

THE DANGERS OF LEGISLATING BASED ON MYTHOLOGY: THE SERIOUS RISKS PRESENTED BY THE ANTI-REGULATORY AGENDA OF THE 115TH CONGRESS AND THE TRUMP ADMINISTRATION

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Although Section 1, Article I of the U.S. Constitution vests “All legislative Powers” in the Congress of the United States, the Constitution is largely silent as to exactly how Congress should exercise these awesome powers. Over the years, the U.S. House of Representatives has developed a process by which legislation is vetted and perfected through the prudential conduct of hearings and markups. For the most part, this process has worked. And, when we arguably err, the Presidential veto as well as the U.S. Supreme Court provide checks. Nevertheless, there are times when the need for a legislative response by Congress appears to lack a factual basis or is facetious. The likelihood of this occurring increases when both the Congress and the Executive Branch are controlled by the same political party, thereby diminishing our government’s system of checks and balances. During such times, the risk of ill-conceived legislation becoming law is heightened. Such is our concern with respect to a series of anti-regulatory measures recently considered by the House and which may be supported by the Republican-controlled U.S. Senate and the Trump Administration. After providing a brief overview of the federal rulemaking process, we will debunk the principal myths cited in support of these anti-regulatory measures and then highlight some of the most problematic aspects of the legislation currently under consideration by Congress.

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INTRODUCTION

On the day of his inauguration, January 20, 2017, President Donald J. Trump—similarly to his predecessor¹—issued a “regulatory freeze pending review,” requiring federal agencies to refrain from finalizing any regulation “until a department or agency head appointed or designated by the President . . . reviews and approves the regulation,” with certain exceptions.² The following week, the President met with business leaders and announced, “We think we can cut regulations by 75%. Maybe more, but by 75%.”³ He explained, “We’re gonna be cutting regulation massively. . . . The problem with the regulation that we have right now is that you can’t do anything. You can’t, I have people that tell me they have more people working on regula-

¹ Rahm Emanuel, Assistant to the President and Chief of Staff, Memorandum for Heads of Executive Departments and Agencies (Jan. 20, 2009), <https://www.federalregister.gov/documents/2009/01/26/E9-1639/memorandum-for-the-heads-of-executive-departments-and-agencies> [<https://perma.cc/MU6F-AM9X>].

² Press Release, The White House Office of the Press Secretary, Memorandum for Heads of Executive Departments and Agencies 1 (Jan. 20, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies> [<https://perma.cc/4B6H-FLGD>].

³ Chris Arnold, *President Trump to Cut Regulations by “75 Percent”—How Real Is That?*, NAT’L PUB. RADIO, Jan. 24, 2017, <http://www.npr.org/2017/01/24/511341779/president-trump-to-cut-regulations-by-75-percent-how-real-is-that> [<https://perma.cc/R89D-DR7P>].

tions than they have doing product.”⁴ He also observed that there would still be regulations that would “be just as strong and just as good and just as protective of the people as the regulation we have right now.”⁵ He continued, “We’re gonna take care of the environment, we’re gonna take care of safety and all of the other things we have to take care of.”⁶

Reducing federal regulations is a key component of the Trump Administration’s goal to double economic growth in the United States to four percent⁷ and to “bring[] back jobs and growth.”⁸ The White House website explains:

As a lifelong job-creator and businessman, the President also knows how important it is to get Washington out of the way of America’s small businesses, entrepreneurs, and workers. In 2015 alone, federal regulations cost the American economy more than \$2 trillion. That is why the President has proposed a moratorium on new federal regulations and is ordering the heads of federal agencies and departments to identify job-killing regulations that should be repealed.⁹

In keeping with this agenda, President Trump signed an executive order on January 30, 2017, effectively prohibiting an agency from noticing a new regulation for public comment unless the agency identifies at least two existing regulations to be repealed, subject to limited exceptions.¹⁰ Although the order mentions the “costs” of regulation seventeen times, glaringly absent is any mention about the benefits of regulations.

In a whirlwind of action and in apparent coordination with the new Administration, the Republican-controlled U.S. House of Representatives in the opening weeks of the new 115th Congress introduced several bills under the guise of attempting to improve the regulatory process. In our view, they would do the opposite and severely jeopardize the ability of government agencies to safeguard public health and safety, the environment, workplace safety, and consumer financial protections. These bills—H.R. 5, the “Regulatory Accountability Act of 2017,”¹¹ H.R. 26, the “Regulations from the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Don Lee & Jim Puzzanghera, *Trump Has Vowed to Slash Regulations. Where He Might Start and the Hurdles He Faces*, L.A. TIMES (Jan. 19, 2017), <http://www.latimes.com/politics/la-fi-trump-regulatory-reform-20170119-story.html> [<https://perma.cc/WX7G-46UH>].

⁸ *Issues—Bringing Back Jobs and Growth*, THE WHITE HOUSE, <https://www.whitehouse.gov/bringing-back-jobs-and-growth> [<https://perma.cc/BLZ7-3H8G>].

⁹ *Id.*

¹⁰ Press Release, The White House Office of the Press Secretary, Executive Order—Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling> [<https://perma.cc/T3KL-3TG3>].

¹¹ H.R. 5, 115th Cong. (2017).

Executive in Need of Scrutiny Act of 2017,”¹² and H.R. 21, the “Midnight Rules Relief Act of 2017”¹³—are nearly identical to legislation previously passed by the Republican-controlled House in prior Congresses. Furthermore, it is anticipated that the House will likely consider additional anti-regulatory measures in the upcoming months. The Republican-controlled U.S. Senate is anticipated to consider these bills or similar measures after the House completes its consideration.

Bob Goodlatte, Chairman of the House Judiciary Committee—the committee with jurisdiction over these measures—explains why he believes this legislation is a priority for the Committee and this Congress:

[F]or far too long, our federal government has continued to pile unnecessarily complicated new burdens and red tape on American businesses, which have effectively tied the hands behind the backs of our nation’s small businesses and entrepreneurs. Viewed from another angle, these burdens on U.S. businesses subsidize our foreign competitors. It’s long past time to untie these binds and unleash American ingenuity.

Federal regulations now impose an estimated burden of nearly two trillion dollars. That equals roughly \$15,000 per U.S. household, over 10% of America’s GDP, and more than the GDP of all but eight countries in the world.

[E]xcessive regulation . . . hurts all Americans. It leads to higher prices, lower wages, fewer jobs, less economic growth, and a less competitive America.

But it’s a new day in the United States. While I have been calling for these reforms for years, we now have a President, a Senate, and a House focused on enacting laws to reduce the regulatory burdens that our nation’s small businesses are facing, to get more Americans back to work, and to help grow our economy.¹⁴

Anti-regulatory advocacy groups are also anxious for these measures to become law in the near future.¹⁵ For example, Freedom Partners urges “the new Congress to repeal as many of President Obama’s executive actions and regulations as possible” and to “put lawmakers on record on many of these

¹² H.R. 26, 115th Cong. (2017).

¹³ H.R. 21, 115th Cong. (2017).

¹⁴ Press Release, Bob Goodlatte, Chair, House Comm. on the Judiciary, Goodlatte Announces Agenda for 115th Congress (Feb. 1, 2017), <https://judiciary.house.gov/press-release/goodlatte-announces-agenda-115th-congress/> [<https://perma.cc/AM4L-Z2CV>].

¹⁵ See, e.g., Press Release, U.S. Chamber of Commerce, U.S. Chamber’s Donohue Comments on President Trump’s Executive Actions on Regulations (Jan. 30, 2017), <https://www.uschamber.com/press-release/us-chamber-s-donohue-comments-president-trump-s-executive-actions-regulations> [<https://perma.cc/54AR-BS2V>].

regulations as possible so voters can see where they stand and hold them accountable in 2018.”¹⁶

Unfortunately, nearly all of these measures are problematic for various reasons: (1) they are based on the false premise that restricting the ability of agencies to promulgate rules will promote job creation and economic growth; (2) they myopically focus on the cost of regulations and ignore the benefits of regulations; (3) they may prevent critical public health and safety rules from being implemented by giving numerous opportunities for regulated entities to challenge proposed rulemakings and facilitating endless litigation; and (4) several of these measures greatly expand the power of generalist courts and a polarized Congress to second-guess agencies and substitute their policy judgments for the ones agencies create.

While no one would dispute that our federal regulatory process is hardly perfect, we are seriously concerned that many of the legislative responses that the House has considered to date present dangerous consequences to the American people and the economic well-being of our Nation. To support this contention, we will summarize the principal bills likely to receive the support of the Trump Administration and our Republican colleagues in Congress and explain why the arguments underlying these measures are fallacious.¹⁷

I. A BRIEF OVERVIEW OF THE FEDERAL RULEMAKING PROCESS

Federal regulations impact nearly every aspect of our lives and are “one of the basic tools of government used to implement public policy.”¹⁸ Each year, agencies issue thousands of rules to implement statutory directives “ensuring that workplaces, air travel, foods, and drugs are safe; that the nation’s air, water, and land are not polluted; and that the appropriate amount of taxes is collected.”¹⁹ Approximately 4,000 to 6,000 regulations are issued every year.²⁰ The vast bulk deal with inherently mundane or ministerial mat-

¹⁶ Paige Agostin, *A Roadmap to Repeal: Removing Regulatory Barriers to Opportunity*, FREEDOM PARTNERS (Jan. 6, 2017), <http://freedompartners.org/latest-news/roadmap-repeal-removing-regulatory-barriers-opportunity/> [<https://perma.cc/8FN4-RRPN>]. The Chairman of the Board of Freedom Partners is Mark Holden, the senior vice president and general counsel of Koch Industries, Inc. See *Board Members, Mark Holden, Chairman*, FREEDOM PARTNERS, <http://freedompartners.org/about/> [<https://perma.cc/V3QL-S2DA>].

¹⁷ Much of the analysis in this article is derived, often verbatim, from dissenting views that our Democratic colleagues and we submitted as part of the House Judiciary Committee’s legislative reports on the predecessors of the bills discussed herein that were considered in prior Congresses.

¹⁸ CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2005).

¹⁹ Regulatory Reform: Are Regulations Hindering Our Competitiveness?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov’t Reform, 109th Cong. 56 (2005) (statement of J. Christopher Mihm, Managing Director, Strategic Issues, U.S. Government Accountability Office).

²⁰ See, e.g., Standards Governing the Design of Curbside Mailboxes, 80 Fed. Reg. 19,914 (Apr. 14, 2015).

ters, such as the size of certain screws used in aircraft engines, Federal Aviation Administration flight path determinations, U.S. Coast Guard bridge opening schedules, and standards for curbside mailboxes.²¹ Rulemaking is the “agency process for formulating, amending or repealing a rule,”²² a process that can potentially involve all three branches of the government.

