

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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November 1, 2022

The Honorable Kathi Vidal
Under Secretary of Commerce for Intellectual Property
Director, United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Dear Director Vidal:

The Constitution vests “[a]ll legislative powers” in the United States Congress.¹ This provision is designed to secure individual liberty by ensuring that Americans are “subject to only such federal legislation as is enacted by an elected Congress,” rather than mandates levied by unelected and unaccountable bureaucrats.² Under President Biden, however, the radical left has violated this core constitutional tenet, choosing instead to empower so-called “experts” in the administrative state to advance their progressive policy goals.³ Fortunately, the Supreme Court in *West Virginia v. EPA* has begun to rein in the out-of-control and out-of-touch modern administrative state.⁴ We write with questions about the United States Patent and Trademark Office’s (USPTO) effort to ensure compliance with the *West Virginia* decision.

In *West Virginia*, the Supreme Court reaffirmed a key feature of our constitutional system: that significant policy decisions should be made by the elected representatives of the American people. The Court invoked its “major questions doctrine” to uphold the state of West Virginia’s challenge to an EPA regulation that unilaterally set broad and burdensome compliance requirements harming the state’s citizens and businesses.⁵ The Court explained that when an agency asserts authority of such “economic and political significance,” it must point to “clear congressional authorization for the power it claims.”⁶ The EPA pointed to no such authority, instead “claim[ing] . . . an unheralded power” in the “vague language” of a rarely used statute.⁷

¹ U.S. CONST. art. I, § 1.

² See PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT 23, & 56-57 (ENCOUNTER 2017); *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J. dissenting) (citing FEDERALIST No. 47); cf. James Sherk, *Tales From the Swamp: How Federal Bureaucrats Resisted President Trump*, AMERICA FIRST POLICY INSTITUTE (Feb. 1, 2022).

³ See, e.g., Bernard Sharfman & James Copland, *The SEC Can’t Transform Itself Into a Climate-Change Enforcer*, WALL ST. J. (Sept. 14, 2022); Jonathan Turley, *College-loan forgiveness plan reveals Biden’s constitutional cynicism*, THE HILL (Aug. 31, 2022).

⁴ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).

⁵ See *id.* at 2609-10.

⁶ *Id.* at 2608-09 (internal quotation marks omitted).

⁷ *Id.* at 2610 (internal quotation marks omitted).

The Court also noted that “Congress had conspicuously and repeatedly declined to enact” the very same policy that the EPA sought to implement administratively.⁸ The decision is a reminder that “national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”⁹

The Supreme Court wisely rejected an unconstitutional attempt to go around Congress and unilaterally advance progressive goals through the administrative state.¹⁰ This abuse of administrative law is not limited to the EPA. President Biden has issued scores of executive orders and approved more major rules than any recent president.¹¹ The Biden Administration has sought to use the administrative state to set policies that exceed authority as set by Congress. In one prominent example, the Supreme Court condemned the Occupational Safety and Health Administration’s unlawful vaccine mandate as exceeding statutory authority.¹² Given the Biden Administration’s announced policy objectives and efforts so far, it is likely that the Administration will continue to use administrative agencies to set broad policies with far-reaching economic and political consequences.¹³

The House Judiciary Committee has jurisdiction over the administrative state and the USPTO. As the Committee continues to consider legislative proposals to rein in the abuses of the modern administrative state, we must understand how USPTO is complying with *West Virginia v. EPA*. Accordingly, please provide the following information:

1. All documents or communications referring or relating to USPTO’s responses to, or changes in policy based on, *West Virginia v. EPA*, including any memoranda or guidance on how to account for this decision in future agency actions and policy development.

⁸ *Id.*

⁹ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

¹⁰ *West Virginia*, 142 S. Ct. at 2616.

¹¹ See, e.g., Federal Register, *Executive Orders*, available at <https://www.federalregister.gov/presidential-documents/executive-orders> (last accessed Oct. 6, 2022); Courtney Rozen & Jonathan Hurtarte, *How Biden Has Made Policy With Short-Term, Costly Rules*, BLOOMBERG LAW (May 31, 2022) (accounting for rules from various presidents’ first years in office).

¹² See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 663.

¹³ See, e.g., Courtney Rozen et al., *Biden Agenda Takes Hit From High Court Intent on Limiting It*, BLOOMBERG LAW (June 30, 2022); Svetlana Gans & Eugene Scalia, *The FTC Heads for Legal Trouble*, WALL ST. J. (Aug. 8, 2022); Joe Edlow, *Biden’s Move to Fortify DACA Program an Unlawful Quasi-Amnesty*, THE DAILY SIGNAL (Aug. 30, 2022); Randolph May, *A Major Ruling on Major Questions*, REGULATORY REVIEW (July 15, 2022); Richard Pierce, *Important Changes at the Intersection of Antitrust and Administrative Law*, REGULATORY REVIEW (Mar. 21, 2022); see generally Erik Weibust & Stuart Gerson, *The FTC Seemingly Thumbs Its Nose at the Supreme Court*, NATIONAL LAW REVIEW (July 21, 2022); *Dissenting Statement of Commissioner Christine Wilson, Regarding the Federal Trade Commission Strategic Plan for Fiscal Years 2022-2026* (Aug. 26, 2022) (“Congress created the FTC to serve as an expert agency that protects consumers and promotes competition. The majority’s vision for the agency expands its mission to include goals outside our statutory remit.”); *Dissenting Statement of Commissioner Noah Phillips, Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking*, 4 (Aug. 11, 2022) (citing *West Virginia v. EPA*; criticizing the FTC’s “circumvention of the legislative process and the imposition upon the populace of the policy preferences of a majority of unelected FTC commissioners”); see also *id.* at 7.

2. A list of all pending cases to which USPTO is a party that bear on *West Virginia v. EPA* or the major questions doctrine. Please provide any relevant filings from each case.
3. A list of all completed rulemakings since January 20, 2021, and the specific statutory authority for each rulemaking. In addition, please describe how each rule is consistent with *West Virginia v. EPA*.
4. A list of all pending or expected rulemakings since January 20, 2021, and the specific statutory authority for each rule. In addition, please describe how each pending or expected rule is consistent with *West Virginia v. EPA*.
5. A list of all completed guidance documents published or issued since January 20, 2021, as well as a list of expected future guidance documents to be published or issued, and specific statutory authority for each guidance document. Such documents may include guidance documents issued to USPTO employees that affect the public, and documents pertaining to individual applications or cases that are intended to have broad or general applicability to the public. For each guidance document, please explain why USPTO or its component entities opted to publish or issue guidance rather than promulgate a rule subject to notice and comment requirements. In addition, if the guidance document is not online, please provide a digital copy of that guidance.

Please produce all documents and information as soon as possible but no later than 5:00 p.m. on November 15, 2022. Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Ranking Member

cc: The Honorable Jerrold L. Nadler, Chairman