

Congress of the United States
Washington, DC 20515

September 20, 2022

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Chair Gensler:

We write to bring to your attention *West Virginia v. EPA*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year, President Biden issued more executive orders³ and approved more major rules⁴ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not Executive branch staff. Given this administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap

¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

² U.S. Const. art. I, § 1.

³ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>

⁴ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>.

⁵ *West Virginia*, 597 U.S. at 5-6.

⁶ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

filler.”⁸ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Recently, the Court also struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ In *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

To that end, the Court’s decision casts doubt on the Securities and Exchange Commission’s (SEC) authority to develop, finalize and implement a broad swath of regulations. This includes such rulemakings as:

1. The Enhancement and Standardization of Climate-Related Disclosures for Investors;
2. Special Purpose Acquisition Companies, Shell Companies, and Projections;
3. Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure;
4. Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange,” Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities;
5. Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer; and
6. Regulation Crowdfunding, an 11 page bill that was turned into hundreds of pages of regulatory requirements.

Undertaking rulemaking on these specific issues requires a “clear delegation of authority” from Congress – authority of which Congress has not yet provided.

Thus, our Article I responsibilities demand that we monitor the SEC to ensure it does not operate outside its statutory directives. Accordingly, to assist in this effort, please provide the following no later than September 30, 2022:

1. A list of all pending rulemakings and the specific Congressional authority for each rulemaking. This list should include those rulemakings identified above.
2. A list of all expected rulemakings and the specific Congressional authority for each rulemaking.

⁸ *Id.* at 5.

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. ____ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ____ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

We appreciate your prompt attention to this request.



Patrick McHenry
Republican Leader
Committee on Financial Services



Kay Granger
Republican Leader
Committee on Appropriations



James Comer
Republican Leader
Committee on Oversight and Reform