A. Executive Branch Rulemaking

The Administrative Procedure Act (APA) establishes the rulemaking and formal adjudication requirements for all administrative agencies.²³ The APA’s baseline procedural requirements are designed to maintain a balance between agency flexibility and due process. In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.²⁴ These requirements focus “predominately on agencies’ development of new rules,” according to the Government Accountability Office (GAO).²⁵

In general, proposed rules go through an extensive vetting process that many believe is already ossified and overly cumbersome.²⁶ Most agencies promulgate rules using the informal rulemaking process set forth in section 553 of the APA, commonly known as notice-and-comment rulemaking.²⁷

²¹ *See id.*

²² 5 U.S.C. § 551(5) (2012).

²³ Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5372, 7521 (2017)).

²⁴ For example, the Unfunded Mandates Reform Act, 2 U.S.C. §§ 1532–1538 (2012), requires an agency to prepare a “qualitative and quantitative assessment of the anticipated costs and benefits . . . as well as the effect of the federal mandate on health, safety, and the natural environment” for any rule imposing such mandate that may result in the expenditure of \$100 million or more by the private sector or state, local, and tribal governments in the aggregate. Other statutorily-imposed analytical requirements for rulemakings include: the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (2012); and the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for federal rulemaking. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993) (outlining requirements for cost-benefit analysis and review by the Office of Information and Regulatory Affairs for significant rules issued by executive branch agencies).

²⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS I (2007).

²⁶ *See generally, e.g.*, Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012); H.R. 348, the “Responsibly And Professionally Invigorating Development Act of 2015” (RAPID Act); H.R. 712, the “Sunshine for Regulatory Decrees and Settlements Act of 2015”; and, H.R. 1155, the “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015” (SCRUB Act): Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 1 (2015) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen), http://judiciary.house.gov/_cache/files/cfc2a8c6-729e-4e77-9f9f-561f60f1c153/narang-testimony.pdf [https://perma.cc/8B3Z-6MBS].

²⁷ 5 U.S.C. § 553 (2012). Agencies may also choose or may be required by statute to use other rulemaking procedures, including formal rulemaking, negotiated rulemaking, and hybrid or expedited approaches, which generally tend to have greater procedural requirements and be

Agencies engaged in notice-and-comment rulemaking must provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the rule's content, which is typically accomplished through publication in the *Federal Register*.²⁸ After the comment period closes, the agency must consider the public's responses and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule, from which the public should be able to understand the substance and justification of the rule.²⁹ The final rule and the general statement must then be published in the *Federal Register* not less than 30 days before the rule becomes effective.³⁰

The Office of Information and Regulatory Affairs (OIRA) also plays a major role in the rulemaking process. That office, housed in the Office of Management and Budget (OMB)—which itself is located within the Executive Office of the President—serves as the federal government's "central authority for the review of Executive Branch regulations," among other responsibilities.³¹ OIRA is headed by an Administrator nominated by the President and confirmed by the Senate.³² Pursuant to Executive Order 12866, issued by President Clinton in 1993, OIRA must review any "significant regulatory action."³³

'Significant regulatory action' means any regulatory action that is likely to result in a rule that may:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

subject to stricter judicial review than section 553 notice-and-comment rulemaking. Though rarely used, agencies must sometimes follow the APA's formal rulemaking procedures "when rules are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c) (2012).

²⁸ 5 U.S.C. § 553(b)–(c) (2012).

²⁹ *Id.*

³⁰ 5 U.S.C. § 553(d) (2012).

³¹ EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, <https://obamawhitehouse.archives.gov/omb/oira> [<https://perma.cc/CQ3M-QMSQ>].

³² *Id.*

³³ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.³⁴

OIRA typically reviews between 500 and 700 significant regulatory actions annually.³⁵

B. Judicial Review of Rulemaking

The APA provides for judicial review of agency rulemaking when there is no other adequate judicial remedy available for "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."³⁶ The Act requires the reviewing court to compel agency action when it is unlawfully withheld or unreasonably delayed and to set aside as unlawful agency action, findings, and conclusions when found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in [a formal rulemaking] or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.³⁷

There is a strong presumption that Congress intends judicial review of administrative action to be available,³⁸ with two exceptions: when statutes specifically preclude judicial review and when Congress provides agencies with statutory discretion.³⁹ A court, however, always has the authority to review the constitutionality of agency actions, including those actions that are otherwise unreviewable.⁴⁰

³⁴ *Id.*

³⁵ *Frequently Asked Questions*, EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> [https://perma.cc/6YZP-ZJ53].

³⁶ 5 U.S.C. § 702 (2012).

³⁷ 5 U.S.C. § 706(2)(A)–(F) (2012).

³⁸ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 667 (1986).

³⁹ 5 U.S.C. § 701(a) (2012).

⁴⁰ *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also generally Oestereich v. Selective Serv. Sys.*, 393 U.S. 233 (1968).

In the seminal case on judicial deference, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court held that courts must give “considerable weight” to an agency’s construction of a statute it administers.⁴¹ Ron Levin, Professor of Law at Washington University in St. Louis and Chair of the Judicial Review Committee for the Administrative Conference of the United States, explains the rationale for this deference:

The justification for *Chevron* deference rests in part on respect for congressional delegation. It recognizes that Congress often decides to entrust policymaking authority in certain areas; when it does so, and the agency acts within the scope of that delegation as the court understands it, a court is obliged to honor the legislature’s expectations by upholding a rational exercise of that authority even where the agency reaches a conclusion that the reviewing court would not have reached.⁴²

Over the twenty years following its enactment and prior to the current Congress, the CRA had been successfully used only once. In 2001, an incoming Republican Congress and the George W. Bush Administration disapproved a rule dealing with workplace ergonomics that was issued by the prior Clinton Administration.⁴³ In stark contrast, however, thirteen Obama Administration rules have already been nullified pursuant to the CRA during the first three months of the Trump Administration as of April 18, 2017. These nullified regulations include: a regulation restricting gun purchases by the mentally ill through the use of firearms background checks;⁴⁴ a rule intended to protect streams from pollution caused by mine runoffs;⁴⁵ a Federal Communications Commission rule requiring Internet service providers to inform customers about rights to opt in or opt out of the use or the sharing of their confidential information;⁴⁶ a rule prohibiting states to redirect federal funds away from family planning clinics,⁴⁷ and a Securities and Exchange Commission anti-corruption rule,⁴⁸ among others.⁴⁹

⁴¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (internal quotations omitted).

⁴² Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Gov’t Affairs, 114th Cong. 38 (2015), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94906/pdf/CHRG-114shrg94906.pdf> [<https://perma.cc/9KDS-44LR>] (statement of Prof. Ronald M. Levin, Washington University School of Law).

⁴³ Pub. L. No. 107-5 (2001).

⁴⁴ Pub. L. No. 115-8 (2017).

⁴⁵ Pub. L. No. 115-5 (2017).

⁴⁶ Pub. L. No. 115-22 (2017).

⁴⁷ Pub. L. No. 115-23 (2017).

⁴⁸ Pub. L. No. 115-4 (2017).

⁴⁹ These include the following: Interior Department rules regulating land use, Pub. L. No. 115-12 (2017), and hunting on National Wildlife Refuges in Alaska, Pub. L. No. 115-20 (2017); Education Department regulations concerning accountability and state plans under the Elementary and Secondary Education Act of 1965, Pub. L. No. 115-13 (2017), and assessing the quality of teacher preparation programs, Pub. L. No. 115-14 (2017); Labor Department rules requiring federal contractors to disclose certain labor law violations they committed in the preceding three years, Pub. L. No. 115-11 (2017), relating to drug testing of unemployment compensation applicants, Pub. L. No. 115-17 (2017), obligating employers to make and main-

C. Congressional Review Act

Under current law, Congress may invalidate agency rules under the Congressional Review Act (CRA),⁵⁰ which was enacted with bipartisan support in 1996 as part of the Republican “Contract with America.”⁵¹ The purpose of the CRA is to provide a “process that would keep Congress informed about the rulemaking activities of federal agencies and allow for expeditious Congressional review, and possible nullification.”⁵²

The CRA authorizes Congress to disapprove an agency rule to which it objects by enacting a joint resolution of disapproval.⁵³ The joint resolution must be introduced within at least sixty days of the rule’s submission to Congress.⁵⁴ For such resolution to take effect, it must pass both Houses of Congress and be signed by the President, thereby satisfying the requirements of the Constitution’s Bicameralism and Presentment Clauses.⁵⁵ Upon signing, the disapproved rule is deemed not to have been in effect at any time.⁵⁶ Additionally, the CRA prohibits an agency from reissuing a rule that is “substantially the same” as a disapproved rule.⁵⁷ The CRA prescribes special expedited procedures for Senate consideration of a joint resolution of disapproval, but does not provide for similar procedures in the House of Representatives.⁵⁸

II. THE FALSE ARGUMENTS IN SUPPORT OF SO-CALLED REGULATORY REFORM

Much of the opposition to regulatory safeguards is motivated by unsubstantiated and debunked claims that regulations undermine economic growth, job creation, and entrepreneurship. Unfortunately, this discontent with regulations appears to be “motivated by dissatisfaction with substantive agency outcomes rather than with legitimate concerns about judicial practice.”⁵⁹

tain records of work-related injuries and illnesses, Pub. L. No. 115-21 (2017), and regarding state payroll deduction savings programs for private-sector employees, Pub. L. No. 115-24 (2017).

⁵⁰ 5 U.S.C. §§ 801–808 (2012).

⁵¹ Contract with America Advancement Act, Pub. L. No. 104-121, subtitle E, 110 Stat. 857–874 (1996) (codified as 5 U.S.C. §§ 801–808 (2012)).

⁵² Interim Report on the Administrative Law Process and Procedure Project for the 21st Century, Subcomm. on Commercial & Admin. L. of the H. Comm. on the Judiciary, 109th Cong. 72 (Dec. 2006).

⁵³ See 5 U.S.C. § 802 (2012) (outlining congressional disapproval procedure).

⁵⁴ 5 U.S.C. § 802(a) (2012).

⁵⁵ U.S. Const. art. I, § 7, cl. 2–3.

⁵⁶ 5 U.S.C. § 801(f) (2012).

⁵⁷ 5 U.S.C. § 801(b)(2) (2012).

⁵⁸ 5 U.S.C. § 802(c) (2012).

