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**BEFORE THE HOUSE COMMITTEE ON JUDICIARY  
SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST**

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Thank you, Chairman Massie, Ranking Member Cicilline, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning the REINS Act and the importance of regulatory protections.

I am a Professor of Law at The George Washington University Law School. I also serve as Vice Provost for Faculty Affairs for the University, and am a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, energy law, and environmental law, I specialize in the way agency expertise and science-informed decisionmaking effectuate congressional intent in bringing the benefits of regulatory protections to the public. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on topics related to my expertise. Early in my career, I practiced as a civil and environmental engineer; that experience and training particularly inform my assessment of the legal framework within which agencies make decisions involving scientific or technical complexity.

I am deeply concerned about the REINS Act. It is impractical and harmful to the people of this country. It is poor governance that eviscerates a core of government legitimacy—reasonableness. And it is likely unconstitutional. In my testimony today, I will first provide a general overview of the role of agency expertise and administrative procedures in developing regulatory protections, paying special attention to the guardrails that Congress has in place to ensure fidelity to statute and democratic accountability. Next, I will explain why the REINS Act would fail to achieve what it promises and would instead harm our economy, our safety, our health, and our environment. I will conclude with commentary on its constitutional flaws.

**I. The Role of Agency Expertise and Administrative Procedures in Carrying Out Congressional Intent**

Congress has long recognized that among the branches of government, agencies—within the executive branch—are best positioned to leverage specialized expertise to tackle the most challenging issues we face as a society. Early expressions of this congressional intent, for example, were designed to protect the functioning of our economy,<sup>1</sup> to begin to offer some

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<sup>1</sup> *See, e.g.*, *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944) (regarding Federal Power Commission's rate order, "It is the product of expert judgment which carries a presumption of validity."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1266-67 (1986) (describing faith in "ability of experts to develop effective solutions to the economic disruptions created by a market system").

protection against inhumane working conditions,<sup>2</sup> and to harness the power of the atom for peaceful purposes.<sup>3</sup> In the 1960s and 1970s, it became clear that more protections were desperately needed—for health, safety, and the environment—and this institution further entrusted agencies to bring their deep expertise to bear on matters involving “significant scientific uncertainties, where the stakes were potentially life-and-death.”<sup>4</sup>

For nearly a century, therefore, Congress has recognized that agencies are in the best position to gather technical and scientific information, conduct studies, and leverage the professional judgment of doctors and veterinarians, epidemiologists and pathologists, food and crop scientists, geologists, biologists, and hydrologists, engineers, economists... the list is long. The point is that the challenges of today are incredibly complex and difficult to address solely in the legislative arena; thus, Congress establishes the statutory basis for action but tasks the Executive Branch with the duty to bring that legislative vision to life.

To be sure, Congress has put a number of guardrails in place to promote transparency and accountability and to enable its oversight of the agencies. The Administrative Procedure Act, for example, requires agencies engaged in rulemaking to “give interested persons an opportunity to participate,” consider “the relevant matter presented,” and explain their ultimate decisions in a “concise . . . statement of basis and purpose.”<sup>5</sup> As my co-author and I have described, these requirements and their corollaries “reinforce notions of legitimacy”:

First, they are consistent with participation and voice—attributes considered fundamental to democratic decisionmaking as well as to the perceived legitimacy of the process. Second, they encourage and reward deliberation and responsiveness. The former furthers neutrality and protects against arbitrariness and extreme outcomes by slowing the pace of decisionmaking and bringing the benefits of dialog to bear on proposed agency actions. The latter fosters trust and demonstrates that participants were treated with respect. Finally, these procedural rules are important building blocks for one of administrative law’s ultimate legitimizers: reasoned decisionmaking.<sup>6</sup>

As suggested above, the reason-giving requirement serves several purposes relevant to this hearing’s topic. First, it alleviates concerns about legislative delegations of rulemaking authority. This is because agencies, unlike Congress, are not afforded a presumption of lawfulness—they are reviewed on the basis of their reasoning at the time they made the decision.<sup>7</sup> This principle

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<sup>2</sup> *E.g.*, The Fair Labor Standards Act, 29 U.S.C. § 203(l) (assigning Secretary of Labor responsibility in defining prohibited “oppressive child labor”); National Labor Relations Act, 29 U.S.C. § 160 (assigning National Labor Relations Board responsibility to prevent unfair labor practices).

