

Prepared Testimony of

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Regulations from the Executive in Need of Scrutiny (“REINS”) Act

Chairman Bachus, Ranking Member Cohen, Vice Chairman Farenthold, and members of the Subcommittee, thank you very much for inviting me to testify. I am honored that the members of the House Judiciary Committee on Regulation Reform, Commercial and Antitrust Law have invited me to testify a second time¹ on the Regulations in Need of Scrutiny (“REINS”) Act, filed as H.R. 367 in this Congress.

I have been asked to testify on three topics: the REINS Act’s constitutionality; how several leading policy arguments interrelate with the constitutional case for the Act; and three common objections to the Act.

I. The Constitutionality of the REINS Act

Under the REINS Act, before any legislative rule takes effect, the executive agency promulgating the rule must submit to both Houses of Congress and the Comptroller General a copy of the rule, a general statement restating the rule, and a classification designating the rule as major or nonmajor. (H.R. 367, sec. 3, proposing new 5 U.S.C. § 801(a)(1)(A).) (“Rules” are defined under the Administrative Procedure Act, 5 U.S.C. § 551(4), and one is deemed “major” if the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget (“OIRA”) finds that it is likely to result in \$100 million or more annual effect on the U.S. economy, a major increase in costs or prices for various designated groups, or significant adverse effects on competition, employment, investment, productivity, or innovation. See *id.*, proposing new 5 U.S.C. § 804.) Subject to limitations and exceptions enumerated in the Act, a major rule may not take effect unless both Houses of Congress enact and the President signs (or, if after a presidential veto, both Houses enact by two-thirds supramajorities) a joint resolution approving of the rule. (See *id.*, proposing new 5 U.S.C. §§ 801(b)(1), 802.) To minimize the possibility that a joint resolution is never considered, the Act amends both House’s internal rules to privilege joint resolutions for expedited consideration and votes. (See *id.*, proposing new 5 U.S.C. § 802(c)-(e).)

The REINS Act is a constitutional exercise of Congress’s legislative powers under the Necessary and Proper Clause. (See U.S. Const. art. I, § 18.) The Constitution entrusts all federal legislative powers to Congress. (See U.S. Const. art. I, § 1.) In many different fields of regulation and policymaking, Congress has enacted legislation enabling executive agencies to promulgate rules. Every time that Congress enables an agency to promulgate rules, it makes a judgment that the rulemaking power is a necessary and proper complement to the agency’s

responsibility to effectuate policies enacted by Congress in furtherance of Congress's enumerated powers. When an enabling act empowers an agency to make rules, the agency (acting as the President's delegate as specified by Congress) then has executive powers to make rules. Yet (except for extreme situations implicating the President's inherent executive powers) the agency has no power to execute until Congress enacts a law and a legislative policy for it to execute.² Ordinarily, then, an agency's executive powers to make rules are entirely contingent on Congress's creating and structuring those powers by prior legislation. Congress may create subject-specific structures for rulemaking (most often, in the statutes enabling rulemaking in agency organic statutes), or general constraints on rulemaking (for example, the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the Congressional Review Act, 5 U.S.C. § 801 et seq.). These structures and constraints embody Congress's judgments about what processes and procedures are necessary and proper to make rulemaking effective and consistent with other important priorities.

The REINS Act adds another general constraint on the process by which agencies may make rules: Major rules are legislatively deemed not to be necessary and proper supplements to agencies' primary responsibilities to implement Congress's legislative priorities, unless and until Congress enacts a joint resolution of approval for a given major rule. Since the Necessary and Proper Clause gives Congress the power to authorize rulemaking, it also authorizes Congress to impose a new precondition like the REINS Act on major rulemakings.

