

SEPARATION OF POWERS RESTORATION ACT OF 2016

JUNE 14, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4768]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4768) to amend title 5, United States Code, with respect to the judicial review of agency interpretations of statutory and regulatory provisions, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The Amendment

The amendments are as follows:

Strike all that follows after the enacting clause, and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Separation of Powers Restoration Act of 2016”.

SEC. 2. JUDICIAL REVIEW OF STATUTORY AND REGULATORY INTERPRETATIONS.

Section 706 of title 5, United States Code, is amended—

(1) by striking “To the extent necessary” and inserting “(a) To the extent necessary”;

(2) by striking “decide all relevant questions of law, interpret constitutional and statutory provisions, and”;

(3) by inserting after “of the terms of an agency action” the following “and decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. Notwithstanding any other provision of law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law. No law may exempt any such civil action from the application of this section except by specific reference to this section”; and

(4) by striking “The reviewing court shall—” and inserting the following:

“(b) The reviewing court shall—”.

Amend the title so as to read:

A bill to amend title 5, United States Code, to clarify the nature of judicial review of agency interpretations of statutory and regulatory provisions.

Purpose and Summary

H.R. 4768, the “Separation of Powers Restoration Act of 2016” or “SOPRA of 2016,” amends the Administrative Procedure Act to overturn the so-called *Chevron* and *Auer* doctrines of judicial deference to agency interpretations of statutory and regulatory provisions.

Background and Need for the Legislation

I. A BRIEF HISTORY OF THE *CHEVRON* DOCTRINE

The *Chevron* doctrine, named for the case in which it was originally conceived, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is the centerpiece of the Judicial Branch’s modern jurisprudence concerning the propriety of judicial deference to Federal agencies’ statutory interpretations. Under this doctrine, a court reviewing an agency’s interpretation of a statute it administers must first determine, using traditional canons of statutory construction, whether the statute speaks clearly to the question the agency has addressed. *See* 467 U.S. at 842–43. If so, the court must follow Congress’ expressed intent. *Id.* If, however, the statute does not reflect a clear congressional intent—*i.e.*, it is “silent or ambiguous” on the question at hand—the court is to defer to the agency’s interpretation, provided that it is within the “permissible” range of available statutory interpretations. *Id.* at 843–844. The *Chevron* doctrine displaced the Supreme Court’s prior rubric for whether and how to defer to administrative agencies, in which perhaps the foremost precedent was *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944), in which the Court articulated an approach commonly referred to as *Skidmore* deference:

We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Not all of the judiciary’s decisions within the pre-*Chevron* rubric, however, were consistent, which led to confusion in the law.¹

Over the years, rather than resolve confusion, the *Chevron* doctrine and its admixture of primacy in deciding “what the law is”—in some cases, primacy for the Judicial Branch, in others, primacy for the Executive Branch—has generated increasing confusion and concern in the courts, Congress, the legal bar, and legal academia. Numerous Supreme Court and appeals court decisions in the decades since *Chevron* have striven to evolve or elucidate the doctrine, sometimes cabining its use, sometimes not. A sampling of such decisions from the Supreme Court, for example, includes the following:

- *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), in which the Court held that, although *Chevron* deference applies to review of agency interpretations issued in promulgating a regulation, such deference is not required during review of agency interpretations issued through less formal means, such as in an opinion letter or a *post hoc* legal brief;
- *United States v. Mead Corp.*, 533 U.S. 218 (2001), in which the Court held that the degree to which application of the *Chevron* doctrine is appropriate depends on whether a statute contains a delegation of lawmaking authority to an agency (the so-called “*Chevron* Step Zero” question);
- *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), in which the Court suggested that deference to an agency’s statutory interpretation might be required, even if a court had previously interpreted the same statute differently;
- *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012), in which the Court, by plurality opinion, ruled in contrast that an agency’s statutory interpretation did not command deference, in light of a contrary, prior interpretation by the Court;
- *City of Arlington v. FCC*, 533 S. Ct. 1863 (2013), in which the Court held that *Chevron* deference must be applied in review of an agency’s interpretation of the statutory terms that define the agency’s jurisdictional limits, an issue that can sorely tempt an agency’s willingness to interpret a statute most faithfully to Congress’ intent; and, most recently,

¹See, e.g., Lawson, Gary and Kam, Stephen, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine* (Selected Works, 2012) at 6–10 (available at http://works.bepress.com/gary_lawson/1).

- *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), in which the Court held that, while *Chevron* deference generally remains applicable in review of agencies' statutory interpretations, it does not provide the appropriate interpretive framework if there is no express delegation of lawmaking authority to the agency on a question of "deep economic and political significance."

This complex case law, of which the foregoing decisions are just examples, has created a complex and evolving framework for review of agencies' statutory interpretations. At one and the same time, this has broadly increased the power of Federal administrative agencies, by ceding them authority to determine the metes and bounds of their authority under the myriad of Federal statutes containing ambiguous provisions; sowed uncertainty for the public, regulated entities and even Congress, since agencies remain free to change their choices from among "permissible" ways to interpret these statutory provisions; and, revealed a difficult intellectual struggle within the Judicial Branch through which that branch, even 30 years on from *Chevron's* inception, continues to attempt to develop full and clear limits for the application of deference to agency interpretations.

In short, although *Chevron* represented a watershed moment in allowing more deference to agencies than was permissible under *Skidmore*, the Court has been on a slippery slope ever since as it has struggled to define precisely when deference is appropriate and when it is not.

II. CONSTITUTIONAL AND STATUTORY DEFICIENCIES IN THE *CHEVRON* DOCTRINE

It has been posited that the confusion and difficulty spawned by *Chevron* ultimately stem from its lack of sound foundations in constitutional and statutory law. With respect to the Constitution, it has been suggested that the *Chevron* doctrine is inconsistent with the Supreme Court's bedrock judicial review precedent, *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In that case, Chief Justice Marshall, writing for a unanimous Court, resolved one of the most elemental questions of American constitutional law, writing in renowned words that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is." *Chevron*, of course, represents a quite different rule—notwithstanding *Marbury*, when a Federal agency interprets an ambiguous provision of a statute that it administers, it is actually the province of the Executive Branch to say what that law is, at least insofar as the agency chooses from within a range of "permissible" interpretations.

Although the Court did not state as much when it decided *Chevron*, in the years since, the courts, particularly the U.S. Court of Appeals for the District of Columbia Circuit and the Supreme Court itself, have explained that the concept of *Chevron* deference rests on a judicial assumption that, in cases in which statutes are ambiguous, Congress has at least implicitly granted to the implementing administrative agency the authority to determine what the ambiguous terms mean, principally through regulation. See, e.g., *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 140–

41 (D.C. Cir. 1984). This view, however, is difficult, if not impossible, to square with the Framers' intent in the Constitution to create a government of definite, limited, and separated powers. If, as *Marbury* holds, it is, under that separation of powers, the "province and duty of the Judicial Department to say what the law is," it is fair to ask whether Congress can in any way delegate to the Executive Branch that power held by the Judicial Branch. Similarly, it is fair to ask whether the Judiciary itself possesses any constitutional means to delegate that power to the Executive Branch, even if it wanted to. The Judiciary possesses power, under Article III of the Constitution, to decide cases and controversies. It possesses no power, however, to legislate—the means needed (prototypically, if not exclusively, through a constitutional amendment), to delegate or reassign the power of one branch to another.

With respect to statutory law, it has likewise been suggested that *Chevron* conflicts flatly with the express terms of the Administrative Procedure Act of 1946 (APA), commonly considered to be the "constitution" of Federal administrative law. The APA authorizes Federal agencies to act with broad authority in numerous ways. With respect to judicial review of agency actions, however, the APA states unequivocally, in 5 U.S.C. § 706, that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions. . . ."

