

Written Testimony of

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before the

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Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

on

“Reining in the Administrative State: Reclaiming Congress’s Legislative Power”

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Chairman Jordan, Ranking Member Nadler, and Members of the Committee,

Thank you for the opportunity to submit written testimony to the record on regulatory policy issues. I am Elizabeth Skerry, Regulatory Policy Associate for Public Citizen. Public Citizen is a national public interest organization with more than 500,000 members and supporters. For over 50 years, we have successfully and zealously advocated for stronger health, safety, worker, consumer protection, and environmental safeguards, as well as for a robust and effective regulatory system that works in the public interest, not for corporate special interests.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 150 consumer, labor, scientific, research, faith, community, environmental, good government, public health, and public interest groups representing millions of Americans. We are joined in the belief that our country's system of regulatory safeguards should secure our quality of life, pave the way for a sound economy, and benefit us all. Today, I write only on behalf of Public Citizen.

I. Introduction

We would like to begin our written testimony to the record by expressing strong support for the so-called “administrative state” that this Committee’s majority seeks to “rein in” with dangerous and harmful anti-regulatory legislation such as the Regulations from the Executive in Need of Scrutiny (REINS) Act of 2023, H.R. 277. Our nation’s public protections and the administrative agencies that work to uphold them play a critical role in American democracy. Agencies and their rulemakings improve the lives of the American people every day. Without regulatory safeguards that keep our workplaces safe, our products safe to use, our air safe to breathe, and our water safe to drink, society would be a much more dangerous place. When regulations are rolled back and regulatory violations go unenforced, corporate special interests benefit, and ordinary Americans pay the price. Regulations do not take freedom away from the American people—the truth is that there is no freedom without regulation.

We have seen what happens in the absence of good regulations: preventable tragedies like the freight train derailment in East Palestine, Ohio on February 3, 2023. During the Trump administration, a rule that would have required trains to be equipped with modern electric brakes was cast aside on the basis of a flawed regulatory cost-benefit analysis.¹ Cost-benefit analysis is an outdated and anti-regulatory economic exercise that puts too much onus on the quantifiable costs of regulating versus the unquantifiable benefits of regulating (i.e., human dignity and life, welfare, a better environment, clean air, and clean water). Ultimately, this often leads to the issuance of weaker rules that are skewed in favor of corporate special interests and against commonsense public safety.

In the Trump administration’s cost-benefit analysis of the electric break rule that would have prevented the East Palestine disaster, government economists ignored the fact that electric breaks would reduce damages from toxic train derailments by up to \$117 million.² Such blatant analytical

¹ Lisa Gilbert, *Toxic train wrecks are the high cost of rigged cost-benefit analysis*, The Hill (Mar. 4, 2023), <https://thehill.com/opinion/congress-blog/3883740-toxic-train-wrecks-are-the-high-cost-of-rigged-cost-benefit-analysis/>.

² *Id.*

manipulation illustrates how flawed and dangerous cost-benefit analysis is. Now East Palestine and its bordering communities are paying the ultimate price.

Public Citizen certainly agrees that our system of public protections is imperfect and can be improved. To do that, we must reimagine and strengthen the “administrative state” instead of trying to “rein it in.” On Day One, the Biden administration expressed its commitment to improving and modernizing the regulatory review process to protect the public.³ As the President’s “Modernizing Regulatory Review” memorandum points out, the current approach to regulatory review is in need of reform in several respects: it disregards important values such as public health and safety, economic growth, human dignity, equity, and the interests of future generations; it fails to account for numerous regulatory benefits and pays little attention to distributional concerns, thereby inappropriately burdening disadvantaged, vulnerable, and marginalized groups; it lacks efficiency, leading to costly delays; it lacks transparency; and it is dominated by corporate special interests who crowd out the voice of everyday Americans that benefit from regulatory protections.⁴

Public Citizen applauds the Biden administration for making significant process on its ambitious regulatory agenda to protect consumers, workers, public health, and the environment; empower marginalized and underserved communities; and enable swift action to address the climate crisis.⁵ Among the many important pending regulations this administration has proposed to protect the public, here are several to highlight:

- **Federal Trade Commission (FTC) Proposed Rule to Ban Noncompete Clauses**
 - o This rule would “ban employers from imposing noncompetes” on their employees, which quell competition and harm workers.⁶ The agency estimates this proposal “could increase workers’ earnings by nearly \$300 billion per year.”⁷
- **Consumer Financial Protection Bureau (CFPB) Proposed Rule to Rein in Excessive Credit Card Late Fees**
 - o This rule would “curb excessive credit card late fees that cost American families about \$12 billion each year.”⁸ The agency estimates that this proposal “could reduce

³ Memorandum from President Joseph R. Biden, Jr. to the Heads of Executive Departments and Agencies, Subject: Modernizing Regulatory Review (Jan. 20, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

⁴ *Supra* note 3; see Letter from the Coal. for Sensible Safeguards to Off. of Mgmt. & Budget Director Shalanda Young (Sept. 15, 2022), *available at* <https://sensible safeguards.org/outreach/css-urges-white-house-to-finish-regulatory-review-modernization-this-congress/>.