Last Congress, it was suggested that the REINS Act creates two constitutional problems:³ The Act may violate the Constitution's bicameralism and presentment provisions as construed in INS v. Chadha (1982),⁴ and it may encroach on the President's core executive functions, as delineated in Morrison v. Olson (1988).⁵ Neither argument has merit. Chadha declares it unconstitutional for Congress to use so-called "legislative vetos" (resolutions of opposition by a committee of Congress, or by one or both Houses of Congress) to stop executive actions from taking legal effect. Such so-called "legislative vetos" are not constitutionally proper if they alter the rights the parties would have had after executive action. If Congress tries to alter parties' relations, the Court reasoned, its attempt is unconstitutional unless it comes in the form of a "a statute duly enacted pursuant to Art. I, §§ 1, 7."⁶ The REINS Act's preapproval process, however, satisfies this test for "duly enacted" congressional legislation. By definition, a "joint" resolution must be passed bicamerally, and by longstanding practice both Houses of Congress

construe “joint resolutions” to require presentment except when the resolution recommends a constitutional amendment.⁷

Morrison suggested that an act of Congress is unconstitutional if it encroaches on the President’s core executive powers under U.S. Const. art. II, § 1.⁸ An act of Congress is not a proper means for implementing legislative policy if it disrupts the Constitution’s assignment of core executive functions to the President. In all foreseeable applications in practice, however, the REINS Act does not create a threat of such encroachment. Neither the President nor executive agencies have inherent powers under the Constitution to promulgate legislative rules over subjects of domestic regulation; they have whatever rulemaking powers they have pursuant to acts of Congress and subject to limitations set by Congress.

To see why, imagine that, in response to demands by shareholders, a company’s board of directors validly revises the company’s articles of incorporation. Before the revisions, the company’s management could purchase assets in its discretion; after the revisions, the management may not purchase assets worth more than \$10 million unless it first proposes the purchase to the board of directors and the board approves the proposal. In an extremely abstract sense, the management loses “executive power.” Before the revisions, the management had broad discretion to purchase assets; afterward, the management’s discretion is limited for purchases over \$10 million. Legally, however, the management loses no power it ever really had. The management is a creature of the articles of incorporation, it is obligated to stay within the limits of the articles, and it is obligated to follow directives and policies given it by the board of directors acting on behalf of the shareholders.

When they promulgate legislative rules, executive agencies stand in the same relation to Congress (and voters) as a company’s management does to its board of directors (and shareholders). “It is axiomatic that an administrative agency’s power to promulgate legislative regulation is limited to the authority delegated by Congress.”⁹ Rulemakings constitute “executive power” in that agencies promulgate rules to execute their statutory mandates. But agencies have no power to execute until Congress uses its powers to set a policy and authorize means by which that policy may be executed. So neither the President nor executive agencies are deprived of independent powers when Congress revises or imposes new limits on the means by which agencies promulgate rules.¹⁰ Rather, Congress is using its plenary legislative

discretion over rulemaking to specify in what circumstances executive agencies have power to execute.

In short, the REINS Act constitutes a legitimate exercise by Congress of its legislative powers under the Necessary and Proper Clause, and the constitutional objections lodged against the Act last Congress lack merit.

II. Why the REINS Act is Necessary and Proper Today

There are many reasons why Congress may in its discretion decide that it is no longer necessary or proper for major rules to take legal effect without congressional preapproval. I will not recount these reasons exhaustively, primarily because the House Judiciary Committee listed many of them last Congress.¹¹ To give a sense how the Act's merits relate to its constitutional authority, however, let me recount four representative reasons.

The first reason is economic growth. For the last five years, the annual increase in gross domestic product has been minus 0.3% (for 2008), minus 3.1% (for 2009), 2.4% (for 2010), 1.8% (for 2011), and 2.2% (for 2012).¹² These growth rates are extremely weak; by one report, the growth rates are so tepid that it will take at least 10 years to return to pre-2008 levels of employment.¹³ It is possible that the costs of complying with existing regulations are impeding economic growth. By one account, the costs of complying with existing regulations in 2008 were estimated to be \$1.75 trillion (on a gross domestic product of \$14.3 trillion).¹⁴ Using data available from OIRA, a witness before this subcommittee testified last week that over the last four years the total regulatory cost burden on U.S. economic actors has increased \$520 billion.¹⁵ Given the tepid state of the economy, members of this House may reasonably conclude, Congress should stop the federal government from constricting economic activity any further. Members may reasonably conclude that major rules are not necessary unless members of Congress decide for themselves that the benefits claimed for such rules really outweigh their possible tendencies to retard economic growth.

