Center for Progressive Reform

June 12, 2023

Dear Representative:

We, the undersigned Member Scholars at the Center for Progressive Reform, are writing to express our opposition to passage of the REINS Act (Regulations from the Executive in Need of Scrutiny Act of 2023; H.R. 277). In signing the letter, we have included our titles and the institutions at which we teach for purposes of identification.

The Center is a nonprofit research and advocacy organization that conducts independent scholarly research and policy analysis, and advocates for effective, collective solutions to our most pressing societal challenges. Guided by a national network of scholars and professional staff with expertise in governance and regulation, we convene policymakers and advocates to shape legislative and agency policy at the state and federal levels and advance the broad interests of today's social movements for the environment, democracy, and racial justice and equity.

Under the proposed legislation, no "major" regulation would take effect unless affirmatively approved by Congress, by means of a joint congressional resolution of approval, which is signed by the President. If a joint resolution is not enacted into law by the end of 70 session days or legislative days, as applicable, the regulation is not legally valid and it will not go into effect. As law professors who teach administrative and environmental law, we consider the proposal to be unnecessary to establish agency accountability and unwise as a matter of public policy because it undercuts the implementation of laws intended to protect people and the environment.

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We oppose the REINS Act for the following reasons:

1. *The REINS Act would replace the strengths of agency rulemaking with the weaknesses of the legislative process.*

The current system of administrative agencies of the federal government began more than 100 years ago, and it matured through the 20th century. It was codified in its present form in the Administrative Procedure Act (APA) passed in 1946. In order to take advantage of the scientific, economic, legal, and other expertise in agencies, Congress has assigned to them rulemaking authority. Congress has also recognized that agencies are more insulated from the political process. Although agencies are (and should be) subject to political influence, agencies must also have legal justifications for their actions. When agency rules are appealed, the federal courts ensure that regulations are backed up by reasonable policy justifications and are consistent with the statutes passed by Congress.

While superficially it may seem like a good idea to make Congress the final arbiter of all significant regulatory decisions – after all, members of Congress are elected and regulators are not – neither most members of Congress nor their respective staff are likely to have sufficient expertise regarding complex regulations to make a considered decision whether to adopt a regulation, particularly within the limited time frame legislators would have to act. Notably, over the last several decades, Congress has scaled back staffing levels and, unlike agencies, congressional offices do not employ doctors, epidemiologists, botanists, statisticians, economists, etc.

Even if Congress did have the necessary expertise to review regulations, the type of careful and time-consuming review that would be required would pose a burden on it, diverting members and their respective staff from other business. Since this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow) important other business, assuming that legislators and their respective staff actually spent the time necessary to understand complex regulations.

Finally, unlike agencies, Congress does not need to have a reasonable policy justification for refusing to approve a regulation. Any disapproval is therefore more likely to reflect the political power of special interests, a potential that would be magnified in light of the fast-track process. This makes the Act a thinly veiled effort to subject regulations to greater political pressure than the opponents of regulation can bring to bear on an agency.

2. *Congress already has the power to stop regulations if extreme circumstances dictate.*

Congress can at any time narrow the rulemaking power it has provided to an agency by amending the original statutory mandate. This solution to a problem of agency

discretion, should one exist, gives Congress an opportunity to consider carefully the pros and cons of limiting agency discretion, as compared to the rush to judgment required by the REINS Act. In addition, while we do not endorse the use of the Congressional Review Act, we also note that this tool is available to Congress for responding to agency regulations that it opposes. In noting our skepticism of the Congressional Review Act, we observe that it suffers from many of the same flaws as the REINS Act. Most notably, its truncated legislative procedures and short deadlines defeat the kind careful consideration of regulations that would be possible through regular order lawmaking.

3. The Act is counter-democratic.

When Congress wishes to assign new rulemaking authority to an agency, it must do so while operating under regular order legislative procedures, including at least a majority of both the House and the Senate and a signature by the President. In contrast, the REINS Act would empower a single chamber to thwart the implementation of legislation that has passed under such regular order legislative procedures. In other words, a single chamber can block what a previous Congress and President approved – the authority of an agency to adopt legally effective rules. This is not democratic; it is counter-democratic.

Moreover, the REINS Act amounts to an effort by Congress to evade responsibility, not assume it. If the President signs a joint resolution and a regulation becomes a law, regulated entities are still authorized to challenge the legality of the regulation on any procedural or substantive ground they might have had if the agency itself still had discretion to adopt the regulation as legally binding. Normally, when Congress passes a law, it can be legally attacked, but only on grounds that the law is beyond Congress' constitutional authority to adopt the law or Congress failed to use the procedures to adopt the law required by the Constitution. Yet, the language of the REINS Act would give regulated entities a surprising and peculiar gift, permitting them to challenge a regulation on grounds that would ordinarily be mooted by Congress' passage of the law. It is unclear how Congress can pass a law approving a regulation and still purport to give that approval no legal effect. But the effort to do so indicates that the sponsors of the REINS Act are unwilling to allow Congress to step forward and take the responsibility for passing a law enacting a regulation into place, despite their professed aim of increasing legislative accountability.

Even more significantly, this feature of the REINS Act renders the Act unconstitutional. Section 805(c) of the Act specifically provides that after congressional approval and signature by the president, the rule is still a "rule," not legislation. But this operation runs afoul of the Supreme Court's reasoning in *INS v. Chadha*, which determined that when Congress effects change through bicameralism and presentment, it creates a law – a

statute. Thus, by attempting to deny statutory effect to a joint resolution, the REINS Act deviates from the requirements of the Constitution.[1]

4. If it is not broken, don't fix it.

While the regulatory system is not perfect, it has over the years led to vast improvements in lives of millions of Americans, by making the air cleaner; the water purer; food, drugs and cars safer; and the environment healthier, among many other achievements. We believe that the REINS Act is likely to disrupt the regulatory system, and thereby deny Americans the additional reasonable protections the system can deliver. And, as we take up next, there is no sufficient reason to risk this disruption.

5. The regulatory process is accountable even though regulators are not elected.

Agencies develop regulations to implement laws passed by Congress, soliciting comment from affected parties and the public. The White House Office of Information and Regulatory Affairs (OIRA) vets drafts of significant regulatory proposals. Once agencies issue final regulations, Congress can still nullify them by amending the relevant provisions of the authorizing statute. Members of Congress can lobby the agency during the rulemaking process, and congressional committees can hold hearings to raise questions about an agency's plan to promulgate regulations (or review regulations that have been issued). And, as previously mentioned, regulations are subject to judicial review. The courts ensure that agency rulemakings are consistent with the underlying organic statutes, while also ensuring that agencies have issued an adequate written response to the evidence and policy arguments in the rulemaking record that are contrary to the rule that was adopted. Thus, under current law, by the time a regulation is finally adopted, two and usually all three branches of government have weighed in, and advocates on all sides of the relevant issues have ample opportunity to affect the outcome.

For the previous reasons, we oppose passage of the REINS Act. Thank you for your consideration of our views.

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[1] We recognize that the Wisconsin State Supreme Court has recently upheld as constitutional under the state's constitution a portion of that state's version of the REINS Act, a portion that requires agencies to obtain the governor's approval before adopting major rules. A separate portion, which employs the same basic legislative procedures for approving regulations was not considered or addressed. *See* Koschkee v. Taylor, 929 N.W.2d 600 (Wis. 2019). Thus, that case is not relevant to the argument raised here about congressional powers.

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