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President Joseph R. Biden Jr.
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Biden,

One week ago, you assumed the Presidency of the United States of America and took the oath of office. You swore to preserve, protect, and defend the Constitution of the United States. Today, we write to you in our capacity as State Attorneys General regarding areas of vital importance to our States as you execute your job in the days and months ahead.

The Constitution vests the President with the "executive Power" and, among other things, charges the President to nominate officers and "take Care that the Laws be faithfully executed." In our federal system, State Attorneys General represent our state governments and our citizens, and we are responsible for defending their interests and protecting their rights. State Attorneys General in particular serve as an important check and balance as the President carries out his constitutional charges.

We stand ready to meet with your administration to discuss more how the issues below affect our States; litigation is never a first option, and we would like to help your team in its important job on behalf of all Americans, consistent with the Constitution and the rule of law. Yet if you sign unconstitutional laws passed by Congress, it will be our responsibility and duty to challenge those laws in court. If cabinet officials, executive officers, and agencies go beyond the bounds of their statutory authority, fail to follow legally required procedures, or fall short of the bedrock Administrative Procedure Act obligation of reasoned decisionmaking, it will likewise be our responsibility to take action.

The President cannot cut constitutional corners or shirk statutory strictures without inevitably doing more harm to our country than good. The foundations of our republic and American life are embedded within our Constitution's carefully crafted design. Accordingly, today by this letter we respectfully urge you when pursuing your policy priorities to honor the core

constitutional tenets which should be appreciated and respected by every person entrusted with the honor and burdens of the presidency.

**Limited Federal Power**

The Constitution announces in its preamble its purpose to "promote the general Welfare." However, the provisions of the Constitution carefully adhere to the principle that a large and diverse nation cannot be best governed by any single central administration, no matter how well it is structured. While a national government with ample power and authority in certain areas can make a country strong, united, and prosperous, our Constitution declines to give our national government plenary power. Rather, Article I, Section 8, along with some of the amendments, endows the federal government with a specific and plainly non-exhaustive set of powers. Nothing in the Constitution grants general legislative power to the federal government. Put simply, the federal government has certain jobs to do and the Constitution leaves all of the rest of the business of governance to be addressed by our separate sovereign States, and our citizens.

While the powers of the federal government are expressly limited and circumscribed, there is of course much for the federal government to do without exceeding the bounds of powers set forth in the Constitution. Where a particular matter is excluded from the sphere of federal authority and there is a problem that ought to be addressed, our States are ready and able to do the job. Moreover, if the people of a handful or more of the States desire to take a united approach on a regulatory matter that is outside of the federal government's legislative power, they can negotiate and enter into legally binding multi-state compacts for that purpose by following the constitutional process for doing so. Accordingly, the limits on federal power are not a flaw of the Constitution, they are a feature of the complex tapestry of our system of government that enables governance that accounts for local differences, allows the American people to benefit from experimentation at the state level, and increases the responsiveness of government as people can "vote with their feet."

Unfortunately, many people today do not appreciate—and some outright reject or deny—the Constitution's limits on the power and responsibility of the federal government. As a consequence, there is political pressure for Congress and the President to exceed the bounds of federal power, lest they be judged to be ignoring important issues or failing to address critical problems. While we understand this political reality, it is our duty to insist on adherence to the Constitution and we urge you and your Administration to not propose or publicly support any new federal law outside the bounds of the federal government's limited power. If the House and the Senate do pass such a law, we urge you to honor the oath you have taken and veto it.

**Limited Presidential Power**

In addition to dividing powers between state and federal governments, the Constitution further enhances our system of government and protects individual liberty by dividing the powers of the federal government among the three branches.

Under the Constitution, the principal political control of our government is entrusted not to the President, but to the carefully constructed Congress which serves as both sail and anchor of the federal ship of state. Congress writes the laws and the President and his officers are limited under the Constitution to the role of faithfully carrying them out. The Executive Branch is required to act within the strictures laid out by statutes passed by Congress.

When Congress acts it does so with a legitimacy and authority that flows from its design. In order to reach the President's desk, laws must be passed by both the House of Representatives and the Senate. The biennially elected House is designed to timely respond to and reflect changes in the political will of the nation and is apportioned among the States by population so as to represent the majority of the American people. The Senate, meanwhile, has longer terms and staggered elections to provide a stable and undeniably more cautious representation of the interests of the States of the Union.

As you well know from your many decades of experience in Congress, requiring the assent of the House and the Senate for laws to be passed makes it quite difficult to enact significant legislation. Congress cannot and does not act on a whim, nor is it supposed to. The intricate federal legislative process is by design a sturdy and essential bulwark against unripe, unwise, and divisive lawmaking. Accordingly, it is just as important to respect the absence of legislation as its passage. No President has ever had or ever will have the pleasure of seeing each and every one of their legislative suggestions come to fruition. Undoubtedly, you will feel in some instances that a failure of an initiative to pass has been a mistake. On those occasions, your fidelity to the Constitution will be tested. It is likely that no one who has not been entrusted with the presidency could understand the temptation of taking action by executive fiat that follows from the failure or delay of the enactment of legislation that a President genuinely believes is necessary for the benefit of the country. But a President is not a Prime Minister or a King and must respect that his constitutional office is a limited Chief Executive, not the supreme authority of the state. When Congress has spoken, its legislative commands must be heeded. The President is obliged by oath to obey the laws enacted by Congress. Statutory roadblocks and constraints are not mere opportunities for creative lawyering or administrative gamesmanship. Statutory directives are not mere suggestions.

