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December 30, 2022

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Arizona Democratic Party v. Hobbs*, No. 22-15518
Argument Scheduled: March 7, 2023

Dear Ms. Dwyer:

Plaintiff-Appellees (the "State") hereby respond to Defendants' 28(j) notice regarding *Louisiana v. Biden*, __ F.4th __, 2022 WL 17749291 (5th Cir. 2022). Defendants' attempts to find error in that decision lack merit.

Defendants claims the Fifth Circuit "failed to recognize important distinctions between exercises of regulatory authority and the propriety authority at issue here." Not so.

The Fifth Circuit specifically addressed this very issue, holding the "federal contractor mandate is neither a straightforward nor predictable example of procurement regulations authorized by Congress." *Id.* at *9. There, as here, the Federal Government argued by analogy to the private sector, claiming that because some private companies have imposed employee vaccine mandates so too can the Federal Government. But the Fifth Circuit correctly held that analogy failed because "[a]t issue ... is not whether the federal government may (analogously) force its employees to get vaccinated against COVID-19, but whether the federal government may place such a requirement in its contracts with third parties, including the Plaintiff States. *The*

Government has provided no examples of such contracts in the private sector." (emphasis added).

Instead, the Contractor Mandate is an "'enormous and transformative expansion in' the President's power under the Procurement Act." 2022 WL 17749291 at *10 (citation omitted). Moreover, one of the government's own *principal* cases refutes its attempted regulatory-vs-proprietary decision, holding that a procurement requirement "is likely to be found regulatory where it apparently seeks to set a broad policy." *UAW v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003) (cleaned up). That is undeniably true for the Contractor Mandate, which imposes an intrusive mandate on tens of millions of workers. Federal Defendants' thus flunk their own cherry-picked standard.

The plainly regulatory nature of a mandate affecting fully *one-fifth* of the U.S. workforce also refutes Defendants' attempted reliance on Judge Graves's dissent, which in turn relied on the putative limited proprietary nature of the Contractor Mandate. That proprietary-nature argument should be rejected for the reasons adopted by the Fifth Circuit, 2022 WL 17749291 at *8-11, and set forth in the State's Answering Brief (at 43-45).

Sincerely,

s/ Drew C. Ensign
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Deputy Solicitor General
Counsel for the State of Arizona