



Committee on Transportation and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

Peter A. DeFazio  
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Sam Graves  
Ranking Member

Katherine W. Dedrick, Staff Director

Jack Ruddy, Republican Staff Director

September 23, 2022

The Honorable Pete Buttigieg  
Secretary  
United States Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Secretary Buttigieg:

We write to bring to your attention *West Virginia v. Environmental Protection Agency (EPA)*, a recent Supreme Court (“Court”) decision that clarified the limitations of certain agency action.<sup>1</sup> Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,<sup>2</sup> 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 orders and approved more major rules than any recent president.<sup>3</sup> We are concerned that 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 unaccountable bureaucrats.<sup>4</sup> 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.<sup>5</sup> 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

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<sup>1</sup> *West Virginia v. EPA*, 597 U.S. \_\_\_ (2022).

<sup>2</sup> U.S. CONST. ART. I, § 1.

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

<sup>4</sup> See U.S. CONST. art I; see THE FEDERALIST NO. 51 (James Madison).

<sup>5</sup> *West Virginia*, 597 U.S. at 17.

‘reason to hesitate before concluding that Congress’ meant to confer such authority.’<sup>6</sup> Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”<sup>7</sup> 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 filler.”<sup>8</sup> Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”<sup>9</sup> As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden Administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium<sup>10</sup> and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.<sup>11</sup> Thankfully, 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.”<sup>12</sup> In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”<sup>13</sup>

The Committee on Transportation and Infrastructure has broad jurisdiction that covers the United States Department of Transportation (DOT or Department), including its modal administrations.<sup>14</sup> *West Virginia v. EPA* stands as another reminder that Congress is the entity ultimately responsible for writing the law in the United States. We are concerned over the promulgation of recent DOT rules and guidance materials that, we believe, seek to implement policies that were either rejected by Congress or are demonstrative of perverse agency decision-making. This is compounded by Biden Administration-led efforts to impose partisan policies government-wide. Furthermore, it appears as though DOT and the Administration are implementing these policies that violate the spirit of law.

As you know, on November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) was signed into law.<sup>15</sup> Exactly one day and one month after IIJA’s passage, on December 16, 2021, the Federal Highway Administration (FHWA) issued a memorandum (memo) entitled “Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America.”<sup>16</sup> Although this memo states that it is mere “guidance,” in the same sentence the memo states that it is intended to be “an overarching framework to prioritize the use of [IIJA] resources.”<sup>17</sup> Unsurprisingly, the memo then further sets out the parameters and prioritization for types of investments and policies, and then

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<sup>6</sup> *Id.* at 20 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

<sup>7</sup> *West Virginia*, 597 at 4.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. \_\_\_ (2021).

<sup>11</sup> *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. \_\_\_ (2022).

<sup>12</sup> *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

<sup>13</sup> *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

<sup>14</sup> House Rule X, clause 1(r).

<sup>15</sup> *IIJA*, Pub. L. No. 117-58 (2021), 135 Stat. 429.

<sup>16</sup> Memorandum From Stephanie Pollack, Adm’r FHWA to Associate Administrators, FHWA (Dec. 16, 2021), available at [https://www.fhwa.dot.gov/bipartisan-infrastructure-law/docs/building\\_a\\_better\\_america-policy\\_framework.pdf](https://www.fhwa.dot.gov/bipartisan-infrastructure-law/docs/building_a_better_america-policy_framework.pdf).

<sup>17</sup> *Id.*

requires these policies to be incorporated into all “legacy” apportioned programs amended by IIJA, as well as for any new programs under IIJA.<sup>18</sup> This direction goes far beyond the language of the law and seeks to discourage states from choosing the projects they need most – for example, building new roads.<sup>19</sup> This memo is in complete contradiction to the letter of the law and appears to be nothing short of an attempt by DOT to get a second bite at the apple after the passage of IIJA.

