

Written Testimony of

Elizabeth Skerry
Regulatory Policy Associate, Public Citizen

before the

House Judiciary Committee
Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

on

“Reining in the Administrative State: Agency Adjudication and Other Agency Action”

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PUBLICCITIZEN

Chairman Massie, Ranking Member Correa, and Members of the Subcommittee,

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

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 180 consumer, labor, scientific, research, faith, community, environmental, good government, public health, and public interest groups representing millions of Americans. We are joined in the belief that our country's system of regulatory safeguards should secure our quality of life, pave the way for a sound economy, and benefit us all. Today, I write only on behalf of Public Citizen.

I. Introduction

We would like to begin our written testimony to the record by expressing strong support for the so-called “administrative state” that this Subcommittee’s majority seeks to “rein in” and continues to disparage. It was just over a year ago, on March 10, 2023, that this Subcommittee held an eerily similar hearing titled “Reining in the Administrative State: Reclaiming Congress’s Legislative Power” in the wake of the toxic freight train derailment in East Palestine, Ohio. This was a preventable tragedy caused by the absence of good and necessary regulation. During the Trump administration, a rule that would have required trains to be equipped with modern electric brakes was cast aside on the basis of a flawed regulatory cost-benefit analysis.¹

Thankfully, this past year, the Biden administration updated Circular A-4, a guidance document for agencies on how to conduct regulatory analysis, for the first time in 20 years.² In doing so, the administration reformed cost-benefit analysis to finally recognize that unquantifiable benefits are just as meaningful as quantifiable benefits.³ This monumental change will help more public protections that protect the health and safety of regular Americans, and which we can’t put a price on, see the light of day.

We strongly encourage the Subcommittee to propose and advance legislation that would similarly improve and strengthen the regulatory process. Yet, we are concerned that over one year later, this Subcommittee is still focusing its time, energy, and taxpayer dollars on criticizing our regulatory system instead of ensuring that our regulatory system stays on course, becomes stronger, and keeps the public safe.

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

² See Press Release, U.S. Off. of Mgmt. & Budget, *Biden-Harris Administration Releases Final Guidance to Improve Regulatory Analysis* (Nov. 9, 2023), available at <https://www.whitehouse.gov/omb/briefing-room/2023/11/09/biden-harris-administration-releases-final-guidance-to-improve-regulatory-analysis/>.

³ See *id.*

Our nation’s public protections and the administrative agencies that work to uphold them play a critical role in American democracy. Agencies and their rulemakings improve the lives of the American people every day. Without regulatory safeguards that keep our workplaces safe, our products safe to use, our air safe to breathe, and our water safe to drink, the public would be placed in much greater harm. When regulations are rolled back and regulatory violations go unenforced, corporate special interests benefit, and ordinary Americans pay the price. Regulations do not take freedom away from the American people—the truth is that there is no freedom without regulation.

In this hearing, the Subcommittee is choosing to attack the validity of the thousands of independent and impartial administrative law judges (ALJs) who help keep our regulatory system up and running. If this Subcommittee wants to see a dysfunctional administrative state, then by all means, it should get rid of ALJs entirely and take us back to 1945 before this critical position was established by the Administrative Procedure Act (APA). The administrative state will truly regress in their profound absence, and our testimony today will spell out why.

II. The importance of agency adjudication and ALJs

Before delving into why ALJs serve a critical role in the regulatory process, it is important to understand why agency adjudication matters. As the Coalition for Sensible Safeguards states in its letter to this Subcommittee, “...maintaining the current robust system of agency adjudication is important for efficient and effective enforcement of our nation’s protective statutes, which help keep our workplaces safe, our drinking water free of contaminants, and our hard-earned money safeguarded against fraud.”⁴

Agency adjudication is integral to the democratic process and a practical mechanism for resolving disputes about regulations. Without agency adjudication, the caseload of the federal judiciary would be bogged down and it would be challenging to find space for critical cases, which is why ALJs play a critical role in judicial efficiency and the regulatory process writ large. The Social Security Administration alone heard approximately 700,000 cases in 2017.⁵ More so, federal judges lack the expertise that ALJs have on complex and heavily fact-based matters of administrative law.