The Supreme Court in *Chevron* did not discuss how, if at all, its rule authorizing deference to Executive Branch interpretation of statutory provisions could be squared with these express terms of the APA. Nor have courts adequately explained that matter since. What is more, it is unquestionably fair to ask how, if at all, the assumption underlying *Chevron* deference can be valid in light of the APA. That assumption is that Congress implicitly delegated to agencies authority to state what the "law" contained in ambiguous statutory provisions "is." But ever since the APA's enactment in 1946, Congress has legislated all statutes authorizing agency regulatory action against the backdrop of its specific decision in the APA to assign to the Judicial Branch exclusive power to "decide all relevant questions of law," including the power to "interpret statutory provisions."

III. THE ROLE OF *chevron* DEFERENCE IN THE MODERN ADMINISTRATIVE STATE AND THE CONSTITUTIONAL SYSTEM OF CHECKS AND BALANCES

The *Chevron* doctrine leaves administrative agencies relatively free in a wide range of circumstances to define the meaning of statutes they administer, and even their own jurisdictional limits. The courts' *Chevron* jurisprudence thus ranks high in importance to the modern administrative state—perhaps second only to jurisprudence regarding delegation by Congress of legislative authority to the same agencies.

That the *Chevron* doctrine is important to the administrative state does not mean, however, that it necessarily fosters good government. On the contrary, there is much reason to think that it does not. It empowers agencies to choose in changing ways which among alternative meanings is the meaning that the Federal Government will give a statute at any given time. This is thought by some to be a virtue allowing flexibility. By others, however, it is

thought to be a vice that leads to uncertainty and unnecessary, protracted litigation that unsettles the rule of law. Perhaps more importantly, the *Chevron* doctrine also realigns the incentives for each Branch of Federal Government. Under *Chevron*'s sway, rather than having a strong incentive to write statutes carefully and clearly to best express Congress' intent, Congress has an incentive to write less careful statutes that poorly express its intent, secure in the knowledge that regulators and courts can and will paper over legislative insufficiencies and insulate legislators against accountability for inadequate work. Agencies, meanwhile, rather than have an incentive to interpret statutes as faithfully and rigorously as possible (the best way to assure that courts might ultimately uphold their actions) have an incentive to play fast and loose with their interpretations and play politics with their choices, so long as they stay within the "permissible" range of alternatives for interpreting vague statutory terms. Courts, finally, have an incentive to perform a less rigorous job of statutory construction themselves. They also have an incentive and a means to avoid the more confrontational work of declaring Congress' work in statutory provisions void for vagueness or simply and clearly lacking in a delegation of authority to an agency—which contrasting results would leave the responsibility and accountability to fix poor statutes to the people's elected representatives in Congress.

Not surprisingly, then, the modern administrative state is characterized by poor and gauzy legislation in which gaps and ambiguities are too often left intentionally by Congress, to be filled by unaccountable agency officials, whose work in turn is facilitated by deference from unaccountable judges. This is not the system of "ambition . . . made to counteract ambition" between the Branches envisioned by the Framers, a system intended to preserve liberty. The Federalist No. 51 (James Madison). This is instead a system of evasion of accountability, exploited by the unaccountable, and facilitated by the evasion of responsibility by the likewise unaccountable, all of which are threats to liberty.

IV. A BRIEF HISTORY OF THE AUER DOCTRINE

The doctrine of judicial deference to agencies' interpretations of ambiguities in their own regulations finds its roots in the Supreme Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In that case, the Court was called upon to interpret a wartime price control regulation issued by the Administrator of the Office of Price Administration. The Court justified its deference to the Administrator's interpretation as follows:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."²

² 325 U.S. at 413–14.

Many years later, post-*Chevron*, the Court directly addressed and re-affirmed the holding of *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* involved the interpretation of a Fair Labor Standards Act regulation promulgated by the Department of Labor. Citing *Seminole Rock*, the Court deferred to the Secretary of Labor's interpretation, reasoning that, "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" ³ The Court continued, "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." ⁴

In the years since *Auer*, however, the doctrine of deference to agencies' interpretations of their own regulations has come under increasing and justified criticism, much of it focusing on the perverse agency incentives and separation of powers concerns inherent in *Auer*. For example, as Justice Thomas wrote in dissent in the case of *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994), which involved the interpretation of Medicare regulations:

Here, far from resolving ambiguity in the Medicare program statutes, the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rule-making process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Not long thereafter, a prominent commentator characterized the *Auer* doctrine as providing that:

[W]henever an agency applies a regulation—whether to seek a civil penalty through an enforcement proceeding, to adjudicate a claim for Federal benefits, or even to determine the means of calculating a prisoner's incarceration—the governing regulation means what the agency says it means unless the reviewing court can conclude that the agency is "plainly wrong," [thereby] mak[ing] it easier for the agency simply to issue vague regulations and then put off difficult policy questions until the relatively less demanding implementation stage. ⁵

Perhaps the most famous and pivotal critique of *Auer* deference was lodged by the late-Justice Scalia in his concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50 (2011). As Justice Scalia argued:

[W]hile I have in the past uncritically accepted [*Auer*'s] rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed,

³ 519 U.S. at 461 (citations omitted).

⁴ *Id.* at 463.

⁵ See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 615–16 (1996).

an *a fortiori* application—of the rule that we will defer to an agency’s interpretation of the statute it is charged with implementing, see *Chevron U. S. A. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).

Deferring to an agency’s interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.⁶

Two terms later, in *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1339–41 (2013), Justice Scalia was even more definitive in his criticism of *Auer*:

For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of “defer[ring] to an agency’s interpretation of its own regulations.” . . . Respondent has asked us, if necessary, to “reconsider *Auer*.” I believe that it is time to do so. . . . While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. . . . *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.

⁶564 U.S. at 68–69.

Finally, in his last full term on the bench, Justice Scalia made plain his desire actually to overturn *Auer*, in his concurrence in *Perez v. Mortgage Bankers' Ass'n*, 135 S.Ct. 1199, 1212–13 (2015):

I am unaware of any . . . history justifying deference to agency interpretations of its own regulations. And there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means. See *Decker v. Northwest Environmental Defense Center*, 568 U. S. ___, ___ – ___, 133 S.Ct. 1326, 1339–1342, 185 L.Ed.2d 447 (2013) (SCALIA, J., concurring in part and dissenting in part) (slip op., at 1–7). I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.

V. THE POTENTIAL FOR A LEGISLATIVE SOLUTION TO PROBLEMS PRESENTED BY THE *CHEVRON* DOCTRINE.

In some cases of questions regarding the standards for judicial decision-making, it is fair for Congress to consider whether to leave resolution of those matters to the Judicial Branch to work out on its own. The question of *Chevron* and *Auer* deference, however, is not the ordinary question. The *Chevron* and *Auer* doctrines appear inconsistent with *Marbury* and the separation of powers; the Judicial Branch for more than thirty years has revealed the difficulty it has faced in cleanly, clearly, simply, and definitively explicating whether, why, how, and specifically when it becomes the Executive Branch's power to “determine what the law is,” not the courts', under the *Chevron* doctrine; instability in the *Auer* doctrine has begun to emerge as well; the *Chevron* doctrine rests on a judicial assumption that Congress has decided to delegate such power in some instances to the Executive Branch, and that the Judicial Branch should afford comity to that decision; and, the express terms of the APA, the general backdrop for all relevant Federal legislation since 1946, specifically belie that assumption by the Judicial Branch.

Accordingly, it is appropriate for Congress to overturn *Chevron* and *Auer* statutorily, rather than wait for the Court to address their numerous deficiencies. H.R. 4768, the “Separation of Powers Restoration Act of 2016,” accomplishes these goals by amending the APA's relevant provision, 5 U.S.C. § 706, to insert a *de novo* review term to render it as explicit as possible that courts, not agencies, must decide all questions of law. The bill then applies that clarified standard explicitly to all questions of law concerning the interpretation of constitutional, statutory and regulatory provisions. By applying the *de novo* term to the interpretation of statutory provisions, the bill overturns *Chevron*. By applying the term to the interpretation of regulatory provisions, the bill overturns *Auer*. Terms of the amendment in the nature of a substitute adopted by the Committee guarantee that those results will extend not only to

cases reviewed under the APA's judicial review chapter, ch. 7 of title 5, but also under the assorted "mini-APAs" present in the United States Code.