Additionally, in the wake of *West Virginia v. EPA*, DOT continues to push the boundaries of its authority in more formalized rulemakings for parochial pet projects. On July 7, 2022, the FHWA issued a notice of proposed rulemaking (NPRM) for a rule that would require states and metropolitan planning organizations to establish a new performance measure with declining targets for carbon dioxide and to measure and report greenhouse gas emissions associated with transportation under the Federal-aid highways program.<sup>20</sup> The regime described by the NPRM seems similar to the elements of the Clean Power Plan scrutinized and ultimately invalidated by the Court in *West Virginia v. EPA*.<sup>21</sup> As you know, Congress included bipartisan provisions to address climate change and transportation resiliency in IIJA. During IIJA negotiations, however, Congress considered and disposed of a greenhouse gas performance measure requirement.<sup>22</sup> Given the legislative history, it is clear that the DOT, by administratively requiring this performance measure, is attempting to circumvent the will of Congress and is contrary to the outcome of Congressional negotiations on IIJA.

Further, the Department is layering supplemental “merit” criteria on top of statutory requirements to determine project awards in its Notice of Funding Opportunity (NOFO) for discretionary grant programs. For example, the Department’s Multimodal Project Discretionary Grant (MPDG) NOFO, a combined NOFO for three grant programs funded in IIJA, states that the Department seeks to fund projects that proactively address equity, reduce greenhouse gas emissions, are designed with specific elements to address climate change impacts, and support the creation of good paying jobs with the free and fair choice to join a union and that incorporates strong labor standards.<sup>23</sup> In addition, the NOFO includes six merit criteria that the Department will use to score the projects.<sup>24</sup> By scoring projects against this merit criteria, DOT is effectively changing the purpose of the discretionary grant programs, once again, in contradiction of IIJA.

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<sup>18</sup> *Id.*

<sup>19</sup> *See* 23 U.S.C. 145.

<sup>20</sup> National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure, 87 Fed. Reg. 42,401 (July 15, 2022), *available at* <https://www.federalregister.gov/documents/2022/07/15/2022-14679/national-performance-management-measures-assessing-performance-of-the-national-highway-system>.

<sup>21</sup> *See West Virginia*, 597 at 9-10 (explaining that the EPA set emission performance rates that states would be required to implement).

<sup>22</sup> Press Release, Sen. Kevin Cramer, Sen. Cramer Statement on Federal Highway Administration’s Greenhouse Gas Emissions Performance Measure Proposed Rule (July 7, 2022), *available at* <https://www.cramer.senate.gov/news/press-releases/sen-cramer-statement-on-federal-highway-administrations-greenhouse-gas-emissions-performance-measure-proposed-rule>.

<sup>23</sup> Notice of Funding Opportunity for the Department of Transportation’s Multimodal Project Discretionary Grant Opportunity, 87 Fed. Reg. 17,108 (Mar. 25, 2022), *available at* <https://www.federalregister.gov/documents/2022/03/25/2022-06350/notice-of-funding-opportunity-for-the-department-of-transportations-multimodal-project-discretionary>; *see also* Notice of Funding Opportunity for the Department of Transportation’s Multimodal Project Discretionary Grant Opportunity (amended May 18, 2022), *available at* [https://www.transportation.gov/sites/dot.gov/files/2022-05/FY22%20Multimodal%20Project%20Discretionary%20Grant%20-%20NOFO\\_Amendment%201%20.pdf](https://www.transportation.gov/sites/dot.gov/files/2022-05/FY22%20Multimodal%20Project%20Discretionary%20Grant%20-%20NOFO_Amendment%201%20.pdf).

<sup>24</sup> *Id.*

Moreover, it is not just in these specific cases where we are concerned about overreach. The Biden Administration also appears to be taking a top-down, one-size-fits-all approach regarding certain policy pursuits. The Justice40 Initiative seeks to allocate 40 percent of certain Federal investments to communities deemed as disadvantaged.<sup>25</sup> Justice40 hinges heavily on what constitutes disadvantaged communities, and the Administration via the Executive Office of the President has created a “screening tool” to help agencies make that determination.<sup>26</sup> DOT has identified 39 programs so far that will be covered by this initiative across programs administered by the Office of the Secretary and four of its underlying agencies.<sup>27</sup> These agencies include: FHWA, the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), and the Maritime Administration (MARAD).<sup>28</sup> This is unacceptable. The Biden Administration cannot simply rule by decree; it must follow Congressional intent. Imposing Justice40 across DOT programs in such a cross-cutting fashion is alarming, and we are concerned that DOT’s implementation of this initiative will undermine the intent of the laws enabling the affected programs.

