March 14, 2011

The United States Senate
Washington, D.C. 20510

The United States House of Representatives
Washington, DC 20515

Dear Members of Congress:

We are writing, as individuals, to express our opposition to passage of the REINS Act. In signing the letter, we have included our titles and the institutions at which we teach for purposes of identification.

Under the proposed legislation, no "economically significant" regulation would take effect unless affirmatively approved by Congress, by means of a joint congressional resolution of approval, which is signed by the President. If a joint resolution is not enacted into law by the end of 70 session days or legislative days, the regulation is not legally valid and it will not go into effect. As law professors who teach administrative and environmental law, we consider the proposal to be unnecessary to establish agency accountability and unwise as a matter of public policy because it undercuts the implementation of laws intended to protect people and the environment.

We oppose the REINS Act because:

1). ***The REINS Act would replace the strengths of agency rulemaking with the weaknesses of the legislative process.***

The current system of administrative agencies of the federal government began more than 100 years ago, and matured through the 20th century. It was codified in its present form in the Administrative Procedures Act (APA) passed in 1946. In order to take advantage of the scientific, economic, legal, and other expertise in agencies, Congress has delegated to them rulemaking authority. Congress has also recognized that agencies are more insulated from the political process. Although agencies are (and should be) subject to political influence, agencies must also have legal justifications for their actions. When agency rules are appealed, the federal courts ensure that regulations are backed up by reasonable policy justifications and are consistent with the statutes passed by Congress.

While superficially it may seem like a good idea to make Congress the final arbiter of all significant regulatory decisions – after all, Members of Congress are elected and regulators are not – neither most Members of Congress nor their staffs are likely to have sufficient expertise regarding complex regulations to make a considered decision whether to adopt a regulation, particularly within the limited time frame legislators would have to act. Congress has scaled back staffing levels and, unlike agencies, Congressional offices do not employ doctors, epidemiologists, botanists, statisticians, etc.

Even if Congress did have the necessary expertise to review regulations, the type of

careful and time-consuming review that would be required would pose a burden on it, diverting members and their staffs from other business. Since this review would have to occur within a short time frame, the REINS Act has the potential to stop (or at least slow) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

It is also uncertain that Congress can or will tear itself away from other pressing business in order to consider approval of pending regulations. In particular, a 70-day deadline is unlikely to give the Senate sufficient time to pass a resolution of approval, turning the Act into a type of a congressional pocket veto for significant regulations.

Finally, unlike agencies, Congress does not need to have a reasonable policy justification for refusing to approve a regulation. Any disapproval is therefore more likely to reflect the political power of special interests, a potential that would be magnified in light of the fast-track process. This makes the Act a thinly veiled effort to subject regulations to greater political pressure than the opponents of regulation can bring to bear on an agency.

2) *Congress already has the power to stop regulations if extreme circumstances dictate.*

The Congressional Review Act (1996) requires agencies to submit new final rules to Congress for review, delaying the effective date of those rules to permit Congress to block them, and establishes a fast-track process for legislation proposed to overrule a regulation. Disapproval legislation must pass both houses and be signed by the President. Congress has only used this authority once, in 2001, to overrule an OSHA ergonomics rule.

More broadly, Congress can at any time narrow the rulemaking power it has delegated to an agency by amending its statutory mandate. This solution to a problem with agency discretion, should one exist, gives Congress an opportunity to consider carefully the pros and cons of limiting agency discretion, as compared to the rush to judgment required by the REINS Act.

3) The Act is counter-democratic

The congressional review law requires a majority of both the House and the Senate and a signature by the President to change what a previous Congress and President had approved – a law authorizing an agency to adopt legally effective rules. In the REINS bill, by comparison, less than a majority in either house can block what a previous Congress and President approved – the authority of an agency to adopt legally effective rules. This is not democratic; it is counter-democratic.

Moreover, the REINS Act amounts to an effort by Congress to evade responsibility, not assume it. If the President signs a joint resolution and a regulation becomes a law, regulated entities are authorized to challenge the legality of the regulation on any procedural or substantive ground they might have had if the agency itself still had discretion to adopt the regulation as legally binding. Normally, when Congress passes a law, it can be legally attacked, but only on grounds that the law is beyond Congress' authority to adopt the law or Congress failed to use the procedures to adopt the law

required by the Constitution. Yet, the language of the REINS Act would give regulated entities a surprising and peculiar gift, permitting them to challenge a regulation on grounds that would ordinarily be mooted by Congress' passage of the law. It is unclear how Congress can pass a law approving a regulation and still purport to give that approval no legal effect. But the effort to do so indicates that the sponsors of the REINS Act are unwilling to allow Congress to step forward and take the responsibility for passing a law enacting a regulation into place, despite their professed aim of increasing legislative accountability.

4) If it is not broken, don't fix it.

While the regulatory system is not perfect, it has over the years led to vast improvements in lives of millions of Americans, by making the air cleaner, the water purer, food, drugs and cars safer, and the environment more secure, among many other achievements. We believe that the REINS Act is likely to disrupt the regulatory system, and thereby deny Americans the additional reasonable protections the system can deliver. And, as we take up next, there is no sufficient reason for to risk this disruption.

5) ***The regulatory process is accountable even though regulators are not elected.***

Agencies develop regulations to implement laws passed by Congress, soliciting comment from affected parties and the public. The White House Office of Information and Regulatory Affairs (OIRA) vets drafts of significant regulatory proposals. Once agencies issue final regulations, Congress has a fast-track opportunity to block them. Members of Congress can lobby the agency during the rulemaking process, and congressional committees can hold hearings to raise questions about an agency's plan to promulgate regulations (or review regulations that have been issued). And, as previously mentioned, regulations are subject to judicial review. The courts ensure that agency rulemakings are consistent with the underlying organic statutes, while also ensuring that agencies have issued an adequate written response to the evidence and policy arguments in the rulemaking record that are contrary to the rule that was adopted. Thus, under current law, by the time a regulation is finally adopted, two and usually all three branches of government have weighed in, and advocates on all sides of the relevant issues have ample opportunity to affect the outcome.

For the previous reasons, we oppose passage of the REINS Act. Thank you for consideration of our views.

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