Your Administration like its predecessors will be beset with pleas of dissatisfied political constituencies for executive action in the face of congressional inaction and for executive action contrary to statutory commands. Saying no, when your oath and the Constitution stands in the way of satisfying people who voted for you and groups that support you, may be one of the hardest parts of your job as President, but it is among the most important.

Overreaching and defying Congress will not be rewarded or succeed. Our States have led the charge in successfully challenging unauthorized and unlawful executive actions, as you know from your years as Vice President. You can be assured that we will do so again, if necessary. Whether it be directing a wide swath of federal agencies to exceed their limited statutory mandates to implement the extreme "Green New Deal" agenda that Congress has not enacted, making transformative changes to our healthcare system that were specifically rejected in passing the Affordable Care Act, strong-arming businesses into changing practices to adhere to unreasonable and twisted interpretations of long-extant statutes, having the Department of the Treasury and the Federal Reserve conjure up massive boondoggle spending sprees without congressional authorization and appropriations, usurping the authority of States to protect local streams, or tearing down immigration statutes passed by Congress by executive fiat, we will not hesitate to defend America against illegal executive actions.

**Individual Constitutional Rights**

The Framers of the Constitution announce in its preamble its ultimate aim to "secure the Blessings of Liberty," and to that end the Founding Generation guaranteed fundamental freedoms by adopting the Bill of Rights. As States Attorneys General, we are committed to ensuring our people's liberty and freedoms secured by the Constitution are not infringed.

Rights enshrined in the Constitution are not up for debate. Yet two of those fundamental rights have been under assault in recent years—the right to the free exercise of religion and the right to keep and bear arms. We strenuously urge you to respect these rights as President.

Until recently, the First Amendment guarantee of the right of free exercise of religion was uncontroversial. Indeed, following *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress enacted the Religious Freedom Restoration Act with near universal support in Congress and from groups across the political spectrum, including from you while you served as Chairman of the Senate Judiciary Committee, which was responsible for the bill. The growing and dangerous hostility to the free exercise of religion in recent years, however, is appalling. As President, and as a man of faith, we hope that you will ensure that your Administration steadfastly accommodates and respects the free exercise of religion and complies with both the Constitution and the Religious Freedom Restoration Act.

The Second Amendment guarantee of the right to keep and bear arms is a part of the Constitution that your oath requires you to preserve, protect, and defend. We are dismayed at your stated intentions to impose numerous limits and burdens on ownership of firearms. You can expect strenuous opposition from us against any such efforts. Picking and choosing which liberties deserve protection among the Bill of Rights sets a dangerous precedent.

**Administrative Process and Reasoned Decisionmaking**

The Constitution bestows the Legislative Power on Congress and the Judicial Power on federal courts. Yet today's federal government has imbued enormous powers in Executive Branch agencies to promulgate regulations and issue binding legal decisions in adjudications. This cession of quasi-legislative and quasi-judicial power to agencies is critically and necessarily premised on the procedural requirements of the Administrative Procedure Act and other laws that demand reasoned decisionmaking and fair administrative practices. It is incumbent on the President to oversee, constrain, and direct executive agencies and their unelected officials to fulfill the responsibility to "take Care that the Laws be faithfully executed." As President we urge you to hold federal agencies to the very highest standards of compliance with their obligations of reasoned decisionmaking and fair process.

The reasoned decisionmaking obligation is erected by the right to obtain relief in federal court against agency actions that are arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706. This requires that an agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (quotation omitted). An agency action runs afoul of the reasoned decisionmaking obligation if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Enforcement of the reasoned decisionmaking obligation is an essential check on agencies that lack the inherent assurances of fulsome deliberation built into the legislative process. Indeed, two of the classic examples of agencies failing to comply with the reasoned decisionmaking obligation are agencies ignoring significant costs and drawbacks of their actions and agencies ignoring superior alternatives. Legislatures with competing parties and ambitious members can avoid such myopic dysfunction. Without these features, executive agencies are unfortunately and consistently prone to narrow-minded decisionmaking.

In fact, agencies in prior Administrations have even engaged in tactics that dramatically increase the odds that they fail to consider all of the costs and potential alternatives when they issue new regulations, welcoming lawsuits from private groups in order to settle them with agreements to act by deadlines that guarantee that the agency's decisionmaking process will be shortchanged as a result. We will accordingly be on guard against any potentially abusive uses of this "sue and settle" strategy.

When Presidents do not take care to ensure that executive agencies live up to their obligation of reasoned decisionmaking, the task often falls to us as State Attorneys General to challenge their actions in court. While we would rather you keep agencies from running amok in the first place, we will not hesitate to step up to the plate when our States are harmed by agency malfeasance.

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In your Inaugural Address, you declared that "[h]istory, faith, and reason show the way, the way of unity" and "without unity, there is no peace, only bitterness and fury." We are concerned, however, that your first week as President appears to indicate your Administration may be following the unfortunate path of executive unilateralism. We respectfully submit that unity requires more restraint, cooperation, and consensus than the first days of your Administration have demonstrated. A measured approach is all the more critical in a time when the American people are reeling from a pandemic and economic crisis. We earnestly hope that the actions of your Administration will better live up to words of your Inaugural Address and better meet the moment going forward.

Thank you for your time and consideration.

Sincerely,

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Leslie Rutledge
Arkansas Attorney General

Todd Rokita
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