⁵⁹ Letter to Rep. Bob Goodlatte (R-VA), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, House Comm. on the Judiciary, from Joel B. Eisen, Professor of Law, Univ. of Richmond Sch. of Law, & Emily Hammond, Professor of Law, George Washington Univ. Law

A. Dispelling the Cost of Regulations Myth

The Trump Administration, as part of its plan for “Bringing Back Jobs and Growth,” notes that “[i]n 2015 alone, federal regulations cost the American economy more than \$2 trillion.”⁶⁰ Similarly, Chairman Bob Goodlatte, in announcing the legislative agenda for the House Judiciary Committee during the 115th Congress, stated, “Federal regulations now impose an estimated burden of nearly two trillion dollars. That equals roughly \$15,000 per U.S. household, over 10% of America’s GDP, and more than the GDP of all but eight countries in the world.”⁶¹

These economic estimates regarding the impact of federal regulations, however, are based on flawed studies. In fact, the non-partisan Congressional Research Service (CRS) has twice debunked anti-regulatory claims on the cost of regulation. The Republican majority often cites as a basis for their claims a study by economists Mark and Nicole Crain asserting that federal regulation imposes an annual cost of \$1.75 trillion on business.⁶² In 2011, CRS conducted an extensive examination of this study, and by analyzing the methodology of this report determined that it was deeply flawed. First, the authors of the study themselves conceded that they “ma[d]e no attempt to estimate the benefits” of regulation.⁶³ Furthermore, CRS found that the study’s authors admitted that their analysis was “not meant to be a decision-making tool for lawmakers or federal regulatory agencies to use in choosing the ‘right’ level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose.”⁶⁴ Academics have likewise concluded that the Crain study was highly flawed.⁶⁵

Sch., *et al.*, at 2 (June 8, 2016), http://progressivereform.org/articles/JudicialReview_HJudiciary_060716.pdf [<https://perma.cc/FY5X-KVV7>].

⁶⁰ *Issues—Bringing Back Jobs and Growth*, *supra* note 8.

⁶¹ Press Release, Rep. Bob Goodlatte (R-VA), Chair, House Comm. on the Judiciary, Chairman Goodlatte Announces Agenda for 115th Cong. (Feb. 1, 2017), <https://judiciary.house.gov/press-release/goodlatte-announces-agenda-115th-congress/> [<https://perma.cc/AM4L-Z2CV>].

⁶² See NICOLE V. CRAIN & W. MARK CRAIN, SMALL BUS. ADMIN., THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010), <http://archive.sba.gov/advo/research/rs371tot.pdf> [<https://perma.cc/4SW3-3VMJ>].

⁶³ See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41763, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS (2011).

⁶⁴ *Id.* at 26 (quoting an e-mail from Nicole and Mark Crain to Copeland).

⁶⁵ See, e.g., Lisa Heinzerling & Frank Ackerman, *The \$1.75 Trillion Lie*, 1 MICH. J. ENVTL. & ADMIN. L. 127, 127 (2012) (noting that the Crains’ study estimate of the cost of regulations “is not credible” as it “reflects a calculation that rests on a misunderstanding of the definition of the relevant data, flunks an elementary question on the normal distribution, pads the analysis with several years of near-identical data, and fails to recognize the difference between correlation and causation,” and that for the “costs of environmental regulation, the bulk of the estimate relies on decades-old studies of decades-old rules, suggesting that voluntary unemployment is the real culprit in today’s regulatory environment.”).

Although anti-regulatory proponents have issued other studies on the cost of regulation,⁶⁶ CRS questioned the methodology of these studies as well in another exhaustive report released in January 2016.⁶⁷ Examining several different approaches for determining proxy measures for the “overall amount of regulation,” CRS noted that each method “produces radically different results,” concluding that the “[c]urrent estimates of the cost of regulation should be viewed with a great deal of caution.”⁶⁸

Far from an exact science, regulatory costs are notoriously difficult to calculate and are often dramatically over-inflated.⁶⁹ Robert Glicksman, Professor of Environmental Law at The George Washington University Law School, explained that companies “have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards,” while agencies tend to adopt conservative assumptions about regulatory costs, such that the cost assessment often ends up reflecting the maximum possible cost, rather than the mean.⁷⁰ In 2013, Public Citizen conducted a retrospective study on claims linking job losses and regulations and found that none “proved remotely accurate.”⁷¹ For instance, automakers that opposed catalytic-converter requirements under the Clean Air Act of 1970 argued at the time that the requirement would “do irreparable damage to the American economy” and erase 800,000 jobs.⁷² Notwithstanding these claims, automobile sales grew during the first year the rule went into effect.⁷³ In addition, automobile costs fell to an all-time low, tailpipe-hydrocarbon emissions fell by more than fifty-seven percent, and there was no

⁶⁶ See, e.g., Clyde Wayne Crews, Jr., *Tip of the Costberg*, COMPETITIVE ENTER. INST. (2017) (“Best wishes to all pouring disdain on the Small Business Administration’s assessment of the regulatory enterprise, as [Cass] Sunstein and several policy groups did.”); Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTER. INST. (2014), <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf> [<https://perma.cc/89ZJ-ABG7>].

⁶⁷ MAEVE P. CAREY, CONG. RESEARCH SERV., R44348, METHODS OF ESTIMATING THE TOTAL COST OF FEDERAL REGULATIONS 1 (2016).

⁶⁸ *Id.* at 2.

⁶⁹ See The Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 3 (2015), http://progressivereform.org/articles/Sachs_testimony_HJud_OIRA_071515.pdf [<https://perma.cc/78RG-4UYL>] (statement of Noah Sachs, Professor of Law, University of Richmond School of Law).

⁷⁰ The Obama Administration’s Regulatory War on Jobs, the Economy, and America’s Global Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial, & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 30-31 (2013), https://judiciary.house.gov/_files/hearings/113th/02282013/Glicksman%2002282013.pdf [<https://perma.cc/L22P-SYLS>] (statement of Robert Glicksman, Professor of Environmental Law, The George Washington University Law School).

⁷¹ TAYLOR LINCOLN, PUBLIC CITIZEN, IT’S AN OUTRAGE: REGULATIONS ARE ENTIRELY TO BLAME FOR UNEMPLOYMENT AND A LEADING CAUSE OF DEATH IN THE UNITED STATES, ACCORDING TO INDUSTRY AND ITS ALLIES 4 (2013), <http://www.citizen.org/documents/regulations-are-to-blame-unemployment-death-report.pdf> [<https://perma.cc/YJ3C-9RKQ>].

⁷² *Id.* at 6–7.

⁷³ *Id.* at 9.

evidence of job losses.⁷⁴ As Robert Weissman, the president of Public Citizen, observed:

There is also a long history of business complaining about the cost of regulation—and predicting that the next regulation will impose unbearable burdens. More informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations, though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.⁷⁵

In addition, anti-regulatory proponents repeatedly fail to account for the benefits of regulation, even though such benefits routinely exceed regulatory costs.⁷⁶ In its critical report on the Crain study, CRS concluded that “a valid, reasoned policy decision can only be made after considering information on both costs and benefits” of regulation.⁷⁷ The Economic Policy Institute reached a similar conclusion.⁷⁸ And the GAO has observed that while the costs of regulations “are estimated to be in the hundreds of billions of dollars,” the “benefits estimates are even higher.”⁷⁹ OMB, which estimates the costs and benefits of regulations, reported in 2015 that from October 1, 2004, to September 30, 2014, the costs of regulation ranged between \$57 billion and \$85 billion, while the benefits were between \$216 billion and \$812 billion.⁸⁰ Therefore, even if one uses OMB’s highest estimate of costs and its lowest estimate of benefits, regulations issued over the past ten years have produced net benefits of \$216 billion to Americans.

⁷⁴ *Id.*

⁷⁵ Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity: Hearing Before the S. Comm. on the Judiciary, 114th Cong. 29 (2015) (statement of Robert Weissman, President, Public Citizen), <http://www.citizen.org/documents/weissman-senate-judiciary-testimony-regulatory-protections.pdf> [<https://perma.cc/LMV5-CEMF>].

⁷⁶ The Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 2–3 (2015) (statement of Noah Sachs, Professor, University of Richmond School of Law), http://progressivereform.org/articles/Sachs_testimony_HJud_OIRA_071515.pdf [<http://perma.cc/4A29-D2FK>].

⁷⁷ COPELAND, *supra* note 56 at 26.

⁷⁸ See John Irons & Andrew Green, *Flaws Call for Rejecting Crain and Crain Model: Cited \$1.75 Trillion Cost of Regulations Is Not Worth Repeating*, ECONOMIC POLICY INST. (July 19, 2011), <http://w3.epi-data.org/temp2011/IssueBrief308.pdf> [<http://perma.cc/WD8H-L4DY>].

⁷⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-939T, REGULATORY REFORM: PRIOR REVIEWS OF FEDERAL REGULATORY PROCESS INITIATIVES REVEAL OPPORTUNITIES FOR IMPROVEMENTS 112 (2007), <http://www.gao.gov/assets/120/112084.pdf> [<http://perma.cc/45C9-Y5FU>].

⁸⁰ OFFICE OF MGMT. & BUDGET, DRAFT 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 1–2, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb_draft_2015_cost_benefit_report.pdf [<http://perma.cc/DW48-3MNH>].

The benefits of regulation are also apparent when viewed through the lens of prevention. For example, a 2011 Environmental Protection Agency report found that the public health benefits of clean air regulations far outweigh the compliance cost to industry.⁸¹ The report concluded that restrictions on fine particle and ground-level ozone pollution mandated by the 1990 Clean Air Act amendments would prevent 230,000 deaths and produce benefits of about \$2 trillion by 2020.⁸²

B. Dispelling the Myth that Regulations Are Bad for Employment

As part of his “Bringing Back Jobs and Growth” plan, President Trump ordered “the heads of federal agencies and departments to identify job-killing regulations that should be repealed.”⁸³ With respect to employment, anti-regulatory proponents routinely argue that regulations “kill” jobs and create economic uncertainty.⁸⁴ Again, this claim is unsupported by empirical evidence.⁸⁵ For example, Wake Forest School of Law Professor Sidney Shapiro testified in 2011 that “the evidence contradicts the claim that regulatory uncertainty is deterring business investment.”⁸⁶ Similarly, Professors Cary Coglianese and Christopher Carrigan, leading administrative law scholars at the University of Pennsylvania, examined the impacts of regulation on an economy-wide basis in a 2014 study and concluded that “regulation plays relatively little role in affecting the aggregate number of jobs in the United States.”⁸⁷ They further argue that anti-regulatory claims are based on empty political rhetoric:

From a theoretical standpoint, regulations might reduce employment by increasing product prices. But regulations can also be expected to increase labor demand as well, particularly in producing the technologies or other compliance strategies needed to im-

⁸¹ ENV'TL PROT. AGENCY, BENEFITS AND COSTS OF THE CLEAN AIR ACT, SECOND PROSPECTIVE STUDY: 1990 TO 2020, 2 (2011), <http://www.epa.gov/air/sect812/prospective2.html> [<http://perma.cc/49RN-J4HQ>].