Among issues discussed in the Committee's record for this bill, including at the hearings discussed below, two matters bear further discussion. These are the questions of the potential for a reemergence of judicial policy activism following the bill's enactment and the possibility of incorporating the *Skidmore* factors or a variation thereof into the bill.

The Committee strongly disfavors judicial activism. Because the bill is limited to the courts' review of pure questions of law, and because it represents a strong congressional reaction against sister-branch activism that defies Congress' true statutory intent—albeit executive branch activism, not judicial activism—the bill should be understood by the courts *not* to condone or license judicial activism. On the contrary, it should be understood as a strong *rejection* of activist abuse under the guise of statutory and regulatory interpretation, regardless of whether undertaken by the Article II or the Article III branch. Post-enactment, the Committee will exercise vigilant oversight to detect whether judicial activism emerges and stand ready to undertake additional legislation to respond to that mischief, if it arises.

With regard to incorporation of the *Skidmore* factors, the Committee acknowledges that there is merit in the *Skidmore* decision's emphasis that courts should consider the "thoroughness evident in [the agency's] consideration," the "validity of [the agency's] reasoning," and the agency-offered interpretation's "consistency with earlier and later [agency] pronouncements." Clearly, courts must not defer to agency interpretations on those grounds, but it will be helpful to the courts in the performance of their tasks if they are assisted by thorough, valid, and consistent agency interpretation rooted in the agency's exercise of its expertise. But courts reviewing agency actions will necessarily be presented with the agency's administrative record and the agency's briefs and oral arguments. These will inherently demonstrate to the reviewing court the thoroughness evident in the agency's consideration, the validity of the agency's reasoning, and the consistency of the agency's interpretation over time. Knowing that the courts must no longer defer to the agency, but must instead be persuaded in the course of *de novo* review of the best interpretation of a statute or regulation, the agency will already be provided by the bill with a strong incentive to bring to bear before the court the most thorough and thoroughly articulated agency consideration of the interpretive question, as well as the most valid and consistent reasoning. Thus, as was suggested by hearing testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, it is not necessary to incorporate the *Skidmore* factors into the text of the bill for the courts to be able to benefit from them.⁷ Accordingly, the Committee declined to incorporate any formulation of the *Skidmore* factors into the bill at this time.

⁷ See Testimony of Prof. John F. Duffy, *Legislative Hearing on H.R. 4768: "The Separation of Powers Restoration Act of 2016,"* Subcommittee on Regulatory Reform, Commercial and Antitrust Law (May 17, 2016) at 8–9 (available at <https://judiciary.house.gov/hearing/h-r-4768-separation-powers-restoration-act-2016/>).

Hearings

On May 17, 2016, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted a legislative hearing on the topic of “H.R. 4678, the ‘Separation of Powers Restoration Act of 2016.’” Testimony was received from: Professor John Duffy, University of Virginia School of Law; Professor Jack Beerman, Boston University School of Law; Jeffrey Bossert Clark, Esq., Partner, Kirkland & Ellis LLC and former Deputy Assistant Attorney General for the Environment and Natural Resources Division, U.S. Department of Justice; Adam J. White, Fellow, Hoover Institution and Adjunct Professor, Antonin Scalia School of Law at George Mason University; Professor Ronald M. Levin, Washington University School of Law; and, John D. Walke, Esq., Director, Clean Air Project, Climate & Clean Air Program.

Before the bill’s introduction, on March 15, 2016, the Subcommittee held an oversight hearing on matters related to the bill. Witnesses at that hearing included: Professor Jonathan Turley, The George Washington University Law School; Professor Duffy; Professor George Shepherd, Emory University School of Law; Professor Beerman; Professor Richard Pierce, The George Washington University School of Law; and, Professor Emily Hammond, The George Washington University School of Law.

Committee Consideration

On June 8, 2016, the Committee met in open session and ordered the bill H.R. 4768 favorably reported, with an amendment, by a rollcall vote of 12 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 4768.

1. Amendment #2, offered by Mr. Johnson. The Amendment would carve out of the bill agency actions based on statutes that expressly grant agency discretion. Defeated 5 to 10.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	5	10	

2. Amendment #3, offered by Mr. Cicilline. The Amendment would carve out of the bill consumer safety regulations from the Food and Drug Administration. Defeated 6 to 10.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	6		

3. Amendment #4, offered by Ms. Jackson Lee. The Amendment would carve out of the bill national security regulations from the Department of Homeland Security. Defeated 5 to 8.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)			
Mr. Labrador (ID)			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	5	8	

4. Amendment #5, offered by Mr. Conyers. The Amendment would carve out of the bill regulations on lead and copper in drinking water. Defeated 4 to 10.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)			
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	4	10	

5. Motion to table the appeal of the ruling of the Chair on the germaneness of Amendment #6, offered by Mr. Cicilline. The Amendment would insert a clarification that race, ethnicity, or national origin may not serve as a basis for judicial disqualification. Motion to Table the Appeal approved 12 to 6.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)			
Mr. Labrador (ID)			

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)	X		
Ms. Walters (CA)			
Mr. Buck (CO)	X		
Mr. Ratchliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Peters (CA)			
Total	12	6	

6. Motion to report H.R. 4768 as amended favorably to the House of Representatives. Approved 12 to 8.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)	X		
Mr. Collins (GA)			

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. DeSantis (FL)	X		
Ms. Walters (CA)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)			
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Peters (CA)		X	
Total	12	8	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4768, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 14, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
*Committee on the Judiciary,
 House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4768, the “Separation of Powers Restoration Act of 2016.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
 DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
 Ranking Member

H.R. 4768—Separation of Powers Restoration Act of 2016.

As ordered reported by the House Committee on the Judiciary
 on June 8, 2016.

H.R. 4768 would authorize courts that review agency actions to decide all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules, without deferring to previous legal determinations by the agency (de novo review).

Under the legislation, the courts could overturn some agency decisions that they would have upheld under current law. Some of those decisions could affect the budget by overturning regulations that affect discretionary spending, direct spending, and revenues. However, CBO has no basis for estimating either the likelihood that such actions would be overturned or what the effects on the budget might be.

Because enacting the legislation could affect direct spending and revenues, pay-as-you-go procedures apply. For example the legislation could affect the timing or content of rules that concern Federal entitlement programs or rules related to the collection of fees. CBO also cannot determine whether enacting H.R. 4768 would increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4768 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Marin Burnett. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 4768 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the

Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 4768 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4768 clarifies the nature of judicial review of agency interpretations of statutory and regulatory provisions to preclude continued deference by courts to such agency interpretations.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4768 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes H.R. 4768 as reported by the Committee.

Section 1. Short Title.

Section 1 sets forth the short title of the bill as the “Separation of Powers Restoration Act of 2016.”

Section 2. Judicial Review of Statutory and Regulatory Interpretations.

Section 2 amends section 706 of title 5 to explicitly state that courts are to decide all relevant questions of law de novo, including all questions of the interpretation of constitutional, statutory, and regulatory provisions.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 7—JUDICIAL REVIEW

* * * * *

§ 706. Scope of review

【To the extent necessary】 *(a) To the extent necessary* to decision and when presented, the reviewing court shall 【decide all relevant questions of law, interpret constitutional and statutory provisions, and】 determine the meaning or applicability of the terms of an agency action *and decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. Notwithstanding any other provision of law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law. No law may exempt any such civil action from the application of this section except by specific reference to this section.* 【The reviewing court shall—】

(b) The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions 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 case subject to sections 556 and 557 of this title 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.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Dissenting Views

INTRODUCTION

H.R. 4768, the “Separation of Powers Restoration Act of 2016,” would require a Federal court to review *de novo* agency rulemakings and statutory interpretations and thereby override the Supreme Court’s long-recognized principle of judicial deference to agencies’ statutory interpretations, which recognizes the value of agency expertise and political accountability in rulemaking. In effect, H.R. 4768 would empower a generalist court lacking the expertise, resources, and public input to nullify agency action solely on policy grounds. 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, which would further delay 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 agencies' expertise and congressionally delegated authority with their own inexpert views and substantive preferences. Lastly, H.R. 4768 is a dangerous solution to a non-existent problem.