A second reason is that legislative rules can jeopardize individual liberty. Congress is expected to use its constitutional powers to “secure the Blessings of Liberty to ourselves and our Posterity” (see U.S. Const. preamble), and “to secure” “certain unalienable Rights . . . among [which] are Life, Liberty and the pursuit of Happiness” (U.S. Dec. of Indep., ¶ 2). Like statutes, if well crafted, legislative rules can secure rights—health, safety, the liberty to compete in a lawful trade, the capacity to purchase goods and services free from deception, and so on. Also

like statutory laws, however, when poorly crafted, legislative rules can also threaten rights. Poorly-crafted wetlands regulations can threaten property rights. Poorly-crafted food or drug labeling regulations can threaten free speech. Poorly-crafted commodity targets can undermine farmers' liberties to compete in markets for the crops they produce. Poorly-crafted airport inspection regulations can threaten the privacy of U.S. citizens to be free from unreasonable searches and seizures. Poorly-crafted health-insurance regulations can coerce insured Americans to cross-subsidize conduct contrary to their religious consciences. Poorly-crafted user fees take property, by unnecessarily diminishing the wealth of people who pay the user fees. It would not be unreasonable for members of Congress to insist that, at least for rules scored as being major rules, it would be advisable for members of Congress to consider carefully the rules' intended goals and their likely effects on the rights of regulated parties. The REINS Act embodies a legislative judgment that it is neither necessary nor proper for executive agencies to put major rules in effect without Congress's debating and taking ownership of the determinations those rules make about individual rights and the public welfare.

The third reason relates to the fact that enabling statutes usually remain in effect far longer than the legislative coalitions that first enact them. Many statutes enabling rulemaking were enacted during the New Deal, and many more were enacted during the 1960s and 1970s. The former statutes are now 70 or 80 years old, and the latter are now 40 or 50 years old. When an enabling act gets this old, it becomes possible and even likely that the agency may use rulemaking to implement policies extremely remote from those anticipated by the legislative coalition that originally enacted the enabling act. This possibility is stoking current controversies over efforts by the Environmental Protection Agency ("EPA") to regulate greenhouse gases. The main provisions of the Clean Air Act were enacted in 1970, 1977, and 1990, and the EPA now reads those provisions at least to permit it and perhaps to require it to make rules on greenhouse gases. However, in the course of regulating greenhouse gases, some argue, "the EPA has taken it upon itself to amend the Clean Air Act's numerical emission thresholds that trigger stationary source permitting requirements so as to ensure a 'common sense' approach to emissions control that Congress never conceived, let alone adopted."¹⁶ In other words, it is possible that the EPA is trying to regulate greenhouse gases with a statutory mandate that fits greenhouse gases extremely poorly, because the mandate is outdated and focused on different immediate problems.

The last factor is the increasing polarization of American politics. By many different metrics, American politics are more divisive and polarized than they were when many rulemaking powers were originally granted. At mid-twentieth century, a leading academic political-science committee studying political parties believed there was no significant ideological division between the parties. By contrast, the 111th Congress has been described as the most ideologically polarized in modern history, because the most conservative Democrat in it voted more liberally than the most liberal Republican. In 1984, 41 percent of American voters described themselves as centrists or near-centrists, while only 10 percent described themselves as being extremely liberal or conservative; by 2004, only 28 percent described themselves as being at the center, while 23 percent described themselves as extremely liberal or conservative.¹⁷