⁸² *Id.* at 2, 14; see also Editorial, *The Job-Creating Mercury Rule*, N.Y. TIMES (Feb. 22, 2012), <http://www.nytimes.com/2012/02/23/opinion/the-job-creating-mercury-rule.html> [<http://perma.cc/5WZY-C548>] (noting that an estimated 11,000 deaths will be prevented by pending mercury rule under the Clean Air Act).

⁸³ *Issues—Bringing Back Jobs and Growth*, *supra* note 8.

⁸⁴ See, e.g., The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary, 112th Cong. (2011), https://judiciary.house.gov/_files/news/Statement%20Full%20Hearing%20HR%203010.html [<http://perma.cc/U7HP-78LJ>] (statement of Rep. Lamar Smith (R-TX), Chair, House Committee on the Judiciary) (“Standing in the way of growth and job creation is a wall of federal regulation.”).

⁸⁵ See, e.g., Sidney Shapiro, et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, CTR. FOR PROGRESSIVE REFORM (2011), http://www.progressivereform.org/articles/sba_regulatory_costs_analysis_1103.pdf [perma.cc/6LZL-GM8M].

⁸⁶ The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary, 112th Cong. 86 (2011) (statement of Sidney Shapiro, Professor of Environmental Law, Wake Forest School of Law).

⁸⁷ CARY COGLIANESE, ET AL., DOES REGULATION KILL JOBS? 7 (2014).

plement new regulations. These opposing forces have the potential to cancel each other out, and empirical research to date suggests this is what happens.

Most of the evidence demonstrates that regulation plays a relatively small role in determining the aggregate number of jobs. Studies either find no relationship at all or they indicate that regulation has at most modest positive or negative effects on overall employment.

Yet . . . politicians still intensely debate regulation's impact on jobs. Of course, it should not surprise anyone to learn that political rhetoric does not track the latest social science research. We know that whatever the evidence may say about policy issues, symbolic gestures play an important role in politics. Politicians face intense pressure to do *something* in the face of crisis – regardless of whether their actions are likely to remedy the underlying problem.⁸⁸

Economic literature and empirical analysis of the impact of regulations on the unemployment rate bolster these analyses. Noting that “[c]laims about government regulation and its detrimental effects on job creation and economic growth are currently receiving substantial attention in the public sphere,” a 2012 George Washington University study, for example, found that “conclusive evidence demonstrating this link between regulatory activity and macroeconomic indicators remains elusive.”⁸⁹ Similarly, Richard Morgenstern, a senior fellow at Resources for the Future who served as a regulatory policy expert at the Environmental Protection Agency under both Republican and Democratic administrations, concluded that there is little economic evidence that environmental regulations “are causing major job losses or major job gains.”⁹⁰ Furthermore, the Economic Policy Institute found that less than 0.3% of employees lost their jobs in extended mass layoffs during the recession due to federal regulation after analyzing data from the Bureau of Labor Statistics.⁹¹ If anything, regulations can promote job growth and put Americans back to work. For instance, the BlueGreen

⁸⁸ Christopher Carrigan & Cary Coglianese, *Informing the Debate over Regulation's Impact on Jobs*, REG BLOG (Mar. 10, 2014), <http://www.regblog.org/2014/03/10/10-carrigan-coglianese-informing-debate/>, [http://perma.cc/9X64-M6U4].

⁸⁹ Tara M. Sinclair & Kathryn Vesey, *Regulation, Jobs, and Economic Growth: An Empirical Analysis*, 1 (The George Washington Univ. Regulatory Studies Ctr. Working Paper 2012), http://regulatorystudies.gwu.edu/images/pdf/032212_sinclair_vesey_reg_jobs_growth.pdf [http://perma.cc/7E8J-TBCX].

⁹⁰ Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Is Minimal*, WASH. POST (Nov. 13, 2011), https://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQUALRF5IN_story.html [http://perma.cc/JB36-GG78].

⁹¹ Isaac Shapiro & John Irons, *Regulation, Employment & the Economy: Fears of Job Loss Are Overblown* (ENVTL. POL'Y INST., Briefing Paper No. 305, 20 2011), http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf [http://perma.cc/EL35-CW54].

Alliance, an organization of America's largest union and environmental organizations,⁹² notes:

Studies on the direct impact of regulations on job growth have found that most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections. The Clean Air Act is a shining example, given that the economy has grown 204% and private sector job creation has expanded 86% since its passage in 1970.⁹³

Surveys of small businesses likewise confirm that federal regulation is not an impediment to hiring or growth. A July 2011 *Wall Street Journal* survey of business economists found that “[t]he main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies.”⁹⁴ Unsurprisingly, a September 2011 National Federation of Independent Business survey of its members found that “poor sales” is the biggest problem facing businesses, not regulation.⁹⁵ A poll conducted by the American Sustainable Business Council, which represents over 200,000 businesses and more than 325,000 business professionals, similarly indicates that most small businesses understand the importance of federal regulation.⁹⁶ It reported that “78% of small employers agree regulations are important in protecting small businesses from unfair competition and leveling the playing field with big business.”⁹⁷ Indeed, the Main Street Alliance, a small business organization, also observes:

In survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers – more demand – not deregulation. Policies that restore our customer base are what we need now, not policies that shift more risk and more costs onto us from big corporate actors. . . . To

⁹² *About Us*, BLUEGREEN ALLIANCE, <https://www.bluegreenalliance.org/about/> [http://perma.cc/BBX5-2DAJ].

⁹³ Letter to Rep. Lamar Smith (R-TX), Chair & Rep. John Conyers, Jr. (D-MI), Ranking Member, House Comm. on the Judiciary, from David A. Forster, Exec. Dir., BlueGreen Alliance 2 (Nov. 2, 2011) (on file with the House Comm. on the Judiciary, Democratic Staff).

⁹⁴ Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring*, WALL ST. J. (July 18, 2011), <http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html> [http://perma.cc/WY8U-THTM] (“Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs.”).

⁹⁵ Press Release, Nat’l Federation of Independent Businesses, Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running (Sept. 13, 2011) <http://www.nfib.com/press-media/press-media-item?cmsid=58190> [http://perma.cc/SHG7-Q5Q3] (“Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs.”).

⁹⁶ Letter from Am. Sustainable Bus. Council to House Comm. on the Judiciary at 2 (Jan. 4, 2016) (on file with the House Comm. on the Judiciary, Democratic Staff).

⁹⁷ *Id.*

create jobs and get our country on a path to a strong economic future, what small businesses need is customers – Americans with spending money in their pockets – not watered down standards that give big corporations free reign to cut corners, use their market power at our expense, and force small businesses to lay people off and close up shop.⁹⁸

Even some conservative policy experts question the claim that regulations undermine employment. Christopher DeMuth, formerly the president of the American Enterprise Institute, a conservative think tank, stated in his prepared testimony that the “focus on jobs . . . can lead to confusion in regulatory debates” and that “the employment effects of regulation, while important, are indeterminate.”⁹⁹ Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, offers this explanation for why conservatives embrace deregulation as a solution for job growth:

Republicans have a problem. People are increasingly concerned about unemployment, but Republicans have nothing to offer them. The G.O.P. opposes additional government spending for jobs programs and, in fact, favors big cuts in spending that would be likely to lead to further layoffs at all levels of government. . . . These constraints have led Republicans to embrace the idea that government regulation is the principal factor holding back employment. They assert that Barack Obama has unleashed a tidal wave of new regulations, which has created uncertainty among businesses and prevents them from investing and hiring. No hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.¹⁰⁰

Although President Trump is committed to efforts to “help scrap job-killing regulations on American businesses,”¹⁰¹ we believe Mr. Bartlett sums up the issue best: there simply is no hard evidence that regulations undermine job development.

⁹⁸ Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, House Comm. on the Judiciary, from Jim Houser, Co-Chair, The Main Street All., et al. 1–2 (Nov. 2, 2011) (on file with the House Comm. on the Judiciary, Democratic staff).

⁹⁹ The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary, 112th Cong. 65 (2011) (statement of Christopher DeMuth, American Enterprise Institute); see also Yang, *supra* note 83 (“In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of government regulations/intervention. By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job creation.”).

¹⁰⁰ Bruce Bartlett, *Misrepresentations, Regulations and Jobs*, N.Y. TIMES ECONOMIX (Oct. 4, 2011), <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/> [<https://perma.cc/NG4T-K5F5>].

¹⁰¹ President Trump (@POTUS), TWITTER (Feb. 24, 2017, 11:46 AM), <https://twitter.com/potus/status/835214271453806592> [<http://perma.cc/THJ2-DF8R>].

C. Dispelling the Myth that Regulations Undermine Innovation

Some anti-regulatory proponents argue that regulation may be “detrimental to economic prosperity to the extent that it deters entrepreneurship.”¹⁰² Higher levels of regulation, they assert, benefit large incumbent firms while placing disproportionate compliance costs on smaller competitors.¹⁰³

Alex Tabarrok, an economics chair at the Mercatus Center (a conservative think tank), refuted this argument in a 2015 study on the effects of regulation on entrepreneurship.¹⁰⁴ Applying the same data set as the anti-regulatory studies, Tabarrok found that industries with “greater regulatory stringency” had “higher startup rates,” as well as similarly high job-creation rates.¹⁰⁵ James Goodwin, a senior policy analyst at the Center for Progressive Reform, adds that regulations also have the effect of creating new markets for competition.¹⁰⁶ For example, regulating toxic chemicals has resulted in new competition by firms and startups in the chemical manufacturing industry.¹⁰⁷ Frank Knapp, Jr., president of the South Carolina Small Business Chamber of Commerce, further argues, “Every responsible new rule that protects the health of our citizens and workers opens a door to newer and better products. Our nation is loaded with these small business entrepreneurs just waiting to solve a problem when the demand is created.”¹⁰⁸ And, based on a 2012 poll of small business owners conducted by the American Sustainable Business Council, 78% of those polled concurred that “regulations are important in protecting small businesses from unfair competition and to level the playing field with big business.”¹⁰⁹

¹⁰² James Bailey & Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, MERCATUS CTR. AT GEORGE MASON UNIV. (Sept. 9, 2015), <http://mercatus.org/publication/regulating-away-competition-effect-regulation-entrepreneurship-and-employment> [<http://perma.cc/CSU4-SLGD>].

¹⁰³ *Id.*

¹⁰⁴ Nathan Goldschlag & Alexander Tabarrok, *Is Regulation to Blame for the Decline in American Entrepreneurship?* 17 (MERCATUS CTR. AT GEORGE MASON UNIV., 2014), http://mason.gmu.edu/~atabarro/Regulation_and_Firm_Dynamics.pdf [<http://perma.cc/C7T7-M2D3>].