In recognition of these serious concerns, the Coalition for Sensible Safeguards—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—strongly opposes this legislation, explaining that it “will make our system of regulatory safeguards weaker by allowing for judicial activism at the expense of agency expertise and congressional authority, thereby resulting in unpredictable outcomes and regulatory uncertainty for all stakeholders.”¹ A group of leading administrative law scholars also oppose H.R. 4768, stating that it is motivated by misplaced objections to regulatory policy, rather than legitimate judicial review concerns, and that the bill presents separation of powers concerns and will generate unnecessary confusion.²

For these reasons and those discussed below, we respectfully dissent and urge our colleagues to oppose this seriously flawed bill.

¹Letter to U.S. Rep. Bob Goodlatte (R-VA), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary from the Coalition for Sensible Safeguards (June 8, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary). Current members of the Coalition include: AFL-CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers; Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Center for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America; Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women's Health Network; National Women's Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children's Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America's Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. COALITION FOR SENSIBLE SAFEGUARDS—OUR MEMBERS, <http://sensiblesafeguards.org/our-members>.

²Letter to U.S. Rep. Bob Goodlatte (R-VA), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary from Joel B. Eisen, Professor Law, University of Richmond School of Law, and Emily Hammond, Professor of Law, George Washington University Law School, *et al.* (June 8, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

DESCRIPTION AND BACKGROUND

DESCRIPTION

Section 706 of the Administrative Procedure Act (APA)³ requires a Federal court, when necessary to decision and when presented, to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”⁴ Section 706, in turn, sets forth various criteria that the court must consider in determining whether such agency action should be held unlawful and set aside.⁵

H.R. 4768 amends section 706 to require the court to decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. The bill also includes a supermandate ensuring that its provisions override all other laws, even those that prohibit judicial review. Specifically, it provides that “[n]o law may exempt any such civil action from the application of this section except by specific reference to this section.”⁶

BACKGROUND

I. OVERVIEW OF FEDERAL RULEMAKING

Federal regulations impact nearly every aspect of our lives and are “one of the basic tools of government used to implement public policy.”⁶ Enacted in 1946, the Administrative Procedure Act (APA) establishes the minimum rulemaking and formal adjudication requirements for all administrative agencies.⁷ The APA’s baseline procedural requirements serve to maintain a balance between agency flexibility and the requirements of due process. As 84 leading administrative law academics have observed, “The APA has served for nearly 70 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life.”⁸ In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking

³ 5 U.S.C. §§ 551 *et seq.* (2016).

⁴ 5 U.S.C. § 706 (2016).

⁵ Section 706 requires the court to:

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions 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 case subject to sections 556 and 557 of this title 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.

Id.

⁶ CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, *The Federal Rulemaking Process: An Overview* 1 (2005).

⁷ The APA defines “rulemaking” as the “agency process for formulating, amending or repealing a rule.” 5 U.S.C. § 551(5) (2016). A “rule” is defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4) (2016).

⁸ Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI), 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

process by Congress and various presidents.⁹ These requirements focus “predominately on agencies’ development of new rules,” according to the Government Accountability Office (GAO).¹⁰

In general, proposed rules go through an extensive vetting process that many believe is already too ossified and burdened by delay.¹¹ The APA defines “rulemaking” as the “agency process for formulating, amending or repealing a rule.”¹² The process for informal rulemaking, commonly referred to as notice-and-comment rulemaking, is outlined in section 553 of the APA, and is the process that agencies follow for promulgating the rules in the overwhelming majority of cases.¹³

In the informal notice-and-comment rulemaking process, agencies are required to provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the rule’s content.¹⁴ A notice is “adequate” if an agency publishes a notice of proposed rulemaking in the *Federal Register* and the notice contains the time, place, and nature of public rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.¹⁵ With respect to the required public comment period, the agency must provide the public with the opportunity to submit written “data, views, or arguments.”¹⁶ There is no minimum time period during which an agency must accept comments, but courts reviewing an agency’s compliance with this APA requirement inquire as to whether the opportunity to comment was “adequate,” which may inform how long the comment period should be for a given rule.

After the comment period closes, the agency must consider the public’s comments and incorporate into the adopted rule a “concise general statement” of the “basis and purpose” of the final rule.¹⁷ From this general statement, the public should be able to obtain a general idea of the purpose of and basic justification for the rule. The final rule and the general statement must be published in the

⁹ Examples of legislative mandates include the Unfunded Mandates Reform Act, Pub. L. No. 104-4 (1995); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 1169 (1980); and the Congressional Review Act, Pub. L. No. 104-121 (1996). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for Federal rulemakings. *See, e.g.*, Exec. Ord. 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).

¹⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 1 (2007).

¹¹ *See, 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 and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 1, 4-5 (2015) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen), http://judiciary.house.gov/_cache/files/cfc2a8c6-729e-4e77-9f9f-561f601c153/narang-testimony.pdf.

¹² 5 U.S.C. § 551(5) (2016).

¹³ 5 U.S.C. § 553 (2016). 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 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) (2016).

¹⁴ 5 U.S.C. § 553(b), (c) (2016).

¹⁵ 5 U.S.C. § 553(b) (2016).

¹⁶ 5 U.S.C. § 553(c) (2016).

¹⁷ *Id.*

Federal Register not less than 30 days before the rule's effective date.¹⁸

II. JUDICIAL DEFERENCE TO AGENCY STATUTORY INTERPRETATIONS

Section 702 of the APA subjects agency rulemaking to judicial review, thereby providing a statutory mechanism for relief 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.”¹⁹ Section 706(2) of the APA requires a reviewing court 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 rule-making] 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.²⁰

There is a strong presumption that Congress intends judicial review of administrative action to be available,²¹ with two exceptions: when statutes specifically preclude judicial review and when Congress provides agencies with statutory discretion.²² A court, however, always has the authority to review the constitutionality of agency action, including those actions that are otherwise unreviewable.²³

While the APA requires reviewing courts to decide all relevant questions of law, interpret statutes, and determine the meaning of agency action, it is well-established that courts “must give substantial deference to an agency’s interpretation of its own regulations.”²⁴ A reviewing court may only invalidate an agency rule or formal adjudication when it violates a constitutional provision or when the agency’s rule exceeds its statutory authority to issue the rule as clearly expressed by Congress.²⁵ Thus, courts cannot simply strike down a rule based on policy grounds.²⁶ Indeed, the Supreme

¹⁸ 5 U.S.C. § 553(d) (2016). The APA exempts from all of its informal rulemaking requirements rules relating to certain subject matter areas. These rules include those governing: (1) “a military or foreign affairs function of the United States;” (2) “a matter relating to agency management or personnel;” or (3) a matter relating to “public property, loans, grants, benefits, or contracts.” 5 U.S.C. § 553(a) (2016). The APA also exempts from the notice-and comment requirements rules that are issued for “good cause,” i.e., where an agency finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b) (2016).

¹⁹ 5 U.S.C. § 702 (2016).

²⁰ 5 U.S.C. § 706(2) (A)–(F) (2016).

²¹ *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 667 (1986).

²² 5 U.S.C. § 701 (2016).

²³ *See Webster v. Doe*, 486 U.S. 592 (1988); *Oestereich v. Selective Service System*, 393 U.S. 233 (1968).

²⁴ *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 103 (1995).

²⁵ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁶ *Id.*

Court has routinely observed that the scope of judicial review is narrow and “a court is not to substitute its judgment for that of the agency.”²⁷ This is true even where an agency changes its previous interpretation of a regulation following a change in Administration, so long as it provides adequate grounds for doing so.²⁸

Nevertheless, courts retain an important role in determining whether an agency action is permissible, arbitrary, or capricious.²⁹ The Supreme Court held in the seminal case on judicial deference, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, that courts must give “considerable weight” to an agency’s construction of a statute it administers.³⁰ Professor Ron Levin, Professor of Law, Washington University in St. Louis, and Chair, 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.³¹

Under *Chevron*, courts utilize a two-step process to determine whether an agency’s statutory interpretation is controlling.³² Under step one, a reviewing court must determine whether an agency’s interpretation of a statute is valid by applying the traditional tools of statutory interpretation.³³ Deference to an agency’s interpretation of an underlying statute is appropriate where Congress has generally delegated authority to the agency to “make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁴ Courts assume that Congress intended to delegate such “gap-filling” authority where a “rule sets forth important individual rights and duties, the agency focuses fully and directly upon the issue and uses full notice-and-comment procedures, and the resulting rule falls within the statutory grant of authority and is reason-

²⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983); *Judulang v. Holder*, 132 S. Ct. 476, 483 (2011).