Given these deeper divisions and polarization, rulemaking is likely to be more controversial now than it was mid-twentieth century. During the 110th Congress, a Republican President could use rulemaking powers to set policies contrary to a Democratic Congress elected in opposition to his policies. In the 112th Congress, after a Republican House was elected in opposition to President Obama's agenda, President Obama campaigned saying, "we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."¹⁸ For example, the House of Representatives passed a cap-and-trade environmental bill in the 111th Congress, but the debate provoked opposition substantial enough that the Senate Majority Leader dropped the bill and let it die.¹⁹ Politically, it is reasonable to construe that fact and the results of the November 2010 election as a signal that the public is strongly opposed for the time being to further environmental energy restrictions as too expensive and anti-growth. Nevertheless, in December 2010, the EPA initiated rulemaking proceedings for greenhouse gases.²⁰

The old-enabling-statute problem and the polarization problem both make rulemaking seem less legitimate than it may have seemed 40 or 50 years ago. American government may fairly be judged by how solidly its institutions "deriv[e] their just powers from the consent of the governed." (U.S. Decl. of Indep., ¶2.) In some circumstances, agencies may and do promulgate rules to complete intentions sought by a legislative majority and expressed in enabling legislation. As the greenhouse-gas example suggests, however, it is possible that agencies may use rulemaking powers to impose new policies onto problems not remotely on the minds of the members of the political coalition that originally conferred rulemaking powers on the agency. In such circumstances, agency rulemaking may cease to relate significantly to the consent of the

electorate. It is also possible for a President and administration of one party to use rulemaking powers in defiance of electoral opposition, even when that opposing party wins a referendum election on an issue under rulemaking. In such a circumstance, administrative rulemaking may be used to defy, circumvent, wait out, or grind down the will of the electorate.

To prevent such mismatches between rulemaking and popular opinion in important policy disputes, members of the House may reasonably conclude that agencies should be denied the power to make enforceable major rules unless and until Congress considers and embraces the policy arguments supporting the proposed rule. The House will act well within its constitutional discretion if, on this basis, it decides that major rules are no longer necessary and proper without prior congressional approval.

III. The Inadequacy of Several Likely Objections to the REINS Act

Opponents of the REINS Act may make three objections against it: Congress lacks the requisite expertise or scientific background to consider the technical issues raised by many rules; Congress is too politicized to consider the merits of these technical issues dispassionately; and the REINS Act would force Congress to spend too much of its legislative calendar considering joint resolutions of approval. None of these arguments have merit.

A. Agencies Sometimes Lack Enough Evidence to Justify Their Pretensions of Expertise

In administrative practice, there are good reasons for suspecting that rules are often proposed with far less science or expertise than REINS Act opponents claim. Consider a benzene rule litigated in the 1970s. Benzene is used in motor fuels, solvents, detergents, and other organic chemicals, and it is also a by-product from refining petroleum. It is lethal when inhaled at extremely high concentrations (20,000 parts per million (ppm)), and it may cause nausea, leukemia, or blood disease at lower concentrations (above 25 ppm) above ordinary background levels (0.5 ppm or lower). The U.S. Occupational Safety and Health Administration (“OSHA”) promulgated a legislative rule barring benzene at levels of 1 ppm or higher in the late 1970s. The rule was litigated up to the U.S. Supreme Court, and the opinions written by the various Justices generated important legal precedents about the constitutional non-delegation doctrine and statutory construction of agency enabling statutes.²¹ Here, however, I focus not on the legal ramifications of the Supreme Court’s decision but on the underlying benzene rule, which illustrates problems common in rulemaking.