⁵ See Letter from the Coal. for Sensible Safeguards to Off. of Mgmt. & Budget Director Shalanda Young (Sept. 15, 2022), *available at* <https://sensible safeguards.org/outreach/css-urges-white-house-to-finish-regulatory-review-modernization-this-congress/>.

⁶ Press Release, Fed. Trade Comm’n, FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19 (Mar. 6, 2023), *available at* <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19>.

⁷ Press Release, Fed. Trade Comm’n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), *available at* <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

⁸ Press Release, Consumer Fin. Protection Bureau, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>.

late fees by as much as \$9 billion per year,” a major win for consumers that treats them with dignity instead of imposing shame in the form of junk fees.⁹

- **Environmental Protection Agency (EPA) Proposed Rule to Designate Certain PFAS Chemicals as Hazardous Substances**

- This rule would “designate two of the most widely used per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as ‘Superfund.’”¹⁰ Furthermore, this proposal “would increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination.”¹¹

Just as the Biden administration has signaled pending reforms that purport to improve the regulatory process, there is a groundbreaking bill being reintroduced in this Committee called the Stop Corporate Capture Act, H.R. ___ that would bring bold and ambitious reforms to address the most egregious problems plaguing our Federal system of public protections. The Stop Corporate Capture Act is the antithesis to anti-regulatory legislation such as the REINS Act.

II. The Regulations from the Executive in Need of Scrutiny (REINS) Act of 2023

Unfortunately, this Committee’s focus on the REINS Act shows that it is headed in the wrong direction. The REINS Act would make it harder – or perhaps impossible – for agencies to protect the public by rendering the regulatory process more inefficient and dysfunctional than it already is. The REINS Act is a radical threat – one of the most radical in generations – to our government’s ability to protect the public from harm. The bill’s clear aim is to halt the implementation of critical new public health and safety safeguards, financial reforms, and worker protections – making industry even less accountable to the public. It would do nothing to improve protections for the American public, but instead would benefit only those corporations that wish to game the system and evade safety standards.

Under the REINS Act, the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, and our other agencies whose mission it is to protect the public could not enforce a “major” rule – a rule with a large economic impact – unless both houses of Congress affirmatively approved it, with no alterations, within a 70-day window. The policy would stop the most important rules for protecting the public, including the large number of non-controversial rules agencies produce every year, from being finalized.

This radical bill is unconstitutional on its face. The mandate that a rule must be approved by both houses is in practice a legislative veto that the Supreme Court declared unconstitutional in *INS v.*

⁹ *Id.*

¹⁰ Press Release, U.S. Env’tl. Prot. Agency, EPA Proposes Designating Certain PFAS Chemicals as Hazardous Substances Under Superfund to Protect People’s Health (Aug. 26, 2022), *available at* <https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund>.

¹¹ *Id.*

Chadha because a vote against the rule by either house would “kill” the rule.¹² The warped operability of the REINS Act should be frightening to any member of Congress who believes in bicameralism, presentment, and the integrity of the legislative process.¹³

Further, because the REINS Act would require Congress to vote on all major rules, the bill is completely unworkable and flies in the face of the reality of the legislative process.¹⁴ Congress already increasingly struggles to pass important new laws, including must-pass bills that accomplish basic functions like funding the government. If the REINS Act were to pass, it is all but certain that most, if not all, new major rules would be blocked due to Congressional dysfunction.¹⁵

Indeed, the argument from supporters of the bill that it increases Congressional accountability is based on the deeply flawed assumption that Congress will actually take votes on all new major rules if the bill were to become law.¹⁶ In 2022, there were 52 major final rules issued, meaning Congress would have had to add 52 votes on its agenda to satisfy the REINS Act if it were law.¹⁷ There is very little chance Congress would be able to deal with the enormous increase in workload required by votes for all major rules.¹⁸ It is much more likely that the REINS Act will lead to Congressional inaction, doming new, much-needed protections for the public.

The REINS Act would also further delay a regulatory process that is already rife with roadblocks. The current regulatory process is slow enough as it is. For example, since 2016, the U.S. Occupational Safety and Health Administration (OSHA) has been working on a standard to protect health care and social assistance workers from workplace violence, and over the past seven years the agency has only progressed to the small business review pre-rulemaking stage. During this time, the rate of serious and preventable workplace violence injuries has increased for workers in health care and social assistance.¹⁹

By giving one chamber of Congress veto power over any new significant public health and safety protection, no matter how non-controversial or sensible it may be, the REINS Act is designed to leverage the dysfunction and obstructionism that plague our political process to block agencies’ efforts to fulfill their statutory mandates to pursue public protections. Congress should be searching for ways to ensure that federal agencies are able to enforce laws designed to protect our food supply, water, air quality, financial security, and much more, not putting up roadblocks to sensible safeguards that protect the American people.

¹² Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 Geo. Wash. L. Rev. 1446, 1448 (2015), available at <https://www.gwlr.org/wp-content/uploads/2015/11/83-Geo-Wash-L-Rev-1446.pdf>.

¹³ See *id.* at 1468.

¹⁴ See *supra* note 12, at 1450-51.