²⁸ *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (“Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”).

²⁹ *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011).

³⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (internal quotes omitted).

³¹ *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Management of the S. Comm. on Homeland Security and Government Affairs*, 114th Cong. 38 (2015) (statement of Prof. Ron Levin), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94906/pdf/CHRG-114shrg94906.pdf>.

³² *But see* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597 (2009) (“This structure artificially divides one inquiry into two steps. The single question is whether the agency’s construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask this question, just in different ways.”).

³³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

³⁴ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011).

able.”³⁵ Where an agency acts clearly within the scope of a congressional delegation of authority, the inquiry ends.³⁶

If, however, a court “determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute.”³⁷ Rather, *Chevron* step two requires that a reviewing court defer to any “permissible” interpretation of the law by an agency where a statute is silent or ambiguous.³⁸ The Court has clarified that an agency’s statutory interpretation is permissible where it provides a reasoned explanation of its action, which includes “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”³⁹ Writing for a unanimous majority in 2011, Justice Elena Kagan observed in *Judulang v. Holder* that when “an administrative agency sets policy, it must provide a reasoned explanation for its action,” noting that this requirement is “not a high bar, but it is an unwavering one.”⁴⁰ Also referred to as the “hard look” doctrine, this type of heightened review involves a thorough examination of the administrative record and the agency’s explanation of its statutory authority.⁴¹ Relevant factors in this analysis include the agency’s expertise in producing an administrative record, delegated authority by Congress, and the policy nature of the decision.⁴²

Between 2000 and 2002, the Supreme Court issued a series of decisions further outlining whether courts must defer to agency’s expertise in rulemaking for nonlegislative rules.⁴³ Sometimes referred to as *Chevron* step zero, this inquiry examines whether the principles of *Chevron* even apply to an agency action.⁴⁴ Under these decisions, the Court has generally held that nonlegislative rules, which do not carry the force of law,⁴⁵ do not qualify for *Chevron* deference.⁴⁶ For these rules—which include opinion letters, pol-

³⁵ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007).

³⁶ *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011); *Wells Fargo Bank, N.A. v. F.D.I.C.*, 310 F.3d 202, 205–06 (D.C.Cir.2002) (“Because the judiciary functions as the final authority on issues of statutory construction, an agency is given no deference at all on the question whether a statute is ambiguous.”).

³⁷ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

³⁸ *Id.* at 842–43.

³⁹ *Judulang v. Holder*, 132 S. Ct. 476, 483–84 (2011) *citing* *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

⁴⁰ 132 S. Ct. 476, 479 (2011). Justice Kagan explained that determining whether an action is arbitrary or capricious under the APA requires the same analysis as under *Chevron* step two, suggesting that both inquiries concern whether an agency interpretation is “arbitrary or capricious in substance.” *Id.* at 484 n.7.

⁴¹ Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1410 (1992) (“[Courts] determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, choose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions.”).

⁴² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 468 (2013).

⁴³ *See Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

⁴⁴ *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

⁴⁵ *Id.*

⁴⁶ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise

icy statements, and enforcement guidelines—deference principles first announced in *Skidmore v. Swift & Co.*⁴⁷ apply.⁴⁸ Under *Skidmore*, a reviewing court gives some weight to the agency interpretation of the statute that it administers depending on the timing and consistency of the action under review.⁴⁹

CONCERNS WITH H.R. 4768

I. H.R. 4768 WILL LEAD TO REGULATORY PARALYSIS AND THEREBY DELAY THE IMPLEMENTATION OF CRITICAL REGULATORY SAFEGUARDS

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.⁵⁰ Heightened review would force agencies to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking, which is already burdened by procedural delays.⁵¹ Professor Richard Pierce of The George Washington University Law School explains:

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,

of that authority."); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

⁴⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁴⁸ *Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter "H.R. 4768 Hearing"] (statement of Professor Ronald M. Levin, Washington University School of Law), <https://judiciary.house.gov/wp-content/uploads/2016/05/Levin-Testimony.pdf>.

⁴⁹ Peter L. Strauss, *Deference is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight"*, 112 COLUM. L. REV. 1143, 1145 (2012).

⁵⁰ ABA Sec. of Admin. L. & Reg. Prac., *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."); see Letter from Anna Shavers, Chair, ABA Section of Administrative Law and Regulatory Practice, to Sen. Tom Carper (D-DE) and Sen. Tom Coburn (R-OK) on S. 1029, the Regulatory Accountability Act of 2013, at 17, http://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf (discussing reform of judicial deference to interpretations of rules); see Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI), 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

⁵¹ ABA Sec. of Admin. L. & Reg. Prac., *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."); see Letter from Anna Shavers, Chair, ABA Section of Administrative Law and Regulatory Practice, to Sen. Tom Carper (D-DE) and Sen. Tom Coburn (R-OK) on S. 1029, the Regulatory Accountability Act of 2013, at 17, http://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf (discussing reform of judicial deference to interpretations of rules); see Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI), 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

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.⁵²

The Administrative Conference of the United States (ACUS) has likewise observed that the consequence of heightened review would be a loss of certainty, efficiency, and fairness in the rulemaking process.⁵³ In the context of its opposition to an earlier proposal to enact a *de novo* standard of review for agency action,⁵⁴ ACUS noted that the “most obvious” concern of heightened review would be diminished rulemaking.⁵⁵ The consequence of this decline in rulemaking would be severe for both the public and regulated entities in several regards.⁵⁶ First, it would undermine transparency and certainty for regulated entities.⁵⁷ Without the benefit of agency action, regulated entities are unaware of agency views. Furthermore, where agencies do issue rules, “profound uncertainty would of necessity prevail while court review proceedings ran their course.”⁵⁸ Second, heightened review would greatly increase regulatory complexity. The ACUS report explains:

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

⁵²Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).

⁵³Ronald M. Levin, *Judicial Review and the Bumpers Amendment* at 591 (1979) (Final Report to the Administrative Conference of the U.S.) [hereinafter “ACUS Report”], <https://www.acus.gov/sites/default/files/documents/Levin%20ACUS%20Bumpers%20report.pdf>.

⁵⁴H.R. 4768’s *de novo* standard of review of agencies’ statutory interpretations is not a new proposal. Congress first considered various proposals that would have created an enhanced judicial review standard in the late 1970’s and early 1980’s. In 1975, Senator Dale Bumpers (D-AR) first introduced legislation that would establish a *de novo* standard of review of agency action. In 1979, the Senate adopted this proposal as an amendment to an unrelated bill, passing by a 51 to 27 vote. Thereafter, Congress considered various other proposals that similarly required reviewing courts to “independently decide all relevant questions of law.” Similar to H.R. 4768’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. Following waves of criticism, however, Congress ultimately rejected these proposals. See generally Ronald M. Levin, *Review of ‘Jurisdictional’ Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 367–68 (1983).

⁵⁵ACUS Report, *supra* note 53, at 590.

⁵⁶*Id.*

⁵⁷*Id.* at 591–92.

⁵⁸*Id.* at 592.