When OSHA promulgated the 1 ppm benzene rule, it had available the following statistical evidence: In Turkey, twice as many shoe workers (13/100,000 instead of 6/100,000) contracted leukemia when exposed to benzene vapors between 150 and 650 ppm in badly ventilated conditions. In Italy, workers who made glue or ink contracted leukemia at abnormally high rates when exposed for long periods of time to solvents with benzene in concentrations between 200-500 ppm. Persistent exposures above 25 ppm were correlated with blood deficiencies and a fatal form of anemia. Other carcinogens had triggered leukemia in mice or rats exposed to the compounds at 1 ppm; it was suspected that benzene also triggered leukemia at the same levels, but previous mice and rat tests had neither confirmed nor refuted those suspicions.²²

These studies provide an extremely thin factual record on which to justify a 1 ppm limitation on benzene in workplaces. Yet these studies constituted the best information available. If these were all the studies available, however, it is not a little pretentious to assert that members of Congress were somehow disqualified from, and only health-and-safety workplace experts were qualified to, make legislative findings about whether benzene needed to be regulated. First, if the available data can identify medical dangers to humans from benzene exposure between 25 and 500 ppm, but not at 1 ppm, how should regulators extrapolate from the data they have to gauge the medical risks of benzene at 1 ppm? Different chemicals pose different risks or benefits to people at different levels, and regulators must make extremely tentative and subjective forecasts to fill in the parts of a risk/exposure curve for which they do not have concrete data. Medical expertise can help make these forecasts, but such forecasts have barely any more epistemological certainty than a legislative judgment. Second, assuming a regulator extrapolates the risk/exposure curve, how feasible is it technologically for the industry to reduce benzene below different exposure levels? And third, assuming regulators can settle these two questions, how should the extrapolated health benefits from reducing benzene be traded off against the economic costs of doing so? The second and third considerations are not scientific; they are transparently political. Yet even the first consideration is political. Scientific method and experience may rule out *some* risk/exposure extrapolations, but they cannot settle on *only one* acceptable curve. If health-and-safety workplace experts have discretion to decide which of several plausible curves best extrapolates the risk of benzene exposure at 1 ppm, they have yet another political choice.

Some major rules may be supported by copious and clear evidence. Given the country's decades of experience with rulemakings, however, members of this Congress may reasonably conclude that the benzene rulemaking is not just an aberrational case but is instead an illustration of common problems. Many contemporary rulemakings raise similar questions—about how to project, from incomplete epidemiological evidence and tests, whether trace doses of substances threaten health, safety, or the environment, and if so, how severely at different levels. Contemporary greenhouse gases regulatory disputes raise difficult questions how to interpret scant empirical information about global warming. Drug labeling disputes raise difficult questions about how closely doctors and patients read warnings and directions on labels. Many rulemakings on economic disputes require regulators to forecast how new technologies may change regulated markets.

Given these and other similar problems, Congress may reasonably conclude that, in at least a significant number of rulemakings, agencies are making judgments with information so scant that the judgments are not really “scientific” or “expert-based” and are instead political. For economically consequential legislative rules, Congress may proceed to conclude that it is no longer necessary and proper that federal agencies make controversial political trade-offs without further review and approval by Congress.

B. Sometimes Agency Rulemakings Are at Least As Politicized As the Legislative Process

It is also far too late in the day for anyone to assert that congressional review of rulemakings will politicize rulemakings that would otherwise be apolitical. Now that the country has had several decades of experience with rulemaking, both policy makers and scholars have become quite familiar with the ways in which special interests can pressure the administrative process as effectively as they pressure the legislative process. The businesses, unions, and individuals regulated by agencies have just as much incentive to pressure or set the agendas of executive agencies as they do for the agenda of Congress. Among policy makers, this possibility is often called “capture.” Among scholars of economics and political science, the study of special-interest-group influence has given rise to “public choice theory,” or the “theory of economic regulation.”²³

The benzene rulemaking discussed in the last section illustrates this problem as well. Congress did not legislate a specific standard for benzene; instead, it instructed OSHA to set, for all chemicals, workplace-safety standards that would “most adequately assure, to the extent

feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health.”²⁴ OSHA determined that somewhere between 1.1 and 1.4 million workers were exposed to heightened levels of benzene. When litigated, however, OSHA’s rule specifically refrained from protecting the workplaces of 795,000 of those workers—gas station attendants.²⁵ Notwithstanding its claimed expertise, OSHA promulgated a rule that was arbitrary. If the epidemiological evidence suggests that benzene should be controlled in the workplace, it is arbitrary to exclude more than half the affected workers. Somehow, it seems, gas-station owners succeeded in pressuring OSHA to exempt their stations. Congressional preapproval could have prevented such an arbitrary exemption; it would have been difficult for members of Congress to justify the arbitrariness of the gas-station exemption in public debate.