¹⁰⁵ Alex Tabarrok, *Is Regulation to Blame for the Decline in American Dynamism?*, MARGINAL REVOLUTION (Feb. 18, 2015), <http://marginalrevolution.com/marginalrevolution/2015/02/is-regulation-to-blame-for-the-decline-in-dynamism.html> [<http://perma.cc/8G77-TSEV>].

¹⁰⁶ *Tangled in Red Tape: New Challenges for Small Manufacturers: Hearing Before the H. Comm. on Small Bus.*, 114th Cong. 4 (2015), [http://www.progressivereform.org/articles/Goodwin%20Testimony%20House%20Small%20Business%20Final%20\(2\).pdf](http://www.progressivereform.org/articles/Goodwin%20Testimony%20House%20Small%20Business%20Final%20(2).pdf) [<http://perma.cc/2GFZ-GCY3>] (statement of James Goodwin, Senior Policy Analyst, Center for Progressive Reform).

¹⁰⁷ *Id.*

¹⁰⁸ *Regulatory Flexibility Act Compliance: Is EPA Failing Business?: Hearing Before the H. Comm. on Small Bus.*, 112th Cong. 3 (2012), http://smallbusiness.house.gov/uploadedfiles/6-27_knapp_testimony.pdf [<http://perma.cc/2GFZ-GCY3>] (statement of Frank Knapp, President, South Carolina Small Business Chamber of Commerce).

¹⁰⁹ Letter from David Levine, CEO & Co-Founder, Am. Sustainable Bus. Council, to Rep. Tom Marino, Chair, & Rep. Henry C. “Hank” Johnson, Ranking Member, Subcomm. on Regulatory Reform, Commercial & Antitrust Law, of the House Comm. on the Judiciary 2 (Feb. 23, 2016) (on file with the House Comm. on the Judiciary, Democratic Staff).

III. OVERVIEW OF ANTI-REGULATORY LEGISLATION THAT MAY BE ENACTED

A. *The Regulatory Accountability Act*

Within two weeks of commencing the new 115th Congress, the House of Representatives passed a comprehensive package of anti-regulatory measures in the form of H.R. 5, the “Regulatory Accountability Act,”¹¹⁰ by a vote of 238 to 183.¹¹¹ The bill was opposed by a broad spectrum of consumer groups,¹¹² labor unions,¹¹³ and environmental organizations,¹¹⁴ among others.¹¹⁵

Title I of H.R. 5,¹¹⁶ the Regulatory Accountability Act (RAA), substantially amends the APA to impose more than sixty additional procedural and analytical requirements to the process that agencies use to promulgate regulations. Many of these new requirements have long been rejected as being ill-conceived.¹¹⁷ For example, the bill would require formal trial-like hearings for high impact rules,¹¹⁸ even though such procedures “largely fell out of favor more than a generation ago as its costs became evident.”¹¹⁹ As Sid-

¹¹⁰ H.R. 5, 115th Cong. (2017).

¹¹¹ 163 Cong. Rec. H371-72 (daily ed. Jan. 11, 2017). Only five Democrats voted for the bill. *Id.*

¹¹² *See, e.g.*, Letter from Rachel Weintraub, Legislative Dir. & Gen. Counsel, Consumer Fed’n of Am., to Members of the U.S. House of Representatives (Jan. 10, 2017), http://consumerfed.org/wp-content/uploads/2017/01/1-10-17-Oppose-RAA_Letter.pdf [<https://perma.cc/NLH5-WKD9>].

¹¹³ *See, e.g.*, Letter from William Samuel, Gov’t Affairs Dep’t, AFL-CIO, to Members of the U.S. House of Representatives (Jan. 10, 2017); Letter from Scott Frey, Dir. of Fed. Gov’t Affairs, AFSCME, to Members of the U.S. House of Representatives (Jan. 9, 2017).

¹¹⁴ *See, e.g.*, Press Release, Nat. Res. Def. Council, 13 Environmental Groups Oppose the Regulatory Accountability Act (RAA), H.R. 5 (January 12, 2017), <https://www.nrdc.org/resources/13-environmental-groups-oppose-regulatory-accountability-act-raa-hr-5> [<https://perma.cc/G3YB-4AJU>].

¹¹⁵ *See, e.g.*, Letter from Robert Weissman, Chair, Coal. for Sensible Safeguards, to Members of the U.S. House of Representatives (Jan. 10, 2017) (describing itself as “an alliance of over 150 labor, scientific, research, good government, faith, community, health, environmental, and public interest groups,” including the American Federation of Teachers, American Lung Association, Consumers Union, Farmworker Justice, League of Conservation Voters, National Women’s Law Center, Natural Resources Defense Council, Service Employees International Union, U.S. Public Interest Research Group, United Food and Commercial Workers Union, and United Steelworkers).

¹¹⁶ H.R. 5, 115th Cong. tit. I (2017).

¹¹⁷ *See, e.g.*, The Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 84 (2013) (statement of David Goldston, Dir. Gov’t Affairs, Nat. Res. Def. Council) (observing that the legislation “is a kind of anthology of bad ideas that have already proven to interfere with efforts to protect the public”).

¹¹⁸ H.R. 5, 115th Cong. tit. I, § 103(b) (2017) (to be codified as 5 U.S.C. § 553(e), (h)).

¹¹⁹ The Regulatory Accountability Act of 2013: Hearing on H.R. 2122 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 38 (2013) (statement of Rep. Steve Cohen, Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary).

ney Shapiro observed, “Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history.”¹²⁰ And the Administrative Law and Regulatory Practice Section of the American Bar Association similarly noted that such requirements “run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete” and that it was unable to identify “a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.”¹²¹

Most critically, the measure would override¹²² laws that prohibit agencies from considering costs, including such laws as the Clean Air Act,¹²³ the Clean Water Act,¹²⁴ the Occupational Safety and Health Act,¹²⁵ and the Federal Mine Safety and Health Act.¹²⁶ As a result, agencies will be forced to weigh the financial and economic costs of critical public health and safety measures against the number of illnesses and lost lives that will result in the absence of such a regulation.

The Obama Administration, with respect to a substantially similar bill considered in the preceding Congress,¹²⁷ issued a strong veto threat.¹²⁸ Stating that the legislation would impose “unnecessary new procedures on agencies and invite frivolous litigation,” the Obama Administration warned that the RAA would impose “layers of additional procedural requirements that would undermine the ability of agencies to execute their statutory mandates” and that these “unnecessary procedural steps” seemed “designed simply to impede the regulatory development process.”¹²⁹ It concluded the bill “would impede the ability of agencies to provide the public with basic protections, and create needless confusion and delay that would prove disruptive for businesses, as well as for State, tribal, and local governments.”¹³⁰

¹²⁰ The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary, 112th Cong. 102 (2011) (statement of Prof. Sidney Shapiro, Wake Forest School of Law).

¹²¹ *Id.* at 144–45 (statement of the Administrative Law and Regulatory Practice Section of the American Bar Association).

¹²² H.R. 5, 115th Cong. tit. I, § 103(b) (2017) (to be codified at 5 U.S.C. § 553(b)(6)).

¹²³ Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered section of 42 U.S.C.). The cost prohibition is codified at 42 U.S.C. § 7142(d)(2) (2012).

¹²⁴ Pub. L. No. 95-217, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.). The limitation on cost consideration is codified at 33 U.S.C. § 1311(b) (2012).

¹²⁵ Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 29 U.S.C.). The limitation on cost consideration is codified at 29 U.S.C. § 655(b)(5) (2012).

¹²⁶ Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended in scattered sections of 30 U.S.C.). The limitation on cost consideration is contained in section 101(a)(6)(A) of the Act.

¹²⁷ H.R. 185, 114th Cong. (2015).

¹²⁸ Statement of Administration Policy: H.R. 185 - Regulatory Accountability Act of 2015, Exec. Office of the President (Jan. 12, 2015), <http://www.presidency.ucsb.edu/ws/index.php?pid=109319> [<https://perma.cc/CA6Z-7FGA>].

¹²⁹ *Id.*

¹³⁰ *Id.*

B. Separation of Powers Restoration Act

The Separation of Powers Restoration Act (SOPRA) comprises Title II of H.R. 5.¹³¹ This measure would require a federal court to review *de novo* agency rulemaking and statutory interpretations.¹³² Specifically, it would mandate a reviewing court to “decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”¹³³ If the underlying statute pursuant to which the regulation was promulgated has a “gap or ambiguity,” SOPRA prohibits the court interpreting that “gap or ambiguity as an implicit delegation to the agency of legislative rule making authority” and it may “not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency’s interpretation on the question of law.”¹³⁴ SOPRA thereby overrides the Supreme Court’s long-recognized principle of judicial deference to agencies’ statutory interpretations. The principle behind deference is that courts recognize the value of agency expertise and political accountability in rulemaking. Thus, SOPRA would empower a generalist court lacking an agency’s expertise, resources, and public input to nullify agency action. As a result of the heightened review standard imposed by the bill, the rulemaking process will become even more costly and time-consuming because it would force agencies to adopt even more detailed factual records and explanations, further delaying the promulgation of critical rules safeguarding public health, safety, and the environment. Furthermore, without any constraint on this review, courts may ignore the administrative record altogether, raising potential separation of powers concerns as courts substitute their own inexpert views and substantive preference for agencies’ expertise and congressionally-delegated authority.

Leading administrative law experts generally agree that abolishing judicial deference to agencies’ interpretations of their statutory authority would make the rulemaking process more costly and time-consuming.¹³⁵ Heightened review would force agencies to adopt more detailed factual records and

¹³¹ H.R. 5, 115th Cong. tit. II (2017).

¹³² *Id.* § 202.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., Michael Herz, *Comments on H.R. 3010, the Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 667 (2012) (“Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.”); Letter from Anna Shavers, Chair, ABA Sec. of Admin. L. and Regulatory Practice, to Sens. Tom Carper (D-DE) and Tom Coburn (R-OK) on S. 1029, the Regulatory Accountability Act of 2013 17, http://www.americanbar.org/content/dam/aba/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf [https://perma.cc/SG4B-RP7Q] (discussing reform of judicial deference to interpretations of rules); Letter from eighty-four administrative law academics to Rep. Bob Goodlatte (R-VA), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, House Comm. on the Judiciary 2 (Jan. 12, 2015) (on file with the House Comm. on the Judiciary, Democratic staff).

explanations, effectively imposing more procedural requirements on agency rulemaking already burdened by procedural delays.¹³⁶

The independent, nonpartisan, and congressionally authorized Administrative Conference of the United States (ACUS)¹³⁷ likewise observed that the consequence of heightened review would be a loss of certainty, efficiency, and fairness in the rulemaking process.¹³⁸ In the context of its opposition to an earlier proposal to enact a *de novo* standard of review for agency rulemaking,¹³⁹ ACUS in 1979 noted that the “most obvious” concern of heightened review would be diminished rulemaking.¹⁴⁰ The consequence of this decline in rulemaking would be severe for both the public and regulated

¹³⁶ *Id.* As Professor Richard Pierce of the George Washington University Law School explained:

Through interpretation and application of sections 553 and 706 of the APA, courts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process that produces results acceptable to a reviewing court in less than half of all cases in which agencies use the process. In particular, the courts have completely rewritten the statutory requirement that an agency must incorporate in each rule a “concise general statement of its basis and purpose.” To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency. Any data gap or any gap in the stated reasoning with respect to any issue can provide the predicate for judicial rejection of the rule on the basis that the agency violated its duty to engage in reasoned decisionmaking. Even after an agency has devoted many years and vast resources to a single rulemaking, it confronts a 50 percent risk that a reviewing court will hold the resulting rule invalid.

Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).

¹³⁷ Established in 1964, ACUS issues recommendations to improve the administrative law process and federal agency procedures. Pub. L. No. 88-499, 78 Stat. 615 (1964). For a legislative history of ACUS, see generally Susan Jensen, *An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1410 (2015).

¹³⁸ Ronald M. Levin, *Judicial Review and the Bumpers Amendment*, 1979 ADMIN. CONF. U.S. 565, 591, <https://www.acus.gov/sites/default/files/documents/Levin%20ACUS%20Bumpers%20report.pdf> [<http://perma.cc/F8GH-9CPA>] [hereinafter “ACUS Report”].

¹³⁹ SOPRA’s *de novo* standard of review of agencies’ statutory interpretations is not a new proposal. See generally Ronald M. Levin, *Review of “Jurisdictional” Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 367–68. Congress first considered various proposals that would have created an enhanced judicial review standard in the late 1970s and early 1980s. See *id.* In 1975, Senator Dale Bumpers (D-AR) first introduced legislation that would establish a *de novo* standard of review of agency action. See *id.* In 1979, the Senate adopted this proposal as an amendment to an unrelated bill, passing by a vote of fifty-one to twenty-seven votes. See *id.* Thereafter, Congress considered various other proposals that similarly required reviewing courts to “independently decide all relevant questions of law.” See *id.* Similar to SOPRA’s *de novo* standard of review, the heightened standard of review in these proposals would have required courts to independently decide all relevant questions of law, review agency determinations of jurisdiction and authority to determine whether they were based on statutory language or other evidence of legislative intent, not accord any presumption in favor of agency determinations of questions of law other than its jurisdiction and authority, and apply what was effectively a “substantial evidence” test for informal rulemaking and the arbitrary or capricious standard. See *id.* Following waves of criticism, however, Congress ultimately rejected these proposals. See *id.*

¹⁴⁰ ACUS Report, *supra* note 131, at 590.

entities in several regards.¹⁴¹ First, it would undermine transparency and certainty for regulated entities.¹⁴² Without the benefit of rulemaking, regulated entities are less aware of agency views. Furthermore, where agencies do issue rules, “profound uncertainty would of necessity prevail while court review proceedings ran their course.”¹⁴³ Second, heightened review would greatly increase regulatory complexity.¹⁴⁴

The CRS also criticized heightened review of agencies’ statutory interpretations, stating that it “will cause delay, complexity, and uncertainty” in the administrative process. In a report on legislation substantively comparable to SOPRA, CRS noted that heightened review would force agencies to dedicate significantly more resources in support of the administrative record in anticipation of review.¹⁴⁵ In addition, CRS observed that “it is almost universally agreed” that the consequence of heightened review will be additional industry challenges to rules.¹⁴⁶ Lastly, CRS expressed concerns that heightened review may skew the agency fact-finding process in favor of those with the resources to shape the agency record by making it more lengthy and costly.¹⁴⁷ Enhanced judicial review could affect public participation in the rulemaking process in other ways, including how agency officials conduct proceedings in anticipation of review, as well as the increased judicial activism that the reform would spur, where individuals have little role in private litigation.¹⁴⁸ Furthermore, parties that oppose a rule could create additional costs and delay in the rulemaking process by increasing the number of appeals of agency determinations.¹⁴⁹

SOPRA also raises separation of powers concerns because it would increase the policymaking power of the Judicial Branch with respect to a broad

¹⁴¹ *Id.*

¹⁴² *Id.* at 591–92.

¹⁴³ *Id.* at 592.

¹⁴⁴ As ACUS explained:

Regulations are normally issued because the agencies perceive a Congressional mandate to issue them; or because agency members feel a conscientious commitment to act as they do; or because of the demands of some outside group that expects to benefit from the new rules. These latter considerations ordinarily impinge on agencies as forcibly, or more forcibly, than any calculus about the chances of prevailing in the courts. In this environment of conflicting pressures, the agencies may respond to the Amendment not so much by promulgating narrower regulations as by conducting more complex rulemaking proceedings, holding more oral hearings, and generating lengthier records, in order to assure that the rule’s validity (can be) established by a preponderance of the evidence shown. These defensive measures can be expected to entail a good deal of overkill, for an agency’s assessment of the danger of reversal is always speculative, and the agency has a strong temptation to engage in what would, in retrospect, be seen as excessive precautions. Such an increase in the complexity of rulemaking activities would appear to be sharply contrary to the underlying purposes of the Amendment. *Id.* at 595.

¹⁴⁵ *Id.* at 46–61.

¹⁴⁶ *Id.* at 47.

¹⁴⁷ *Id.* at 46–47.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

range of highly technical yet politically sensitive regulatory matters. As the Supreme Court in its *Chevron* decision observed, such policy making power should rest primarily in the hands of the elected, politically accountable branches.¹⁵⁰ SOPRA, however, would undermine the political accountability enshrined in the Constitution by forcing federal courts to abandon a legal standard of statutory interpretation that strikes a careful balance among the coordinate branches of government. Eliminating judicial deference may also incentivize judicial activism by allowing a reviewing court to substitute its policy preferences for those of the agency. Rather than deferring to agencies' substantive expertise, enhanced judicial review would enable generalist courts to make policy by applying their policy preferences to their review of an agency rule, whether they do so consciously or not.

C. *Small Business Regulatory Flexibility Improvements Act*

Codified in title III of H.R. 5,¹⁵¹ the Small Business Regulatory Flexibility Improvements Act (SBRFIA) amends the Regulatory Flexibility Act (RFA),¹⁵² which requires a federal agency to prepare a regulatory flexibility analysis¹⁵³ at the time it promulgates certain proposed and final rules that assess the impact of such regulations on "small entities."¹⁵⁴ "Small entities" is defined as a small business, small organization, or small governmental jurisdiction.¹⁵⁵ Congress amended the RFA in 1996 with the enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA)¹⁵⁶ to permit judicial review of an agency's regulatory flexibility analysis for a final rule and of an agency's certification that a rule would not have a significant economic impact on a substantial number of small entities. SBREFA also requires that proposed rules of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) be subject

¹⁵⁰ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984).

¹⁵¹ H.R. 5, 115th Cong. tit. III (2017).

¹⁵² Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. §§ 601–612). In 1996, the RFA was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 242, 110 Stat. 847, 857 (1996), to permit judicial review under certain circumstances of, among other matters, an agency's regulatory flexibility analysis for a final rule and any certification by an agency averring that a rule will not have a significant economic impact on a substantial number of small entities.

¹⁵³ At a minimum, this analysis must: (1) describe the reasons why the rule is being proposed as well as the rule's objectives and legal basis; (2) estimate of the number of small entities to which the proposed rule will apply; (3) describe the rule's projected reporting, recordkeeping, and other compliance requirements; (4) identify all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule; and (5) describe any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. § 603(b)–(c) (2012).

¹⁵⁴ 5 U.S.C. § 601(6) (2012).

¹⁵⁵ *Id.*

¹⁵⁶ Pub. L. No. 104-121, § 242, 110 Stat. 847, 857 (1996).

to an advocacy review panel consisting of representatives of the agency promulgating the rule, the Chief Counsel for Advocacy of the Small Business Administration (SBA), and OIRA.¹⁵⁷

SBRFIA greatly expands the RFA and imposes numerous new procedural and analytical requirements on agencies whenever a rule is subject to the RFA. Among the measure's more problematic aspects is its repeal of the emergency authority¹⁵⁸ that the RFA gives to agencies to waive or delay an initial regulatory flexibility analysis or to delay a final regulatory flexibility analysis.¹⁵⁹ As a result, this provision will prevent agencies from quickly responding to a public health or safety emergency. In addition, SBRFIA imposes the wasteful requirement that agencies amend or rescind all existing rules.¹⁶⁰ Further, SBRFIA expands the availability of judicial review to include any agency action taken to comply with the RFA, and not just "final agency action,"¹⁶¹ as is the case under current law.¹⁶² And SBRFIA grants exclusive jurisdiction to the federal courts of appeals to enjoin, set aside, suspend, or determine the validity of all final rules concerning RFA implementation that have been promulgated by the SBA's Chief Counsel for Advocacy under the authority granted to it under this legislation.¹⁶³ Because of these provisions, SBRFIA creates the opportunity for well-funded anti-regulatory business interests to engage in frivolous litigation. The end result of this legislation would be paralysis by analysis.

D. Require Evaluation Before Implementing Executive Wishlists Act

Title IV of H.R. 5 consists of the Require Evaluation Before Implementing Executive Wishlists Act (the REVIEW Act), which amends § 705 of the APA, which authorizes agencies to postpone the effective date of a

¹⁵⁷ 5 U.S.C. § 609(b) (2012). The review panel requirement was extended to the Consumer Financial Protection Bureau in 2010 through the enactment of the Dodd-Frank Act. *See* 5 U.S.C. § 609(d) (2012).

¹⁵⁸ *See* H.R. 5, 115th Cong. tit. III, § 305 (2017).

¹⁵⁹ Section 608 of the RFA, in pertinent part, allows an agency to waive or delay the completion of some or all of the requirements of § 603 (requiring a regulatory flexibility analysis for an initial rulemaking) and to issue a final rule "in response to an emergency that makes compliance or timely compliance with the provisions of § 603 of this title impracticable." 5 U.S.C. § 608(a) (2012).

¹⁶⁰ *See* H.R. 5, 115th Cong. tit. III, § 307 (2017). Specifically, this provision directs that an "agency shall amend or rescind the rule to minimize any adverse significant economic impact on a substantial number of small entities or disproportionate economic impact on a specific class of small entities . . ." *Id.* (emphasis added). In other words, regardless of the findings of any review of existing regulations, agencies must amend or rescind all existing rules, even when the review finds there is no need to amend or rescind a particular rule.

¹⁶¹ H.R. 5, 115th Cong. tit. III, § 308 (2017).

¹⁶² 5 U.S.C. § 611 (2012).

