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July 15, 2022

Hon. Mark J. Langer
Clerk, U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse &
William B. Bryant Annex
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., et al.*, Case No. 21-5028 (D.C. Cir.) (oral argument held Nov. 3, 2021)

Dear Mr. Langer:

Defendants submit this response to Plaintiff's citation to the Supreme Court's recent decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

In *West Virginia*, the Court declared that "in certain extraordinary cases," the agency "must point to clear congressional authorization for the power it claims." *Id.* at 2609. The Court concluded that *West Virginia* was such "a major questions case." *Id.* at 2610. This was because the novel plan developed by the Environmental Protection Agency ("EPA") would have required a sector-wide shift in electricity production. *Id.* at 2603. It was expected to entail billions of dollars for compliance, require the retirement of dozens of coal-fired plants, eliminate tens of thousands of jobs, cause electricity prices to remain 10% higher in many States, and reduce gross domestic product by at least a trillion dollars by 2040. *Id.* at 2604. Moreover, the Court observed that the agency had located that "newfound power" in the "vague language" of an "ancillary provision" of the statute—one that "was designed to function as a gap filler and had rarely been used in the preceding decades." *Id.* at 2610. And the Court stated that "the Agency's discovery allowed it to adopt a regulatory program" (a cap-and-trade scheme) "that Congress had conspicuously and repeatedly declined to enact itself." *Id.* The Court thus concluded that the

statutory provision upon which EPA relied did not provide authority for the challenged plan. *Id.* at 2616.

West Virginia is not relevant here for three reasons. First, the major questions doctrine has never been raised since this lawsuit was filed in June 2016. Second, whereas *West Virginia* involved a "newfound power," optional practical training has existed since the Truman administration, 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947). *Cf. Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) (congressional actions around an immigration-related interpretation "creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted [its] correctness"). Third, Justice Gorsuch's *West Virginia* concurrence discussing the nondelegation doctrine was only joined by Justice Alito and did not state the views of the Court.

Sincerely,

By: */s/ Joshua S. Press*
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CERTFICATES OF SERVICE AND COMPLIANCE

I hereby certify that this filing is 350 words, and therefore complies with the word limitations of Federal Rule of Appellate Procedure 28(j) and this Circuit's local rules.

I hereby certify that on July 15, 2022, I electronically filed the foregoing letter brief with the Clerk of the Court by using the appellate CM/ECF system. Counsel of record are registered CM/ECF users.

/s/ Joshua S. Press

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