Contrary to this Subcommittee’s misguided belief, ALJs uphold fairness and due process when conducting adjudications. In fact, prior to the passage of the APA, the agency adjudication process lacked fairness as there was no uniform set of procedures regulating agency adjudication.⁶ Each agency had its own way of conducting adjudications, and “[t]his lack of direction led, in some

⁴ See Letter from Coal. for Sensible Safeguards, to the Hon. Thomas Massie & the Hon. J. Luis Correa, U.S. House of Representatives (Mar. 19, 2024), available at <https://sensible safeguards.org/outreach/css-supports-the-current-robust-system-of-agency-adjudication/>.

⁵ See Joe Davidson, *Trump order risks ‘politicization’ of administrative, mostly Social Security, judiciary*, Wash. Post (July 13, 2018), available at <https://democrats-edworkforce.house.gov/media/news/trump-order-risks-politicization-of-administrative-mostly-social-security-judiciary>.

⁶ Benjamin M. Barczewski, *Removal Protections for Administrative Adjudicators: Constitutional Scrutiny and Considerations for Congress*, Cong. Res. Serv. 1, 2 (Sept. 21, 2022), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10823>.

instances, to concerns that agency adjudications were unfair, biased in favor of the agency, and violated due process.”⁷ When Congress passed the APA in 1946, it did so in part to address the flaws in the agency adjudication process, including due process concerns.⁸

Public Citizen certainly agrees that our system of public protections is imperfect and can be improved. To do that, we must reimagine and strengthen the “administrative state” instead of trying to “rein it in.” On Day One, the Biden administration expressed its commitment to improving and modernizing the regulatory review process to protect the public.⁹ As the President’s “Modernizing Regulatory Review” memorandum points out, the current approach to regulatory review is in need of reform in several respects: it disregards important values such as public health and safety, economic growth, human dignity, equity, and the interests of future generations; it fails to account for numerous regulatory benefits and pays little attention to distributional concerns, thereby inappropriately burdening disadvantaged, vulnerable, and marginalized groups; it lacks efficiency, leading to costly delays; it lacks transparency; and it is dominated by corporate special interests who crowd out the voice of everyday Americans that benefit from regulatory protections.¹⁰

Public Citizen applauds the Biden administration for making significant progress on its ambitious regulatory agenda to protect consumers, workers, public health, and the environment; empower marginalized and underserved communities; and enable swift action to address the climate crisis.¹¹ Among the many important pending and final regulations this administration has proposed to protect the public, here are several to highlight:

- **Federal Trade Commission (FTC) Proposed Rule to Ban Noncompete Clauses**
 - o This rule would “ban employers from imposing noncompetes” on their employees, which quell competition and harm workers.¹² The agency estimates this proposal “could increase workers’ earnings by nearly \$300 billion per year.”¹³
- **Consumer Financial Protection Bureau (CFPB) Final Rule to Rein in Excessive Credit Card Late Fees**

⁷ *Id.* at 2.

⁸ *Id.*

⁹ Memorandum from President Joseph R. Biden, Jr., to the Heads of Executive Departments and Agencies, Subject: Modernizing Regulatory Review (Jan. 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

¹⁰ *Supra* note 9; see Letter from the Coal. for Sensible Safeguards, to U.S. Off. of Mgmt. & Budget Director Shalanda Young (Sept. 15, 2022), available at <https://sensiblesafeguards.org/outreach/css-urges-white-house-to-finish-regulatory-review-modernization-this-congress/>.

¹¹ See Letter from the Coal. for Sensible Safeguards, to U.S. Off. of Mgmt. & Budget Director Shalanda Young (Sept. 15, 2022), available at <https://sensiblesafeguards.org/outreach/css-urges-white-house-to-finish-regulatory-review-modernization-this-congress/>.

¹² Press Release, Fed. Trade Comm’n, *FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19* (Mar. 6, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19>.