¹⁶³ H.R. 5, 115th Cong. tit. III, § 309 (2017).

rule pending judicial review when “justice so requires” or “to prevent irreparable injury.”¹⁶⁴

The REVIEW Act amends Section 705 in several respects. First, the bill establishes a new Section 705(b) that would prohibit a final “high-impact rule” (defined as a rule that imposes an annual cost on the economy in excess of \$1 billion) from being published or taking effect until the OIRA Administrator determines whether the rule qualifies as a high-impact rule.¹⁶⁵ Such determination would have to be published by the agency together with the final rule.¹⁶⁶ Second, the bill would require an agency to postpone the effective date of any high-impact rule until the final disposition of all actions seeking judicial review of it.¹⁶⁷ Third, the bill provides that, if no person seeks judicial review of a high impact rule either: (1) within any period explicitly provided for judicial review under applicable law; or (2) during the sixty-day period beginning on the date the high impact rule is published in the *Federal Register*, then the rule can take effect as soon as the applicable period ends.¹⁶⁸ In sum, the measure would automatically stay the implementation of any rule that imposes an annual cost of more than \$1 billion on the economy if a party seeks judicial review of such rule within certain timeframes.

The REVIEW Act is essentially an open invitation for anyone who opposes a proposed regulation to stay its implementation by seeking judicial review. This legislation would worsen regulatory paralysis and delay in the rulemaking system by enabling regulated interests to block the implementation of critical rules simply by filing a lawsuit. As Professor William Funk explains, the REVIEW Act’s “absolute incentive” to challenge and stay the implementation of high-impact rules would create years of costly delays.¹⁶⁹ Professor William Buzbee concurs that the bill will cause “virtually all” high-impact rules to be blocked by “years of litigation.”¹⁷⁰ And it is particularly problematic that the legislation fails to impose any requirement that a

¹⁶⁴ 5 U.S.C. § 705 (2012). With respect to irreparable harm, the Supreme Court requires a reviewing court to determine whether the party seeking to delay the rule will be irreparably harmed absent a stay and has made a strong showing that it will succeed on the merits of the case, or alternatively, whether granting a stay serves the public interest and avoids substantial injury to another party to the litigation. *Niken v. Holder*, 556 U.S. 418, 426 (2009). The Court has also noted that stays are an intrusion into the “ordinary processes of administration” and that judicial review is “not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Id.* at 427.

¹⁶⁵ H.R. 5, 115th Cong. tit. IV, § 402 (2017).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ The Require Evaluation Before Implementing Executive Wishlists Act of 2015 and the Regulatory Predictability for Business Growth Act of 2015: Hearing on H.R. 3438 & H.R. 2631 before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 5 (2016) (statement of Professor William Funk, Lewis and Clark Law School) (on file with House Comm. on the Judiciary, Democratic staff).

¹⁷⁰ *Id.* at 53 (statement of William Buzbee, Professor of Law, Georgetown University Law Center).

judicial review challenge to a rulemaking be meritorious. As a result, any entity that opposes a proposed regulation could commence a lawsuit against it and successfully delay its implementation while the court determines the sufficiency of the suit.¹⁷¹ Worse yet, the measure has no exception allowing agencies to respond to emergency situations.

E. All Economic Regulations are Transparent Act

Title V of H.R. 5, the All Economic Regulations are Transparent Act (ALERT Act),¹⁷² would require a federal agency to submit to OIRA monthly reports on each rule the agency expects to propose or finalize during the succeeding twelve-month period and direct the OIRA Administrator to make such information publicly available on the Internet.¹⁷³ Of critical importance, the ALERT Act would impose a one-size-fits-all moratorium prohibiting virtually all such rules from becoming effective until the information required by the bill has been available online for six months, subject to two woefully inadequate exceptions.¹⁷⁴ In addition, the ALERT Act specifically requires OIRA, in its annual cumulative assessment of agency rulemaking, to report

¹⁷¹ *Id.*

¹⁷² H.R. 5, 115th Cong. tit. V (2017).

¹⁷³ *Id.* § 502.

¹⁷⁴ One exception to the six-month moratorium would require the President to issue an executive order based on the determination that the rule pertains to: (1) an imminent threat to health or safety or other emergency; (2) the enforcement of criminal laws; (3) national security; or (4) the implementation of a statutorily-mandated international trade agreement. *Id.* The other exception applies if the rule qualifies under § 553 of the APA, as amended by H.R. 5, which provides “the agency for good cause, based upon evidence, finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that compliance . . . is impracticable or contrary to the public interest, including interests of national security” *Id.* § 103(b). Clearly, this is problematic, as it is restricted to situations where the President determines that the rule is necessary to address an *imminent* threat to health or safety or other emergency, necessary for the enforcement of criminal laws, necessary for national security, or issued pursuant to any statute implementing an international trade agreement. And it is unreasonable to require a President, who may be in the midst of a national crisis, to take time out to author an executive order dispensing with the bill’s moratorium each time a rule is promulgated.

The other exception is equally problematic. It applies if the proposed rule falls within the APA’s “good cause” exception to the Act’s notice and comment requirement, which the courts have strictly interpreted. As the Court of Appeals for the District of Columbia Circuit opined, “We have repeatedly made clear that the good cause exception ‘is to be narrowly construed and only reluctantly countenanced.’” *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. Env’t Prot. Agency*, 236 F.3d 749, 754 (D.C. Cir. 2001)); *see also Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (“The exception excuses notice and comment in emergency situations, or where delay could result in serious harm.”); *see also Am. Fed. of Gov’t Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (“As the legislative history of the APA makes clear, moreover, the exceptions at issue here are *not* ‘escape clauses’ that may be arbitrarily utilized at the agency’s whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations”).

only the total cost of all rules proposed or finalized during the preceding year “without reducing the cost by any offsetting benefits.”¹⁷⁵

When one considers the fact that about 4,000 to 6,000 regulations are typically issued each year, many of which pertain to purely technical or ministerial matters, each of which—as a result of this bill—would be held up for six months, unless it could be pigeonholed into one of the bill’s two problematic exceptions, it is clear that this measure is thoroughly impracticable.

F. *Providing Accountability Through Transparency Act*

Included as title VI of H.R. 5, the Providing Accountability Through Transparency Act (PATT Act) would require that the general notice of proposed rulemaking by a federal agency include a link to the Internet of a plain-language summary of the proposed rule, not to exceed 100 words, which must be posted on the regulations.gov website.¹⁷⁶

While facially benign, this requirement could have some unintended consequences. Instead of making the rulemaking process more transparent, accessible, and understandable to the public, it may produce the opposite result. Proposed rules are published in the *Federal Register*, where a printed page contains about 1,000 words.¹⁷⁷ The mean length of notices for complex rulemakings is approximately fifty *Federal Register* pages.¹⁷⁸ Thus, with respect to the measure’s application to extremely complex rulemakings—which can often exceed fifty pages as published in the *Federal Register*—the 100-word limit may fail to ensure that the summary provides a sufficiently meaningful explanation of the rulemaking. For example, the paragraph above—which attempts to summarize this two-page measure—is nearly fifty words in length.

Another concern presented by the PATT Act is that an agency’s compliance with this measure’s new requirement could be subject to judicial review under Section 706 of the APA.¹⁷⁹ Unless otherwise prohibited by law, Section 706 authorizes a court “to hold unlawful and set aside agency action, findings, and conclusions,” pursuant to certain grounds set out in that provision.¹⁸⁰ In sum, the PATT Act may present yet another opportunity for opponents of a proposed rulemaking to delay its finalization on the ground that a summary was somehow “not in accordance with law” or not in “observance of procedure,” for example.¹⁸¹ Thus, an entity that opposes a proposed rule could seek judicial review of whether the summary required by the PATT Act sufficiently describes the regulation at issue, which would delay the fi-

¹⁷⁵ H.R. 5, 115th Cong. tit. V, § 502 (2017).

¹⁷⁶ H.R. 5, 115th Cong. tit. VI (2017).

¹⁷⁷ See Cynthia R. Farina *et al.*, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1390 (2015).

¹⁷⁸ *Id.* at 1387.

¹⁷⁹ 5 U.S.C. § 706 (2012).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

nal implementation. Indeed, “[m]any scholars have long maintained” that the current rulemaking process has already become too “ossified,” i.e., that “it takes a long time and an extensive commitment of agency resources” to promulgate a finalized rule and that such ossification is attributable “primarily to the courts, with secondary roles for Congress and the White House.”¹⁸²

G. Regulations from the Executive in Need of Scrutiny Act

In the first week that the 115th Congress was in session, the House passed H.R. 26, the “Regulations From the Executive in Need of Scrutiny Act of 2017” (REINS Act),¹⁸³ which would require *both* Houses of Congress and the President to approve *all* new major rules before they take effect.¹⁸⁴ Major rules are defined as rules with an annual impact on the economy of at least \$100 million, or rules meeting certain specified criteria.¹⁸⁵ The REINS Act, which amends the CRA,¹⁸⁶ may result in an unconstitutional one-house legislative veto.¹⁸⁷ In addition, the REINS Act would impose an extensive series of additional procedural mandates under the amended CRA,¹⁸⁸ the ultimate effect of which will be to further burden the ability of agencies to conduct rulemakings and provide greater opportunities for well-financed industry representatives to stop major rules from going into effect.

The REINS Act’s congressional assent requirement would overlay an already time-consuming rulemaking process that often takes years to conclude. And it would subject rulemakings to the vagaries of congressional gridlock or deliberate inaction, which would be an effective veto of even critically needed rules. In particular, the measure’s congressional approval requirement for all major rules would consume vast amounts of limited congressional time and resources that would necessarily have to be diverted from other critical legislative, oversight, and constituent responsibilities.¹⁸⁹

¹⁸² Pierce, *supra* note 26 at 1493–94.

¹⁸³ H.R. 26, 115th Cong. (2017).

¹⁸⁴ *Id.*

¹⁸⁵ The CRA defines “major rule” as any rule that OIRA determines has resulted in or is likely to result in:

(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

5 U.S.C. § 804(2) (2012).

¹⁸⁶ 5 U.S.C. §§ 801–08 (2012).

¹⁸⁷ See H.R. 26, 115th Cong. § 3 (2017) (requiring that a “major rule shall not take effect unless the Congress enacts a joint resolution of approval”).

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., “REINS Act of 2013:” Promoting Jobs, Growth, and American Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 68 (2013) (statement of Ronald M. Levin, Wil-

In a typical year, eighty major rules are promulgated, and with the REINS Act, there may be *as little as just fifteen days* available to consider such measures based on the Majority's legislative calendar for the current year.¹⁹⁰ Furthermore, Congress may *only* consider such resolutions within seventy legislative days of receiving a major rule.¹⁹¹ This process would constructively end rulemaking as we know it.