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.⁵⁹

The non-partisan Congressional Research Service (CRS) has similarly criticized heightened review of agencies' statutory interpretations, stating that it "will cause delay, complexity, and uncertainty in the administrative process."⁶⁰ In a report on legislation that is substantively comparable to H.R. 4768, CRS noted that heightened review would force agencies to dedicate significantly more resources in support of the administrative record in anticipation of review.⁶¹ In addition, CRS observed that "it is almost universally agreed" that the consequence of heightened review will be additional industry challenges to rules.⁶² 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.⁶³ 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.⁶⁴ 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.⁶⁵

The practical effect of this regulatory paralysis will be even more delays for new rules that benefit the public's health, safety, and security.⁶⁶ John Walke, a senior counsel at the Natural Resources Defense Council (NRDC), testified at the legislative hearing on H.R. 4768 that the bill will result in significant regulatory delay and uncertainty:

First, agencies will issue fewer regulations to carry out Federal laws and protect Americans. Many more congressional deadlines will be missed. I expect that is precisely what some members and corporate lobbyists opposed to regulation hope will happen. It is why they support this legislation. Second, agencies will resort to simply repeating ambiguous and unclear statutory language verbatim in regulations. They will do so in an attempt to insulate themselves from adverse judgments by judges conducting

⁵⁹ *Id.* at 595.

⁶⁰ MORTON ROSENBERG, CONG. RESEARCH SERV., THE FUTURE OF PUBLIC PARTICIPATION IN INFORMAL AGENCY RULEMAKING UNDER PENDING REGULATORY REFORM PROPOSALS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 44 (1982).

⁶¹ *Id.* at 46.

⁶² *Id.* at 47.

⁶³ Rosenberg, *supra* note 60, at 46–47.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Letter to U.S. Rep. Bob Goodlatte (R-VA), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary from the Coalition for Sensible Safeguards (June 8, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

de novo reviews of agency resolutions of statutory ambiguities, conflicts and gaps that are differently reasonable than the judge's notion of what is reasonable.⁶⁷

Agencies are tasked by Congress with protecting the public interest across a spectrum of areas. Few areas are more important to the health and welfare of society than clean drinking water and safe food. To illustrate this concern, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have exempted from the bill rulemakings by the Environmental Protection Agency (EPA) pertaining to the regulation of lead and copper in drinking water.⁶⁸ He explained that the amendment was necessary because "it is critical that Americans have access to safe drinking water and that we do not hinder the ability of Federal agencies, such as the Environmental Protection Agency, to prevent future lead contamination events like the Flint water crisis."⁶⁹ Ranking Member Conyers stated that "federal judges, who are constitutionally insulated from political accountability, should not have the power to second-guess the agency experts concerning the appropriateness of highly technical regulations crucial to protecting the health and safety of millions of Americans."⁷⁰ Unfortunately, this amendment failed by a party-line vote of 4 to 10.⁷¹

To further underscore these concerns Representative David Cicilline (D-RI) offered an amendment to exempt from the bill rulemakings by the Food and Drug Administration (FDA) relating to consumer food safety.⁷² Speaking in support of his amendment, he stated that H.R. 4768 would "bring the agency rulemaking process to a halt, incentivizing judges to rewrite current regulations and introducing uncertainty into the effort to make new ones."⁷³ The consequence of this delay and uncertainty, Representative Cicilline explained, would be to hinder the FDA's ability to protect Americans from foodborne illness, which affects roughly 48 million people in the United States.⁷⁴ This amendment also failed along party lines by a vote of 6 to 10.⁷⁵

In a similar regard, Representative Sheila Jackson Lee (D-TX) offered an amendment that would have exempted from the bill rules issued by the Department of Homeland Security (DHS) pertaining to national security.⁷⁶ She stated in support of her amendment that DHS is "the first line of defense in protecting the Nation and leading recovery efforts from all hazards and threats, which include everything from weapons of mass destruction to natural disasters."⁷⁷ This amendment failed by a party-line vote of 5 to 8.⁷⁸

⁶⁷H.R. 4768 Hearing, *supra* note 48, at 7 (statement of John D. Walke, Esq., Director, Clean Air Project, Climate & Clean Air Program, Natural Resource Defense Council), <https://judiciary.house.gov/wp-content/uploads/2016/05/Walke-Testimony.pdf>.

⁶⁸Tr. of Markup of H.R. 4768, the "Separation of Powers Restoration Act of 2016," by the H. Comm. on the Judiciary, 114th Cong. 63 (June 8, 2016).

⁶⁹*Id.*

⁷⁰*Id.* at 64.

⁷¹*Id.* at 73.

⁷²*Id.* at 32.

⁷³*Id.* at 34.

⁷⁴*Id.*

⁷⁵*Id.* at 46.

⁷⁶*Id.* at 47.

⁷⁷*Id.* at 49–50.

⁷⁸*Id.* at 62.

II. H.R. 4768 RAISES SEPARATION OF POWERS CONCERNS

H.R. 4768 raises separation of powers concerns because it would increase the policymaking power of the Judicial Branch with respect to a broad range of highly technical yet politically sensitive regulatory matters. As the Supreme Court in *Chevron* observed, such policy making power should rest primarily in the hands of the Legislative and Executive Branches. H.R. 4768, if enacted into law, 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 between 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. As Professor Pierce notes, courts lacked explicit authority to review most agency rulemaking until the late Nineteenth century.⁷⁹

The Supreme Court's decision in *Chevron* demonstrates its concern with maintaining the balance of separation of powers, and that the Court feared giving judges too much control over policymaking if presented with a claim involving a question of whether an agency had improperly interpreted Congress' delegation of statutory rulemaking authority. The Court emphatically makes this point:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent Administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁸⁰

In arriving at the deference doctrine articulated in *Chevron*, the Supreme Court acknowledged that Federal courts lacked the expertise to second-guess the agency rulemaking process behind the development of a complex and often highly technical rule or regulation. Rather, the court should overrule an agency's interpretation only if it is so unreasonable in that it exceeds Congress' delegation of rulemaking authority. The basis for the Court's reasoning, as Professor Hammond testified before the Subcommittee on Regu-

⁷⁹ *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 4 (2016) (statement of Professor Richard Pierce, George Washington Law School) (“Until late in the Nineteenth century, courts could not and did not review the vast majority of agency actions. The Supreme Court held that courts lacked the power to review exercises of executive branch discretion. A court could review an action taken by the executive branch (or a refusal to act) only in the rare case in which a statute compelled an agency to act in a particular manner. In that situation, the court was simply requiring the agency to take a non-discretionary ministerial action.”) [hereinafter *Chevron* Hearing], <https://judiciary.house.gov/wp-content/uploads/2016/03/Pierce-Testimony-REVISED.pdf>.

⁸⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

latory Reform, is that “[a]gencies have experience with the statutes they administer and the challenges that arise under the applicable regulatory regimes. Relative to the courts, agencies also have superior expertise, particularly with respect to complex scientific or technical matters.”⁸¹ Importantly, the Court’s reasoning does not rest simply on the understanding that judges are generalists lacking the special scientific and technical knowledge or familiarity with the statutory authorities needed to evaluate certain agency rulemakings. It also reflects the Court’s view with respect to the proper role of the Judicial Branch in relation to the political branches.

Although statutory interpretation resides within the Judicial Branch’s constitutional wheelhouse, the *Chevron* Court also recognized that judges “are not part of either political branch of government.”⁸² And the Court expressed the concern that judges should not be put in the position of “reconciling competing political interests” based on “personal policy preferences.”⁸³ This is because the unelected judges of the Judicial Branch are insulated from the political process and would be unaccountable for any policy decisions they might make in any number of politically sensitive areas of the law. Deferring to an agency’s interpretation of a statute—if reasonable—when the claim is essentially over competing policy preferences is preferable in the Court’s eyes because the Executive Branch is politically accountable. As the Court stated:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, Federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones⁸⁴

The Court’s decision in *Chevron* “is an exercise in judicial self-restraint: by deferring to agencies’ reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law.”⁸⁵ It adopted a legal standard that limited the judiciary to its traditional and constitutional role of interpreting the law while giving deference to policy decisions made by the political branches.

H.R. 4768 would undermine the separation of powers by eliminating judicial deference to agency rulemaking. This would incentivize judicial activism by allowing a reviewing court to substitute its policy preferences for those of the agency.⁸⁶ And rather than deferring to agencies’ substantive expertise, enhanced judicial

⁸¹ *Chevron* Hearing, *supra* note 79, at 2 (written statement of Professor Emily Hammond, George Washington University Law School), <https://judiciary.house.gov/wp-content/uploads/2016/03/Hammond-Testimony-REVISED.pdf>.