The DOT’s broad pursuit of policy goals and promulgation of regulations in stark contrast with or without explicit direction by Congress is especially troubling given the failure to move forward on statutorily mandated regulations. For example, the Federal Aviation Administration (FAA) in Sec. 556 of the FAA Reauthorization Act of 2018 was directed to initiate a rulemaking to increase the duration of aircraft registrations for general aviation aircraft to seven years, up from the current three years.<sup>29</sup> However, while DOT is pursuing its own woke priorities in the regulatory space, the FAA has failed to issue the NPRM to move the ball on the simple date change as Congress instructed. We must question whether DOT understands its role in the regulatory process. Specifically, *West Virginia v. EPA* highlights for DOT that there is no ambiguity regarding the boundaries of bureaucratic powers and the need to follow Congressional directive.

Given this, and as the Committee of jurisdiction overseeing your Department, we assure you we will exercise our robust investigative and legislative powers to not only forcefully reassert our Article I responsibilities, but to ensure the Biden Administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please provide written answers and all relevant materials to the following no later than October 7, 2022:

1. A list of all pending rulemakings and the specific Congressional authority for each rulemaking.
2. A list of all expected rulemakings and the specific Congressional authority for each rulemaking.
3. How has the DOT taken direction from the White House regarding rulemakings? Has the White House reached out to the DOT asking it to undertake specific rulemakings publicly or non-publicly? If so, please provide a list of these rulemakings.

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<sup>25</sup> Press Release, The White House, CEQ Published Draft Climate Economic Justice Screening Tool, Key Component in the Implementation of President Biden’s Justice40 Initiative (Feb. 18, 2022), *available at* <https://www.whitehouse.gov/ceq/news-updates/2022/02/18/ceq-publishes-draft-climate-and-economic-justice-screening-tool-key-component-in-the-implementation-of-president-bidens-justice40-initiative/>.

<sup>26</sup> *Id.*

<sup>27</sup> Justice40 Initiative, DOT, *available at* <https://www.transportation.gov/equity-Justice40> (last visited Sept. 14, 2022).

<sup>28</sup> *Id.*

<sup>29</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 556, 132 Stat. 3186, 3383 (2018).

4. Regarding Justice40:
- a. How has the DOT identified programs that are eligible under this program? Please provide the rationale and legal authority under which DOT reached the eligibility determination for each of the currently eligible programs.
  - b. How is the DOT ensuring that applying Justice40 does not interfere with the Congressional intent of overarching enabling statutes for eligible programs?
  - c. Does the DOT expect that in implementing Justice40 that component agencies will need to reject grant applicants despite the availability of funds? What is DOT's plan should funds go unspent?
  - d. Does DOT anticipate an increase in rejections of grant applications based on the Justice40 criteria?

Thank you for your attention to this matter. If you have any questions please contact Corey E. Cooke, Republican General Counsel, Committee on Transportation and Infrastructure, at (202) 225-9446.

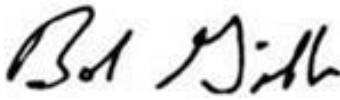
Sincerely,



Sam Graves  
Ranking Member  
Committee on Transportation  
and Infrastructure



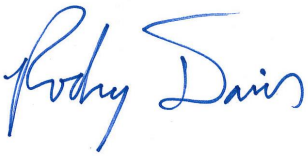
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Ranking Member  
Subcommittee on Aviation



Bob Gibbs  
Ranking Member  
Subcommittee on Coast Guard  
and Maritime Transportation



Daniel Webster  
Ranking Member  
Subcommittee on Economic  
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Rodney Davis  
Ranking Member  
Subcommittee on Highways  
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Ranking Member  
Subcommittee on Railroads,  
Pipelines, and Hazardous Materials



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David Rouzer  
Ranking Member  
Subcommittee on Water Resources  
And Environment