Furthermore, the REINS Act, by requiring Congress to pass judgment on major rules by Members lacking the expertise and time to make a well-informed decision, would allow well-subsidized business interests to further influence the rulemaking process. Major rules generally involve highly technical and complex scientific data as well as other types of evidence that require substantive expertise to decipher. Because Members of Congress lack the time and the resources to provide meaningful review of such rules, they would likely be heavily dependent on "advice" from well-funded industry lobbyists regarding the merits of a rulemaking under consideration.¹⁹²

This is not the first time that Congress has considered a congressional approval mechanism for agency rulemaking. In the early 1980s, Congress held a number of hearings on this concept¹⁹³ and a bill was introduced that would have required affirmative congressional assent to all major rules.¹⁹⁴ Wisely, Congress chose not to pursue such a mechanism. Indeed, Chief Justice John G. Roberts, Jr., when he was an Associate White House Counsel in

liam R. Orthwein Distinguished Professor of Law, Washington University in St. Louis) ("Even though the REINS Act contains exemptions from the filibuster, floor time is a scarce asset, and should not readily be committed to a substantial workload without a justifying payoff. On the other hand, if the assumption is that members would vote to rubberstamp a rule without paying much attention, what would be the benefit of insisting on affirmative approval?").

¹⁹⁰ H.R. 26, 115th Cong. § 3 (2017).

¹⁹¹ *Id.* (specifying that if a joint resolution "is not enacted into law by the end of 70 session days or legislative days, as applicable . . . then the rule described in that resolution shall be deemed not to be approved and such rule shall not take effect").

¹⁹² Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial & Admin. L. of the H. Comm. on the Judiciary, 112th Cong. 126 (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council) ("Lobbyists would descend on Congress with even greater fervor than is currently the case to pressure Members to take their side on individual regulations.").

¹⁹³ See, e.g., Constitutional Amendment to Restore Legislative Veto: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 98th Cong. (1984); An Amendment to Sec. 13 of S. 1080, The Regulatory Reform Act, to Provide for Congressional Review of Agency Rules: Hearing Before the Subcomm. on Admin. Practice & Proc. of the S. Comm. on the Judiciary, 98th Cong. (1984); On the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional: Hearing Before the H. Comm. on Rules, 98th Cong. (1983); Legislative Veto and the "Chadha" Decision: Hearing before the Subcomm. on Admin. Practice & Proc. of the S. Comm. on the Judiciary, 98th Cong. (1983); The Supreme Court Decision in *INS v. Chadha* and its Implications for Congressional Oversight and Agency Rulemaking: Hearing before the Subcomm. on Admin. Law & Gov't'l Rels. of the H. Comm. on the Judiciary, 98th Cong. (1983).

¹⁹⁴ H.R. 3939, 98th Cong. tit. II (1983). Then-Rep. Trent Lott (R-MS) was the sponsor of this legislation, which was cosponsored by seventy-nine Members, all but five of them Republicans.

1983, criticized this idea because it would “hobbl[e] agency rulemaking by requiring affirmative Congressional assent to all major rules.”¹⁹⁵ He further noted that such a provision “would seem to impose excessive burdens on the regulatory agencies in a manner that could well impede the achievement of Administration objectives.”¹⁹⁶

In addition to imposing an unworkable approval process, the REINS Act raises constitutional concerns because it may provide for what arguably is an unconstitutional one-House legislative veto. As Professor Ronald Levin testified, one House of Congress can effectively veto an agency’s rule under H.R. 26’s congressional approval mechanism by simply not acting within the seventy-legislative-day-timeframe provided for in the bill.¹⁹⁷ Such a mechanism would be, in effect, indistinguishable from the one-house legislative veto that the Supreme Court held to be unconstitutional in *INS v. Chadha*.¹⁹⁸ In *Chadha*, the Court held that a veto of a federal agency’s legislative act by the House was itself a legislative act that required passage by both Houses of Congress and presentment to the President for his signature.¹⁹⁹ Under the REINS Act, one House could effectively veto an agency rule (*i.e.*, a legislative act) without meeting the Constitutional requirements discussed in *Chadha* by simply not acting to pass a resolution of approval.

H. *The Midnight Rules Relief Act*

Also during its first week in session in the 115th Congress, the House passed H.R. 21, the “Midnight Rules Relief Act of 2017” (Midnight Rules Act),²⁰⁰ a sweeping measure that would dramatically expand the ability of Congress to summarily disapprove rules submitted to it under the CRA during the last six months or so of an outgoing presidential administration. Were this bill currently in effect, every regulation submitted to Congress since May 16, 2016 through the end of 2016—including critical, time-sensitive public health and safety regulations—could be invalidated by the next Congress *en bloc* via a joint resolution without allowing Members to consider

¹⁹⁵ “REINS Act of 2013”: Promoting Jobs, Growth, and American Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 28 (2013) (statement of Steve Cohen, Ranking Member, Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary); Guest Blogger, *Roberts Showed Prudence in Reg Reform Initiative*, CTR. FOR EFFECTIVE GOV’T (Sept. 6, 2005), <http://www.foreffectivegov.org/node/2652> [https://perma.cc/HME9-CMHL].

¹⁹⁶ Guest Blogger, *infra* note 196.

¹⁹⁷ The “REINS Act of 2013”: Promoting Jobs, Growth, and American Competitiveness: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 64 (2013) (statement of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis).

¹⁹⁸ *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

¹⁹⁹ *Id.* at 952–59.

²⁰⁰ H.R. 21, 115th Cong. (2017). The term “midnight rule” refers to a final administrative agency rule promulgated at the end of an outgoing presidential administration’s term of office.

the merits of each individual regulation and regardless of how many years it took to formulate these rules. In effect, the *en bloc* disapproval process authorized by the Midnight Rules Act would facilitate wholesale eradication of a prior administration's regulatory agenda. And, by operation of current law, an agency would be prohibited from ever issuing a replacement rule that is substantially the same as a regulation invalidated under this measure, absent congressional action.²⁰¹

The general concern is that such rule could reflect an effort by an outgoing administration to bind the incoming administration. As one analysis explains:

An incoming administration cannot simply undo a final midnight rule published in the Federal Register if the rule is subject to the Administrative Procedure Act's notice-and-comment requirements, as is the case with most significant rules. The new administration can modify or revoke the rule only by initiating a new rule-making procedure—that is, by publishing a new proposed rule in the Federal Register, affording the public an opportunity to submit comments, reviewing the comments, and so forth.²⁰²

The Midnight Rules Relief Act, however, seeks to address a nonexistent problem. So-called midnight rules may actually take longer to adopt than other rules. Public Citizen, in its July 2016 report, found that rules finalized during a transition period typically were proposed several years prior to their adoption, short-circuiting the Majority's stated premise in support of the bill.²⁰³ Public Citizen reported that the average rulemaking duration for economically significant rules, rules that have an effect on the economy exceeding \$100 million, adopted in transition periods was 3.6 years.²⁰⁴ The same study found that, by comparison, economically significant rules adopted in non-transition periods took 2.8 years to complete.²⁰⁵ In addition, ACUS studied the same phenomenon and concluded that many of these rules involve "relatively routine matters not implicating new policy initiatives by incumbent administrations," and that the "majority of the rules appear to be the result of finishing tasks that were initiated before the Presidential transition period or the result of deadlines outside the agency's control (such as year-

²⁰¹ 5 U.S.C. § 801(b)(2) (2012).

²⁰² HOUSE COMM. ON THE JUDICIARY MAJORITY STAFF, FINAL REPORT TO CHAIRMAN JOHN CONYERS, JR.: REINING IN THE IMPERIAL PRESIDENCY—LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 181 (2009) (footnotes omitted).

²⁰³ Michael Tanglis, *Shining a Light on the "Midnight Rule" Boogeyman*, PUB. CITIZEN (July 18, 2016), <http://citizen.org/documents/Midnight-Regs-Myth.pdf> [<https://perma.cc/3EKC-ES98>].

²⁰⁴ *Id.* at 4.

²⁰⁵ *Id.*

end statutory or court-ordered deadlines).”²⁰⁶ Similarly, the Center for Progressive Reform observes that concerns surrounding midnight rulemaking are overstated and that they are motivated by “ensuring that certain fundamentally antiregulatory components of the rulemaking process—namely, cost-benefit analysis and OIRA review—are afforded every opportunity to achieve the antiregulatory ends that some would desire,” not improving the quality of rules.²⁰⁷

In sum, the *en bloc* disapproval process authorized by this measure would facilitate wholesale eradication of a prior administration’s regulatory agenda, without giving Congress the opportunity to consider the merits of individual regulations. And, once any such rule is invalidated, the agency that promulgated it would be prohibited under the CRA from ever issuing replacement rules that are “substantially the same” absent congressional action.²⁰⁸

CONCLUSION

The concerns highlighted in this article are not limited to ill-conceived efforts to reform our Nation’s rulemaking process. Rather, our critical point is that when Congress legislates, it must do so in a prudential and deliberative manner based on actual facts and reliable data. When we fail to adhere to that protocol, especially in a time when one political party controls both

²⁰⁶ ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-2: MIDNIGHT RULES 1–2 (June 14, 2012), <https://www.acus.gov/sites/default/files/Final-Recommendation-2012-2-Midnight-Rules.pdf> [<https://perma.cc/39KV-QTFD>].

²⁰⁷ As CPR explained:

While “midnight regulations” might make for a good political talking point, there simply is no reason to believe that a rule released at the end of an administration is worse than those that are released at any other point. In fact, the administration could have been working on such rules for as long as seven years, which, according to the logic of the midnight regulation alarmists, would suggest that the quality of the rules is even better. After all, if the underlying assumption is that longer rulemakings make for better rules, then many of these last rules could very well be the best of the administration. . . . But all of this talk about alleged concerns regarding rule quality is actually beside the point. Just take a close look at the arguments that the midnight regulation alarmists raise. You’ll see that their real concern is about ensuring that individual rules are subjected to extensive cost-benefit analysis (purportedly to maximize the rule’s net benefits) and lengthy review by the White House Office of Information and Regulatory Affairs (OIRA). Anti-regulatory advocates assume—and they hope others will, too—that cost-benefit analysis and OIRA review leads to “better” rules, but that is not the case in reality. Instead, these institutions lead inexorably to less protective rules and needless delay. While such results may match the policy preferences of corporate interests and their ideological allies, they are highly inconsistent with public’s interest in seeing that agencies carry out their statutory mission in a timely and effective manner.

James Goodwin, *Midnight Regulations, Shmidnight Shmegulations*, CTR. FOR PROGRESSIVE REFORM (Feb. 12, 2016), <http://sensiblesafeguards.org/midnight-regulations-shmidnight-shmegulations/> [<https://perma.cc/Y69B-Y4V7>].

²⁰⁸ 5 U.S.C. § 801(b)(2) (2012).

Houses of Congress as well as the Executive Office of the President, Americans are especially at risk.