⁸² *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 at 865.

⁸³ *Id.*

⁸⁴ *Id.* at 866.

⁸⁵ *Chevron* Hearing, *supra* note 79, at 2 (written statement of Professor Emily Hammond, George Washington University Law School), <https://judiciary.house.gov/wp-content/uploads/2016/03/Hammond-Testimony-REVISED.pdf>.

⁸⁶ Rosenberg, *supra* note 60, at 48–51.

review would enable generalist courts to apply their policy preferences to the review of an agency rule, whether they do so consciously or not. More importantly, judges lack the political accountability of Executive Branch agencies.⁸⁷

The Administrative Conference of the United States (ACUS),⁸⁸ an independent Federal agency dedicated to improving the administrative process, has previously raised this concern in opposition to substantively similar legislation.⁸⁹ In a report in support of its recommendation on judicial review, ACUS noted that a heightened standard of review may potentially apply far beyond questions of law to include questions of fact, policy, and procedure.⁹⁰ This form of sweeping authority vested in one branch of government would represent, in ACUS's view, "a fundamental overthrow of the existing allocation of power between judicial and executive branches,"⁹¹ representing "so complete a departure from prevailing separation-of-powers principles that the student of administrative law would virtually be left without any point of reference from which to critique it."⁹² ACUS explains:

In this situation, Congress has literally delegated a portion of its standard-setting power, and through that delegation Congress entrusts to the (agency), rather than to the courts, the primary responsibility for interpreting the statutory term. Such a situation exists when, for example, an administrative agency implements a statute by issuing rules that it believes will serve the public convenience, interest or necessity, or by setting rates that it deems just and reasonable, or by promulgating regulations to carry out the purposes of this statute. In any of these situations, the purposes of the underlying legislation would be undermined in a quite fundamental way if the regulations could be upheld only where the agency persuaded a reviewing court by a preponderance of the evidence that the regulation was "right." The legal results of this approach can also be appraised in more pragmatic terms. Plenary judicial review of all regulations would clearly impair the effectiveness of the many substantive statutes that become the subjects of administrative rulemaking. It would lead to inferior regulation because courts simply do not have agencies' constant involvement with administration of the various programs, let alone agencies' technical sophistication. The APA standards of review aim at a balanced scheme whereby the detached perspective of judicial generalists complements the experience and knowledge of agency specialists. A system of review that vests judges with primary

⁸⁷*Id.*; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) ("But whatever the logic of the Marbury argument or the wisdom of strong judicial control of administrative law-making, the Marshall court itself gave early sanction to deference principles."); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 18 (1985) ("*Marbury* does not make clear whether the exercise of independent judicial judgment to keep agencies within statutory bounds is constitutionally indispensable.")

⁸⁸ACUS Report, *supra* note 53, at 576.

⁸⁹H.R. 4768 Hearing, *supra* note 48, at 8 (statement of Professor Ronald M. Levin, Washington University School of Law), <https://judiciary.house.gov/wp-content/uploads/2016/05/Levin-Testimony.pdf>.

⁹⁰ACUS Report, *supra* note 53, at 568, 572.

⁹¹*Id.* at 575.

⁹²*Id.* at 589.

responsibility for both functions cannot be as successful. Whether or not Congress could effectively forbid court to rely on agency expertise in factual and policy areas, an effort to do so would be quite ill advised.⁹³

Policymaking is more properly suited for the political branches, which are ultimately accountable to the people who are affected by such policies. As the Court in *Chevron* recognized, judges have no political constituency by constitutional design and there is no mechanism by which the public or the political branches could demonstrate disapproval of judicially determined policy. This is counter to the constitutional principles that animate the political branches, which are accountable to the public for policymaking decisions.

Furthermore, tasking the Judicial Branch with policymaking functions could undermine its unique constitutional role as the interpreter of the law's meaning. The legitimacy of the Judicial Branch rests upon the perception that it remain above the fray of politics. If enacted, H.R. 4768 would place judges in a position to routinely determine substantive policy on potentially politically sensitive issues and in a manner that goes beyond reconciling competing political interests present in some cases. Court decisions could come to be viewed as partisan exercises rather neutral determinations of law and courts as political actors no different from a Presidential administration or Congress.

Proponents of H.R. 4768 argue that this legislation is needed to restore the separation of powers between Congress and the Executive Branch. In their view, the Executive Branch has infringed upon Congress' legislative powers through an expansion of the rule-making process and that Federal courts should "rein in" Executive Branch agencies by substituting their own judgement on policy matters. These arguments essentially reflect an anti-regulatory approach to policy and governance based on the belief that Federal courts may be more amenable to carrying out such an agenda. There is, however, absolutely no guarantee that any future Executive Branch administration or Federal judge will share such an agenda. As Professor Levin testified:

Even people who agree with the anti-government premises of the sponsors [of H.R. 4768] should recognize that a change in the APA standard of review is an inapt tool for advancing that agenda. It is shortsighted, because it ignores the fact that, over time, political administrations change. Sometimes the Administration in office will generally be in favor of deregulation, and in these circumstances a more intrusive standard of judicial review would tend to undercut that Administration's policies just as surely as it may tend to undercut a more progressive Administration's policies when the latter holds power.⁹⁴

⁹³ *Id.* at 590.

⁹⁴ *Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 9 (2016) (written statement of Professor Ronald Levin).

This concern was also shared by the Majority's witness at the legislative hearing on the bill⁹⁵ who said that because the bill broadly applies to all agency actions, H.R. 4768 may "frustrate Congress' intent" in cases where Congress clearly expected agencies to apply expertise through gap-filling authority:

There may be other contexts, however, in which the language, structure and purposes of a statute indicate that Congress expects reviewing courts to defer to persuasive agency reasoning concerning the proper construction of a statute or statutory gaps that Congress would have wanted an agency to fill in line with consistent administrative policy. . . . In fact, to some, the term "deference" may be something of a misnomer in this context. When Congress has delegated to an agency the power to administer a statute, and the agency has thoroughly considered a problem, and provided persuasive, valid reasoning for its consistent view of the meaning of a statutory term, a reviewing court is likely to be convinced that the agency has made a correct decision, or at least a decision that is just as likely to be correct as any contrary view advanced by the challengers on judicial review. In such a case, the agency's decision ought to be approved regardless of whether the Skidmore factors are considered to be indicators of persuasion or of deference.⁹⁶

He also observed that it was "widely accepted that reviewing courts should defer to agency statutory construction when Congress explicitly delegated interpretive authority to the administering agency" even prior to the Supreme Court's decision in *Chevron*,⁹⁷ where it held that courts should rule to an agency's reasonable interpretation of its statutory authority.⁹⁸

In response to these concerns, Representative Henry C. "Hank" Johnson, Jr. (D-GA) offered an amendment to exempt from the bill rules issued by agencies pursuant to express statutory authority.⁹⁹ Speaking in support of his amendment, Representative Johnson explained that the bill would undermine clear congressional intent in those instances where Congress expressly delegates authority to agencies and restricts judicial review.¹⁰⁰ The amendment failed, however, along party lines by a vote of 5 to 10.¹⁰¹

In sum, H.R. 4768 will disrupt the careful balance reflected in the Supreme Court's *Chevron* decision. Bolstering the power of unelected judges to make substantive policymaking decisions will not correct any perceived imbalance between the Executive and Legislative Branches. Rather, this bill will destroy that balance by giving a non-political branch of the government an explicit license to make substantive policy on a host of highly technical and sci-

⁹⁵ *Id.* at 16 (Professor Jack Beermann, Boston University School of Law), <https://judiciary.house.gov/wp-content/uploads/2016/03/Beermann-Testimony.pdf>.

⁹⁶ *Id.* at 8–9.

⁹⁷ *Id.* at 4.

⁹⁸ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

⁹⁹ Tr. of Markup of H.R. 4768, the "Separation of Powers Restoration Act of 2016," by the H. Comm. on the Judiciary, 114th Cong. 22 (June 8, 2016).