In addition, experience with rulemaking has also taught that administrative processes can suffer from problems more extreme than the corresponding problems of the legislative process. Economist Bruce Yandle describes “a theory of regulation [he] call[s] ‘bootleggers and Baptists.’” When Congress tries to insulate an administrative process from ordinary legislative politics, quite often two groups end up exerting undue influence on the process. One group (Baptists) are idealists. They dislike the legislative process precisely because it forces policy makers to sacrifice abstract ideals to the concrete demands of industry groups, labor unions, and other special interests. The other group (the Bootleggers) consist of the biggest and best-connected interests. According to Yandle, Baptists often initiate administrative processes and then lose control to Bootleggers:

[W]hat do industry and labor want from the regulators? They want protection from competition, from technological change, and from losses that threaten profits and jobs. A carefully constructed regulation can accomplish all kinds of anticompetitive goals of this sort, while giving the citizenry the impression that the only goal is to serve the public interest.²⁶

To take one of many examples: It was documented that, between 1994 and 2008, more than 3600 people died, 6500 people were injured, and more than \$1.5 billion of property damage was caused by fires involving flammable furniture. Many of these fires were caused when cigarette smokers fell asleep with lighted cigarettes on beds or furniture, or when cigarette smokers carelessly left cigarettes on or close to furniture. This problem is difficult to solve by federal regulation of the makers of cigarettes or furniture, because it is difficult for national law to reach into homes and stop smokers from being careless. Assuming that federal regulatory law

must respond to the problem, however, there are two possible solutions: Compel cigarette companies to make self-extinguishing cigarettes, or compel furniture manufacturers to make non-flammable beds and furniture.

Cigarette companies anticipated the possibility that the Consumer Products Safety Commission (CPSC) might lobby Congress for jurisdiction to require self-extinguishing cigarettes. (By statutory exemption, the CPSC lacked jurisdiction over cigarettes.) Peter Sparber, a vice president of the Tobacco Institute, gave out hundreds of thousands of dollars to local fire departments and courted their support for the National Association of Fire Marshals (NAFM). Later, Sparber left the Tobacco Institute and lobbied in his own name. He “volunteered” as the NAFM’s lobbyist while he continued to lobby extensively for the Tobacco Institute. Not coincidentally, the NAFM then petitioned the CPSC to institute legislative rulemaking to require furniture makers to make upholstered furniture flame-retardant enough not to burn if ignited by a smoldering cigarette. Later, the manufacturers of brominated fire retardant chemicals, whose chemicals furniture makers would need if CPSC approved NAFM’s petition, lent their support to that petition. (Conveniently, the chemical makers were also represented by Sparber).

Furniture makers responded similarly: They appealed to health and environment concerns to frustrate CPSC’s acting on NAFM’s petition. Brominated fire retardants have been correlated with thyroid disease, impaired brain development, and impaired reproductive functions in animals. Furniture makers’ lobbyists persuaded concerned members of Congress to attach a rider to an appropriations bill blocking further action on the CPSC rulemaking until the National Institute of Health could study the health and environmental effects of fire-retardant chemicals.²⁷ After these studies were completed, CPSC finally issued the notice of proposed rulemaking in 2008—fourteen years after the NAFM petitioned for a rule. As of the date of this hearing, CPSC still has not yet issued a final rule.²⁸