¹³ Press Release, Fed. Trade Comm’n, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), available at <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

- This rule “will lower the typical late fees charged by big credit card issuers from an average of \$32 down to \$8 in most cases.”¹⁴ The agency estimates that this final rule “will save families \$10 billion every year, an average savings of \$220 per year for the more than 45 million people who are charged late fees.”¹⁵
 - Note: This rule was in the proposed rulemaking stage at this time last year when we submitted our testimony to this Subcommittee.¹⁶
- **Environmental Protection Agency (EPA) Final Rule to Designate Certain PFAS Chemicals as Hazardous Substances**
 - This rule would “designate two of the most widely used per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as ‘Superfund.’”¹⁷ Furthermore, this rule “would increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination.”¹⁸
 - Note: This rule was in the proposed rulemaking stage at this time last year when we submitted our testimony to this Subcommittee.¹⁹ As of December 6, 2023, this rule was in the final rule stage and pending review at the U.S. Office of Information and Regulatory Affairs (OIRA).²⁰

Just as the Biden administration has instituted reforms that will improve the regulatory process when fully implemented, there is a groundbreaking bill that has been reintroduced in the House Judiciary Committee called the Stop Corporate Capture Act, H.R. 1507, which would bring bold and ambitious reforms to address the most egregious problems plaguing our Federal system of public protections. The Stop Corporate Capture Act is the most important regulatory reform proposal currently pending in Congress and is the polar opposite of anti-regulatory legislation such as the Regulations from the Executive In Need of Scrutiny (REINS) Act, H.R. 277.

¹⁴ See Press Release, U.S. Consumer Fin. Protection Bureau, *Statement of CFPB Director Rohit Chopra on the Final Rule to Close the Credit Card Late Fee Loophole* (Mar. 5, 2024), available at <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-the-final-rule-to-close-the-credit-card-late-fee-loophole/#:~:text=We%20are%20finalizing%20a%20rule,who%20are%20charged%20late%20fees.>

¹⁵ *Id.*

¹⁶ See Press Release, U.S. Consumer Fin. Protection Bureau, *CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees* (Feb. 1, 2023), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>.

¹⁷ Press Release, U.S. Env'tl. Prot. Agency, *EPA Proposes Designating Certain PFAS Chemicals as Hazardous Substances Under Superfund to Protect People's Health* (Aug. 26, 2022), available at <https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund.>

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ See U.S. Off. Info. & Reg. Affairs, *List of Regulatory Actions Currently Under Review*, RegInfo.gov (last visited Apr. 10, 2024), available at <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp> (see “RIN: 2050-AH09,” “RECEIVED DATE: 12/06/2023”); U.S. Off. Info. & Reg. Affairs, *View Rule*, RegInfo.gov (last visited Apr. 10, 2024), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202310&RIN=2050-AH09.>

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

Unfortunately, this Subcommittee's focus on the REINS Act shows that it is headed in the wrong direction. The REINS Act is a radical threat – one of the most radical in generations – to our government's ability to protect the public from harm. The bill's clear aim is to halt the implementation of critical new public health and safety safeguards, financial reforms, and worker protections – making industry even less accountable to the public. It would do nothing to improve protections for the American public, but instead would benefit only those corporations that wish to game the system and evade safety standards.

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

This radical bill is unconstitutional on its face. The mandate that a rule must be approved by both houses is in practice a legislative veto that the Supreme Court declared unconstitutional in *INS v. Chadha* because a vote against the rule by either house would “kill” the rule.²¹ The warped operability of the REINS Act should be frightening to any member of Congress who believes in bicameralism, presentment, and the integrity of the legislative process.²²

The REINS Act would also further delay a regulatory process that is already rife with roadblocks. For example, since 2016, the U.S. Occupational Safety and Health Administration (OSHA) has been working on a standard to protect health care and social assistance workers from workplace violence, and over the past eight years the agency has only progressed to the small business review pre-rulemaking stage. During this time, the rate of serious and preventable workplace violence injuries has increased for workers in health care and social assistance.²³

By giving one chamber of Congress veto power over any new significant public health and safety protection, no matter how non-controversial or sensible it may be, the REINS Act is designed to leverage the dysfunction and obstructionism that plague our political process to block agencies' efforts to fulfill their statutory mandates to pursue public protections. If the REINS Act was signed into law, rail safety regulations would have no chance of being enacted. Rather, passage of the REINS Act would likely lead to more deregulatory disasters in communities traced with train tracks, putting fenceline and frontline communities at risk.

