of the nation's workforce to receive a COVID-19 vaccine. *See id.* at *16 (citation omitted). Such a decision entails "basic and consequential tradeoffs . . . that Congress would likely have intended for itself." *See id.* In fact, "[t]he last place one would expect" to find such power over public health is in a statute about federal procurement. *See id.*

Third, *West Virginia* explains the doctrinal footing of the major-questions doctrine: it rests on “both separation of powers principles and a practical understanding of legislative intent.” *Id.* at *13; *see also id.* at *19–20 (Gorsuch, J., concurring). This grounding of the doctrine refutes the Government’s assertion that it does not apply when Congress delegates power to the President. Appellees’ Br. at 27.

Fourth, the language in the Procurement Act is at best a “vague statutory grant [that] is not close to the sort of clear authorization required by [Supreme Court] precedents.” 2022 WL 2347278, at *17; *see also id.* at *24–25 (Gorsuch, J., concurring) (discussing “several telling clues” in this regard).

Sincerely,

/s/ Matthew F. Kuhn

/s/ Benjamin M. Flowers

/s/ Brandon J. Smith

Counsel for the Appellees

cc: Counsel of record