<sup>3</sup> *E.g.*, Atomic Energy Act of 1954, 42 U.S.C. § 2011.

<sup>4</sup> Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733, 757 (2011); *see, e.g.*, Consumer Product Safety Act of 1972; Federal Water Pollution Control Act Amendments of 1972; Clean Air Act Amendments of 1970; The Occupational Safety and Health Act of 1970; National Environmental Policy Act of 1969.

<sup>5</sup> 5 U.S.C. § 553(c).

<sup>6</sup> Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Env’t L. Rev. 313, 323 (2013) (footnotes omitted).

<sup>7</sup> *See* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Emily Hammond, *Deference and Dialog in Administrative Law*, 111 Colum. L. Rev. 1722, 1736-37 (2011) (elaborating on this point).

ensures that they transparently explain the basis for their actions, provide a reasonable explanation, and maintain fidelity to statute. To emphasize the point, the final rule must be within the bounds Congress has authorized.<sup>8</sup>

Thus, reason-giving . . . facilitates oversight . . . because it permits other stakeholders—Congress, the executive, regulated entities, and regulatory beneficiaries—to understand the agency’s justifications and hold it accountable for its decisions. In this way, the transparency of reason-giving enables democratic oversight, helping ensure agencies’ legitimacy in the democratic scheme.<sup>9</sup>

Of course, many other checks on agency action are at play during rulemaking. Among these are the reviews conducted by the Office of Information and Regulatory Affairs (OIRA) for executive agencies’ rules, other statutory restrictions, like the Unfunded Mandates Reform Act, and the ongoing dialogue that occurs between the legislative and executive branches.

In addition, judicial review can reinforce statutory boundaries and provide signals to Congress about agencies’ fidelity to statute. This is true regardless of which standard of review applies because agencies are always expected to act within their statutory bounds. One doctrine, of course, that garners much attention is that of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*<sup>10</sup> The test provides that when a court reviews an agency’s interpretation of a statute it administers, the court must ask first whether Congress has spoken clearly; if so, the clear language controls.<sup>11</sup> If not, the court will uphold the agency’s permissible—that is, reasonable—construction of the statute.<sup>12</sup>

With almost forty years’ experience with *Chevron*, moreover, Congress can craft substantive statutory language more tightly if it wants to cabin an agency’s discretion in carrying out its mandate. The *Chevron* doctrine also facilitates Congress’s ability to monitor agencies by incentivizing agencies to use procedures that are more transparent; this is a key function of *United States v. Mead Corp.*<sup>13</sup> Agencies’ procedural choices matter because they impact the level of deference that will be afforded on judicial review.<sup>14</sup>

The topic of judicial review deserves a large caveat, however. What this institution should really be concerned about is the current dysfunction in the courts, which is straining separation of powers, and disrupting agencies in carrying out the mandates that Congress has given them to protect the people of this country and our environment. Although a full explication is beyond the scope of this hearing, one especially pernicious doctrine is the Major Questions Doctrine,<sup>15</sup>

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<sup>8</sup> *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 534 (2008).

<sup>9</sup> *Hammond & Markell*, *supra* n.6, at 325.

<sup>10</sup> 467 U.S. 837 (1984).

<sup>11</sup> *Id.* at 842-43 (1984).

<sup>12</sup> *Id.*

<sup>13</sup> 533 U.S. 218 (2001).

<sup>14</sup> This point is eloquently made in Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *Colum. L. Rev.* 1749 (2007).

<sup>15</sup> *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

which is unprincipled,<sup>16</sup> results in a weakening of regulatory protections,<sup>17</sup> and amounts to a “power grab” in the Supreme Court.<sup>18</sup>

## II. Room for Improvement – But REINS Act Would Harm

I emphasize that there is always room for improvement in agency decisionmaking; Representative Jayapal’s Stop Corporate Capture Act, for example, offers several upgrades aimed at empowering the public, ending corporate manipulation, prioritizing social justice and equity, and minimizing the dysfunction that OIRA review engenders. By contrast, the REINS Act is utterly impractical, unwise, and ultimately threatening to the most basic notions of health, safety, and welfare that our nation needs to thrive.

