

U.S. House of Representatives
Committee on Agriculture
Washington, DC 20515

September 23, 2022

The Honorable Thomas J. Vilsack
Secretary
United States Department of Agriculture
1400 Independence Avenue SW
Washington, D.C. 20250

Dear Secretary Vilsack,

As you are aware, a recent Supreme Court decision, *West Virginia v. EPA*, clarified the limitations of certain agency action. Given this administration's concerning reliance on executive actions to advance some of its most radical priorities, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority. Relatedly, we are requesting information regarding the U.S. Department of Agriculture's (USDA) efforts to review recent and pending agency actions in light of this important holding.

In the decision, the Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.¹ 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.”² Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”³ 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.”⁴ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁵ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s interpretive liberties are not unique. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium⁶ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.⁷ 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

¹ *West Virginia*, 597 U.S. at 5-6.

² *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

³ *West Virginia*, 597 at 4.

⁴ *Id.* at 5.

⁵ *Id.* at 5.

⁶ *Alabama Assn. of Relators v. Department of Health and Human Servs.*, 594 U.S. ___ (2021).

⁷ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

people’s representatives.”⁸ In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”⁹

Nevertheless, we remain concerned that a variety of USDA’s recent and pending actions rely on specious statutory interpretation to achieve political goals well beyond Congressional intent. From repeated abuses of the Commodity Credit Corporation Charter Act (Charter Act) to controversial livestock and poultry marketing reforms, the potential effects of these actions are far reaching and of enormous economic significance to our nation’s farmers, ranchers, foresters, and consumers.

While the 2008 Farm Bill required the promulgation of certain regulations with respect to the Packers and Stockyard Act (PSA), the rules that came out of USDA went well beyond the plain meaning of the statute as well as Congressional intent and stood in conflict with established circuit court precedent. Indeed, Congress acted on several occasions to prohibit certain parts of the regulations from going into effect. We are concerned the newly proposed and pending Packers and Stockyards regulations will prove similarly flawed.

We are also troubled by a recent anti-trust enforcement action against major poultry processing companies that seems to have run parallel to USDA’s rulemaking. After a nearly year-long merger review by the Department of Justice (DOJ), Cargill announced the completion of the acquisition and merger of Sanderson Farms with Wayne Farms on July 22, 2022¹⁰ only to have the DOJ file a lawsuit and proposed consent decree three days later.¹¹ The lawsuit’s inclusion of vague allegations of PSA violations is completely unrelated to the bulk of allegations raised in the complaint and includes a troubling and novel interpretation of the unfair and deceptive practices provision of the PSA to preclude the use of the poultry tournament system – a system long used by the vast majority of poultry processing companies to pay their growers. The resulting consent decree inhibits the newly combined company’s use of the tournament system and requires the company to comply with a litany of contract disclosure requirements outlined in a proposed USDA regulation. Unfortunately, the timing of the merger review, enforcement action, and ongoing rulemaking process suggest a coordinated manipulation of executive power to advance controversial policy objectives while hampering open and transparent feedback from the major poultry processing companies during the ongoing rulemaking process.

We have also questioned the statutory authority for the Partnerships for Climate-Smart Commodities program to support the production and marketing of “climate-smart commodities” since its inception. While the Charter Act grants the Secretary of Agriculture broad authority under the enumerated specific powers in section 5 of the Act, that authority is not boundless. This program clearly goes beyond the four corners of the statute. As the program has unfolded it has become abundantly clear that you have taken a conservation climate program and called it a marketing program in order to avail yourself of the powers in the Charter Act.

⁸ *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

⁹ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁰ <https://www.cargill.com/2022/cargill-continental-grain-complete-acquisition-sanderson-farms>

¹¹ <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>

What is more, the recent announcement that you will more than double the money going to this program is abusive and troublesome. What was an already outrageously priced \$1 billion “pilot” program will now carry a price tag of \$3.5 billion. That is \$3.5 billion in taxpayer money unilaterally siphoned away from legitimate uses under the Charter Act such as addressing immediate market disruptions currently facing America's producers.

As the committee of jurisdiction overseeing your agency, we intend to exercise our oversight authority to ensure the Biden administration does not continue to exceed Congressional authorizations. To assist in this effort, please provide:

1. A list of all expected USDA rulemakings and the specific Congressional authority for each rulemaking, including expected economic impacts, any expected costs due to increased litigation, and the expected reason for any such litigation.
2. All documents and communications between USDA and DOJ related to the alleged violation of the Packers and Stockyards Act outlined in the complaint, filed by DOJ on July 25, 2022, and related to the development of the subsequent consent decree.
3. A detailed legal analysis of section 5 of the Commodity Credit Corporation Charter Act and how the Partnerships for Climate-Smart Commodities program falls into one of the specific powers, including:
 - a. An analysis of other occasions where the specific authority was also used and how such occasion is similar to or distinguishable from this program.
 - b. A factual description of any instances where the Department acted unilaterally pursuant to the Commodity Credit Corporation Charter Act and Congress subsequently, though legislation, limited the availability of the authorities of the Act.
 - c. Any legal opinion developed by the Office of General Counsel related to the decision to pursue this program.

Please respond in writing to Parish Braden, Staff Director at the House Committee on Agriculture, at parish.braden@mail.house.gov no later than October 7, 2022.

Sincerely,



Glenn “GT” Thompson
Member of Congress



Austin Scott
Member of Congress

Eric A. "Rick" Crawford
Member of Congress

Scott DesJarlais
Member of Congress

Vicky Hartzler
Member of Congress

Doug LaMalfa
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Rodney Davis
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