Regardless of what one thinks of the merits of the CPSC’s rulemaking, the regulatory process confirms vividly how accurate Yandle’s Baptist-bootlegger metaphor is. The tobacco and flame-retardant chemical industries let the NAFM act as the Baptist fronting their bootlegger agendas. The furniture industry used health and environmental advocates as Baptists in the same way. Separately, the politics of the cigarette/furniture dispute illustrate how byzantine contemporary regulatory politics are. At different points, the dispute involved regulatory and

appropriating committees in Congress, the CPSC, the National Institutes of Health, and several other agencies. The agencies gave special interests many more opportunities to pressure the regulatory process than they would have had if they had only needed to deal with committees of Congress. It would not be unreasonable for members of this Congress to decide that this case study is illustrative. If so, members of Congress may reasonably decide that it is no longer necessary or proper to keep rulemaking structured on the pretense that agencies are systematically more insulated from interest-group pressure or capture than Congress is.

C. The REINS Act Will Not Force the House to Vote More Often Than It Should

Finally, the REINS Act will not clog the Congress's legislative agenda. In the last Congress, this House took 1,608 recorded votes.²⁹ If the last decade's worth of data is representative, if passed the REINS Act will force members of this House to consider between 50 and 100 joint resolutions of approval each year, or 100 to 200 resolutions each Congress.³⁰ At most, that addition would add three to six percent votes to the House's existing business. But the House can increase the number of days it is in session. The House could pare down the number of votes it takes on other more ceremonial or symbolic issues. And at least some major rules will be uncontroversial enough to pass by voice votes. Once executive agencies appreciate that both Houses will consider major rules more seriously, they should consult both Houses more closely before rules are finalized—to help defuse controversies before they ever get to the floor of either House.

To be sure, the REINS Act may still require both Houses to take more votes than they do now. This possibility, however, deserves two responses. First, since Congress has ultimate responsibility over the nation's federal legislative powers, it is ultimately Congress's job to consider the pros and cons of legislative rules, which are set to take the force of law, and which are likely to have a significant impact on the U.S. economy. Second, citizens deserve a Congress that performs that job. A government is not meaningfully free or republican if it cannot hold its representatives electorally accountable for politically controversial policies. The REINS Act tightens the connection between the federal government's policy making and electoral accountability. Members of this House may reasonably conclude that a few extra votes each Congress are an acceptable price to pay to make the federal government more responsible to the people for the policies it implements by major rules.

ENDNOTES

¹ See Prepared Testimony of Eric R. Claeys, Hearing on the Regulations in Need of Scrutiny (“REINS”) Act, March 8, 2011, before the Subcommittee on Courts, Commercial, and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, 112th Congress, available at http://judiciary.house.gov/hearings/hear_03082011.html.

² See *National Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

³ Statement of Sally Katzen before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary on “The REINS Act – Promoting Jobs and Expanding Freedom by Reducing Needless Regulations,” January 24, 2011, available at http://judiciary.house.gov/hearings/hear_01242011.html.

⁴ 462 U.S. 919 (1982).

⁵ 487 U.S. 654 (1988).

⁶ *Chadha*, 462 U.S. at 954-55 n.16; see *id.* at 952-53.

⁷ See http://www.house.gov/house/Tying_it_all.shtml;
http://www.senate.gov/reference/glossary_term/joint_resolution.htm.

⁸ *Morrison*, 487 U.S. at 688-89.

⁹ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

¹⁰ Assuming that these preconditions satisfy the bicameralism and presentment requirements and do not run afoul of other similar constitutional limitations.

¹¹ See House Committee on the Judiciary, “Regulations from the Executive in Need of Scrutiny Act of 2011,” H.R. Rep. 112-278, Part 1, 112th Cong., 1st Sess., at 7-13.

¹² Data available at U.S. Department of Commerce, Bureau of Economic Analysis, “National Income and Product Account Tables,” <http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&910=X&911=0&903=1&904=2008&905=2012&906=A> (checked March 1, 2013).

¹³ Andre Damon, “Ongoing Slump in America: Tepid US Jobs Report,” *GlobalResearch*, Dec. 8, 2012, available at <http://www.globalresearch.ca/ongoing-economic-slump-in-america-tepid-us-jobs-report/5314768>.