¹⁵ See *id.* at 1457.

¹⁶ See *id.* at 1460-63.

¹⁷ Reginfo.gov, Executive Order Review Search Results (EO Review Search Criteria: Agencies=All; Review Status=Concluded; Received from 01/01/2022; Received to 12/31/2022; Major=Yes; Stage of Rulemaking=Final Rule;), <https://www.reginfo.gov/public/do/eoAdvancedSearch> (last accessed Mar. 8, 2023).

¹⁸ See *supra* note 12, at 1455, 1457, 1461.

¹⁹ See Letter from Coal. for Sensible Safeguards, to Members of the U.S. Congress (Feb. 27, 2023), available at <https://sensiblesafeguards.org/outreach/groups-oppose-the-reins-act-of-2023/>.

If the REINS Act was signed into law, rail safety regulations would have no chance of being enacted. Rather, passage of the REINS Act would likely lead to more deregulatory disasters in communities traced with train tracks, putting fence line and frontline communities at risk.

III. The Stop Corporate Capture Act

The Stop Corporate Capture Act is important now more than ever to help move this Committee and the regulatory process writ large in the right direction. Public Citizen supports the Stop Corporate Capture Act and hopes it becomes law.²⁰ To tackle the pressing challenges we face as a nation – including the climate crisis, growing economic inequality, and racial injustice – we must have a robust, responsive, and inclusive Federal regulatory system. We do not have such a regulatory system today. This groundbreaking bill works to change that.

The Stop Corporate Capture Act offers the necessary comprehensive blueprint for modernizing, improving, and strengthening the regulatory system to protect the public more effectively. It would level the playing field for all members of the public to have their views accounted for in regulatory decisions that affect them; promote scientific integrity; and restore our government’s ability to deliver results for workers, consumers, public health, and the environment.

Among the essential reforms this bill would introduce are the following²¹:

- End Unbridled Corporate Influence
 - o The Act brings transparency to the “black box” of the White House regulatory review process, which has become a focal point for corporate lobbying. The Act accomplishes this by requiring disclosure of changes and the sources of those changes to draft rules during that process. Furthermore, the Act makes it a federal crime for corporations to submit false information in order to influence regulators during the rulemaking process.
- Prioritize Social Justice and Equity
 - o The Act creates an Office of the Public Advocate, charged with promoting agencies’ public engagement practices and helping members of the public to participate more effectively in regulatory proceedings, especially people from structurally marginalized communities. The Office of the Public Advocate will research the social equity impacts of the regulatory process and perform social equity assessments of pending rules when requested by the public. The Act also strengthens agency procedures for notifying the public, particularly members of structurally marginalized communities and non-English speakers, about pending rulemakings.
- Restore Scientific Integrity and Independent Expertise

²⁰ See Letter from Coal. for Sensible Safeguards, to the Hon. Jerold Nadler & the Hon. Jim Jordan, U.S. House of Representatives (Dec. 2, 2022), *available at* <https://sensible safeguards.org/outreach/css-supports-the-stop-corporate-capture-act/>.

²¹ *Id.*

- The Act codifies *Chevron* deference, the long-standing principle that prevents judges from allowing their political preferences to influence their decisions in cases involving regulations by requiring courts to defer to government agencies that Congress empowered to protect the public. The Act also requires anyone submitting scientific or other technical research to agencies during the rulemaking process to disclose any potential conflicts of interest the research may raise. In addition, a provision of the Act bars the White House from unreasonably delaying essential safeguards by empowering agencies to resume work if the regulatory review process fails to conclude after sixty days.

The Stop Corporate Capture Act deserves this Committee's attention, not the REINS Act.

IV. Conclusion

The common thread throughout our written testimony, and what we hope this Committee takes away, is the importance of the public's voice, perspective, participation, and best interests in the Federal regulatory process. As mentioned, the Stop Corporate Capture Act is the antithesis to the dangerous and harmful anti-regulatory REINS Act. The Stop Corporate Capture Act empowers the public instead of giving unconstitutional power to Congress.

The REINS Act undermines the voice of the people after they have made their voices heard through the public comment process. This radical bill gives members of Congress the power to silence the voices of their own constituents who have democratically shared their opinions on the very rules that Congress delegated authority to agencies to promulgate.²² Agencies are the subject matter experts, not Congress.

While the Stop Corporate Capture Act creates an Office of the Public Advocate, the REINS Act makes Congress the public's adversary.

The REINS Act needs to be "reined in," meaning it must never become law.

Public Citizen supports the Stop Corporate Capture Act and the Biden administration's efforts to improve public participation and modernize the rulemaking process. Public Citizen believes that regulatory cost-benefit analysis ought to be a thing of the past, or, at the very least, must not be used to weaken and block regulatory protections. If cost-benefit analysis is to stay, it must be revised to appropriately weigh the very real benefits of regulatory protections to everyday Americans.

Public Citizen looks forward to the Biden administration proposing reforms to the regulatory process and working with both the Biden administration and this Committee on legislation to improve the regulatory process for the sake of the public interest, not for corporate special interests. Thank you for your time.

²² See *supra* note 12, at 1455.