The REINS Act would replace science-informed, participatory government decisionmaking with an utterly impractical system. Congress is neither designed nor staffed to deeply evaluate every single agency’s major rules, particularly within seventy days (and with committee consideration within only fifteen days).<sup>19</sup> For all agencies’ major rules to suddenly flood the halls of Congress would overwhelm the Comptroller General, inundate the committees, and distract the Houses from all their legislative priorities. And to suggest that the entire record of even one agency’s considered effort in creating a rule—which may have been years in the making—could be thoughtfully approved or rejected in such a short time is a fallacy meant to obscure the real aims of the Act.

Indeed, the REINS Act’s suggestion that it is meant to promote legislative transparency is baffling. It permits only one or two hours of debate on the joint resolutions and otherwise sets such tight timeframes that it is difficult to understand how legislators could give a careful review to each regulation. This scenario promotes opacity and heightens the risk that votes will be based on naked political preferences that would not be permissible in the agencies themselves.

What is more, the wellbeing of our people and our planet hangs in the balance. The REINS Act is transparent in one thing: its intent to take away the basic protections agencies offer for the safety of our workers, food, water, and cars; the efficacy of our medicines; the equity and dignity to which all people are entitled; and the health of our planet on which we all rely. Right now, America needs more protections—not fewer. We know from the East Palestine disaster what an anti-regulatory culture can do, and we have seen these lessons across our history; think back to the 2008 Wall Street Collapse, for example. We know as well that weak regulatory protections mean fewer people make it home to their families after work, more people die too soon, and we hasten and intensify the climate disasters that are only increasing in frequency. This isn’t idle speculation; it is backed up by the cost-benefit analyses that the REINS Act asks for but that are already available for review by Congress and the public.<sup>20</sup>

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<sup>16</sup> E.g., Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, -- Cal. L. Rev. – (forthcoming 2023).

<sup>17</sup> E.g. Thomas McGarity, *The Major Questions Doctrine Wrecking Ball*, -- Va. Env’t L.J. – (forthcoming 2023).

<sup>18</sup> E.g. Lisa Heinzerling, *The Supreme Court’s Clean-Power Power Grab*, 28 Georgetown Env’t L. Rev. 425 (2016).

<sup>19</sup> Although the Act asks the Comptroller General to produce a report about the number of regulations on the books, of course this institution already has a sense of agencies’ workloads because this institution created those workloads.

<sup>20</sup> Much of this information is easily available at regulations.gov. For plain-language examples, see DOE, Press Release, *DOE Finalizes Two New Rules for General Service Lamps That Will Conserve Energy, Save Consumers*

The REINS Act also claims that it will result in more carefully drafted and detailed legislation, but this institution knows how to do that. The examples span the U.S. Code, but consider two. Congress made very clear in its 1990 Clean Air Act amendments that indeed, this institution intends for EPA to provide protections against air toxics. The Infrastructure Investment and Jobs Act is also quite precise in the many programs it established, like the Joint Office of Energy and Transportation that is working toward a zero-emission transportation infrastructure.

### III. The REINS Act is Constitutionally Suspect

Finally, the REINS Act is concerning because it blurs separation of powers beyond what the Constitution can bear. First, in establishing the joint resolution process, the Act seems to insist that the agency rule remains an action of the Executive Branch. But because Congress means to prevent agency rules from becoming binding law in the absence of a joint resolution, it is exercising its legislative power. And in *INS v. Chadha*, the Supreme Court held that legislative acts are subject to the bicameralism and presentment requirements of the Constitution.<sup>21</sup> Alternatively, it would also violate separation of powers for Congress to exercise the executive function of finalizing regulations.<sup>22</sup>

Thank you again for the opportunity to testify today. I look forward to your questions.

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*Money*, Apr. 26, 2022 (announcing rule that will save consumers over \$3 billion and avoid 222 million metric tons of greenhouse gas emissions over thirty years); EPA, News Release, *EPA Proposes to Strengthen Air Quality Standards to Protect the Public from Harmful Effects of Soot*, Jan. 6, 2023 (announcing proposed rule that would prevent up to 4200 premature deaths per year, 270,000 lost work days per year, and result in as much as \$43 billion in net health benefits in 2032); *see also* Sidney Shapiro et al., Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation (2011), at [https://cpr-assets.s3.amazonaws.com/documents/RegBenefits\\_1109.pdf](https://cpr-assets.s3.amazonaws.com/documents/RegBenefits_1109.pdf).

<sup>21</sup> 462 U.S. 919 (1983).

<sup>22</sup> *Cf.* *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (emphasizing the constitutional command that “Congress play no direct role in the execution of the laws.”).