¹⁴ See Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (SBA Office of Advocacy, Sept. 2010) (regulatory impact); U.S. Department of Commerce, Bureau of

Economic Analysis, “National Income and Product Account Tables,” *supra* (2008 GDP, checked March 1, 2013). But see Lisa Heinzerling & Frank Ackerman, “The \$1.75 Trillion Lie,” 1 *Michigan Journal of Environmental & Administrative Law* 127 (2012); “The Impact of Regulatory Costs on Small Firms,” available at <http://www.sba.gov/advocacy/7540/49291>. For a lower estimate of \$1.1 trillion, see Clyde Wayne Crews, *Ten Thousand Commandments: A Snapshot of the Federal Regulatory State* 6 (2010 edition).

¹⁵ See Douglas Holtz-Eakin, “Regulations, Jobs, and America’s Global Competitiveness,” Testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, House Committee on the Judiciary, February 28, 2013, available at http://judiciary.house.gov/hearings/113th/hear_02282013.html.

¹⁶ Jonathan H. Adler, “Would the REINS Act Rein in Federal Regulation?” *Regulation* (Summer 2011), at 22, 25. See Amy Harden, “Clean Air Act: Defend or Dismantle?” *National Journal Energy Experts Blog*, Sept. 13, 2010, available at <http://energy.nationaljournal.com/2010/09/clean-air-act-defend-or-disman.php>.

¹⁷ See William A. Galston, “Can a Polarized American Party System Be ‘Healthy’?” 34 *Issues in Governance Studies* 1, 6 (Summer 2010).

¹⁸ Matt Compton, “We Can’t Wait: President Obama in Nevada,” *White House Blog*, October 24, 2011, <http://www.whitehouse.gov/blog/2011/10/24/we-cant-wait-president-obama-nevada>.

¹⁹ Gail Russell Chaddock, “Harry Reid: Senate Will Abandon Cap-and-Trade Energy Reform,” *Christian Science Monitor*, July 22, 2010, <http://www.csmonitor.com/USA/Politics/2010/0722/Harry-Reid-Senate-will-abandon-cap-and-trade-energy-reform>.

²⁰ EPA, “EPA to Set Modest Pace for Greenhouse Gas Standards,” December 23, 2010, <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d2f038e9daed78de8525780200568bec!OpenDocument>.

²¹ *Industrial Union, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 614-16 (1980). The figures used in text are the figures the Supreme Court reported as standard in its opinion.

²² *Id.* at 617, 618 n.9, 619 n.12, 657 n.64.

²³ See, e.g., Gary Becker, “A Theory of Competition among Pressure Groups for Political Influence,” 98 *Quarterly Journal of Economics* 371 (1983); George J. Stigler, “The Theory of Economic Regulation,” 2 *Bell Journal of Economics and Management Science* 3 (1971).

²⁴ 29 U.S.C. § 655(b)(5) (1980), cited in *Industrial Union*, 448 U.S. at 612.

²⁵ *Industrial Union, AFL-CIO*, 448 U.S. at 616 n.6.

²⁶ Bruce Yandle, “Bootleggers and Baptists: The Education of a Regulatory Economist,” *Regulation* (May/June 1983), 12, 13.

²⁷ Anny Shin, “Fighting for Safety: Your Couch Is Caught in a Flammable Regulatory Battle Between the Chemical and the Furniture Industries,” *Washington Post*, January 26, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012503170_pf.html.

²⁸ 73 Fed. Reg. 11702 (Mar. 4, 2008); <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=3041-AB35>.

²⁹ U.S. House of Representatives Roll Call Votes, available at <http://clerk.house.gov/legislative/legvotes.aspx>.

³⁰ Curtis W. Copeland & Maeve P. Carey, “REINS Act: Number and Types of ‘Major Rules’ in Recent Years” (Congressional Research Service, Feb. 24, 2011), 6 & Table 1.