IV. The Stop Corporate Capture Act

²¹ Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 Geo. Wash. L. Rev. 1446, 1448 (2015), available at <https://www.gwlr.org/wp-content/uploads/2015/11/83-Geo-Wash-L-Rev-1446.pdf>.

²² See *id.* at 1468.

²³ See Letter from Coal. for Sensible Safeguards, to Members of the U.S. Congress (Feb. 27, 2023), available at <https://sensible safeguards.org/outreach/groups-oppose-the-reins-act-of-2023/>.

The Stop Corporate Capture Act is important now more than ever to help move this Subcommittee and the regulatory process writ large in the right direction. Public Citizen supports the Stop Corporate Capture Act and hopes it becomes law.²⁴ To tackle the pressing challenges we face as a nation – including the climate crisis, growing economic inequality, and racial injustice – we must have a robust, responsive, and inclusive Federal regulatory system. We do not have such a regulatory system today. This groundbreaking bill works to change that.

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

Among the essential reforms this bill would introduce are the following:²⁵

- **End Unbridled Corporate Influence**

- The Act brings transparency to the “black box” of the White House regulatory review process, which has become a focal point for corporate lobbying. The Act accomplishes this by requiring disclosure of changes and the sources of those changes to draft rules during that process. Furthermore, the Act makes it a federal crime for corporations to submit false information in order to influence regulators during the rulemaking process.

- **Prioritize Social Justice and Equity**

- The Act creates an Office of the Public Advocate, charged with promoting agencies’ public engagement practices and helping members of the public to participate more effectively in regulatory proceedings, especially people from structurally marginalized communities. The Office of the Public Advocate will research the social equity impacts of the regulatory process and perform social equity assessments of pending rules when requested by the public. The Act also strengthens agency procedures for notifying the public, particularly members of structurally marginalized communities and non-English speakers, about pending rulemakings.

- **Restore Scientific Integrity and Independent Expertise**

- The Act codifies *Chevron* deference, the long-standing principle that prevents judges from allowing their political preferences to influence their decisions in cases involving regulations by requiring courts to defer to government agencies that Congress empowered to protect the public. The Act also requires anyone submitting scientific or other technical research to agencies during the rulemaking process to disclose any potential conflicts of interest the research may raise. In addition, a

²⁴ See Letter from Coal. for Sensible Safeguards, to the Hon. Jerold Nadler & the Hon. Jim Jordan, U.S. House of Representatives (Dec. 2, 2022), available at <https://sensible safeguards.org/outreach/css-supports-the-stop-corporate-capture-act/>.

²⁵ *Id.*

provision of the Act bars the White House from unreasonably delaying essential safeguards by empowering agencies to resume work if the regulatory review process fails to conclude after sixty days.

The Stop Corporate Capture Act deserves this Subcommittee's attention, not the REINS Act or changing the way ALJs operate.

V. Conclusion

The common thread throughout our written testimony, and what we hope this Subcommittee takes away, is the importance of the public's voice, perspective, participation, and best interests in the Federal regulatory process. As mentioned, the Stop Corporate Capture Act is the polar opposite of the dangerous and harmful anti-regulatory REINS Act. The Stop Corporate Capture Act empowers the public instead of giving unconstitutional power to Congress to block important new regulatory safeguards. More so, agency adjudication is integral to the democratic process and a practical mechanism for resolving disputes about the regulations that protect the public and our environment.

The REINS Act undermines the voice of the people after they have made their voices heard through the public comment process. This radical bill gives members of Congress the power to silence the voices of their own constituents who have democratically shared their opinions on the very rules that Congress delegated authority to agencies to promulgate.²⁶ Agencies are the subject matter experts, not Congress. This is why we need independent and impartial ALJs, who likewise have the expertise on complex and heavily fact-based matters of administrative law that federal judges lack, to uphold fairness and due process when conducting adjudications.

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

The REINS Act must never become law. And the role of ALJs in our regulatory process must be protected and respected.

Public Citizen supports the Stop Corporate Capture Act and the Biden administration's efforts to improve public participation and modernize the rulemaking process. Public Citizen believes that agencies should reduce their reliance on regulatory cost-benefit analysis and that it certainly should not be abused in ways that weaken and block regulatory protections.

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

²⁶ See *supra* note 21, at 1455.