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.* at 33.

entific rulemakings which effect the public health and safety of millions of Americans.

III. H.R. 4768 IS A SOLUTION IN SEARCH OF A PROBLEM

H.R. 4768 is a solution to a non-existent problem. Empirically, agency rulemakings on appeal are upheld roughly 70% of the time, regardless of whether the court applies *Chevron* or a hard-look review, which suggests that many other factors ultimately affect the outcome of a court's review.¹⁰² Notwithstanding the debate surrounding deference principles,¹⁰³ the American Bar Association (ABA) Administrative Law Section has clarified:

Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron* and *State Farm* (and, of course, for decades prior to their issuance), courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by Federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.¹⁰⁴

Deference to an agency's judgment is also sound policy, as recognized by *Chevron*, where the Court gave considerable weight to the expertise and political accountability of agencies.¹⁰⁵ As the *Chevron* Court observed, the Constitution does not endow Federal judges with policymaking authority:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, Federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."¹⁰⁶

¹⁰² *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Management of the S. Comm. on Homeland Security and Government Affairs*, 114th Cong. 41 (2015) (statement of Prof. Ron Levin), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94906/pdf/CHRG-114shrg94906.pdf>; see also Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011).

¹⁰³ *Require Evaluation before Implementing Executive Wishlists Act of 2015 and the Regulatory Predictability for Business Growth Act of 2015: Hearing on H.R. 3438 and H.R. 2631 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of William Funk, Lewis & Clark Distinguished Professor of Law, Lewis & Clark Law School).

¹⁰⁴ ABA Sec. of Admin. L. & Reg. Prac., Comments on H.R. 3010, the Regulatory Accountability Act of 2011, 64 Admin. L. Rev. 619, 667 (2012).

¹⁰⁵ *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

¹⁰⁶ *Id.* at 866.

These factors are reflected in all relevant case law and in the scholarship of scores of experts in administrative law.¹⁰⁷ Similarly, the body of precedent surrounding judicial deference already allows for checks on executive abuses; ending this tradition would raise countervailing separation of powers concerns, as Professor Levin explains:

The Court has developed a sophisticated, though always evolving, body of precedents in order to calibrate the complex relationship between courts and agencies. These precedents do provide for a check on executive abuses, but they also reflect a wise recognition that judges do not have a monopoly on wisdom, especially in regard to the specialized problems that arise in the interpretation of regulations . . . elimination of all judicial deference . . . may raise countervailing separation of powers concerns of its own. It brings to mind the reasoning of the *Chevron* opinion, in which Justice Stevens cautioned the courts against being too quick to substitute their judgments for those of politically accountable administrators.¹⁰⁸

Furthermore, Congress has historically yielded to the expertise of the executive branch. Professor Sidney Shapiro, a leading administrative law expert, explains that “it is difficult for legislators to resolve the policy and political conflicts produced by most reform proposals,” while delegation enabled agencies to “fine-tune procedures in different institutional settings and to make incremental changes more easily than if legislation was necessary.”¹⁰⁹ Professor Pierce has similarly cautioned against the legislative reform of the *Chevron* doctrine:

I do not see any opportunity for Congress to make beneficial changes in this area of law by statute at present. The courts have ample discretion to make any needed changes or clarifications in this area of law without any changes in the statutes that now govern this area of law. Courts are in the best position institutionally to make the kinds of changes in legal doctrines that would have a realistic chance of improving the legal framework within which agencies make rules and the quality and timeliness of the resulting rules.¹¹⁰

Finally, as a general matter, administrative law experts believe that there is no need to fundamentally amend the APA, including

¹⁰⁷ Letter to U.S. Rep. Bob Goodlatte (R-VA), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary from Joel B. Eisen, Professor Law, University of Richmond School of Law, and Emily Hammond, Professor of Law, George Washington University Law School, et al. 2 (June 8, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁰⁸ *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Management of the S. Comm. on Homeland Security and Government Affairs*, 114th Cong. 48 (2015) (statement of Prof. Ron Levin), <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94906/pdf/CHRG-114shrg94906.pdf>.

¹⁰⁹ Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 109 (1996).
¹¹⁰ *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 4 (2016) (statement of Professor Richard Pierce, George Washington University Law School), <https://judiciary.house.gov/wp-content/uploads/2016/03/Pierce-Testimony-REVISED.pdf>.

its treatment of judicial review.¹¹¹ They argue that the APA’s drafters were not unlike those of the Constitution in that they had great foresight in making the APA flexible and broad enough so that it is able to fit changing times.¹¹² The APA has served, and should continue to serve, as “a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life.”¹¹³

In the absence of any evidence that legislative change is necessary, H.R. 4768 simply addresses a non-existent problem.

IV. H.R. 4768 IS YET ANOTHER ANTI-REGULATORY BILL BASED ON FALSE ASSUMPTIONS

Although proponents of H.R. 4768 argue that this legislation is necessary to prevent a “circumvention of our Constitution” by Federal agencies,¹¹⁴ H.R. 4768 is yet another thinly-veiled attack on regulations.¹¹⁵ As a group of leading administrative law scholars note, the bill is “motivated by dissatisfaction with substantive agency outcomes rather than with legitimate concerns about judicial practice.”¹¹⁶ John Walke, a senior counsel with the Natural Resource Defense Council (NRDC), similarly observes that H.R. 4768 is just the latest in a wave of “legislation embodying conservative political and corporate attacks on our modern system of Federal regulation and law enforcement by the executive branch.”¹¹⁷ This opposition to regulatory safeguards is motivated by the unsubstantiated and debunked claims that regulations undermine economic growth, job creation, or entrepreneurship, while ignoring the substantial public benefits of regulations.

A. No Evidence Exists Proving that Regulations Have a Significant Adverse Impact on Jobs, Wages, or Innovation

1. Proponents of Regulatory Reform Rely on False Assumptions

Anti-regulatory proponents routinely argue that regulations “kill” jobs,¹¹⁸ citing flawed studies indicating that the cost of regulations exceed \$1.8 trillion a year, or \$15,000 per U.S. household.¹¹⁹ In

¹¹¹See Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 Admin. L.J. Am. U. 89, 89 (1996).

¹¹²See *id.*

¹¹³Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI) 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

¹¹⁴Tr. of Markup of H.R. 4768, the “Separation of Powers Restoration Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 11 (June 8, 2016) (statement of U.S. Rep. John Ratcliff (R-TX)).

¹¹⁵Letter to U.S. Rep. Bob Goodlatte (R-VA), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary from Joel B. Eisen, Professor Law, University of Richmond School of Law, & Emily Hammond, Professor of Law, George Washington University Law School, et al. (June 8, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹¹⁶*Id.* at 2.

¹¹⁷H.R. 4768 Hearing, *supra* note 48, at 3 (statement of John D. Walke, Esq., Director, Clean Air Project, Climate & Clean Air Program, Natural Resource Defense Council), <https://judiciary.house.gov/wp-content/uploads/2016/05/Walke-Testimony.pdf>.

¹¹⁸See, e.g., *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of U.S. Rep. Lamar Smith (R-TX), Chair, H. Comm. on the Judiciary) (“Standing in the way of growth and job creation is a wall of Federal regulation.”).

¹¹⁹Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), <http://archive.sba.gov/advo/research/rs371tot.pdf>; Clyde Wayne Crews, Jr. *Ten Thousand Commandments An Annual Snapshot of the Federal Regulatory*

short, these arguments lack merit. The non-partisan Congressional Research Service (CRS) has twice debunked anti-regulatory claims on the “cost of regulation.” In 2011, the CRS conducted an extensive examination of a study routinely cited by the Majority which was conducted by economists Mark and Nicole Crain asserting that Federal regulation imposes an annual cost of \$1.75 trillion on business.¹²⁰ CRS determined that the methodology of this report, which was widely-cited by advocates for regulatory reform proposals, was deeply flawed,¹²¹ noting that the authors of the study acknowledged 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. (How could we recommend this use when we make no attempt to estimate the benefits?).”¹²²

Following extensive criticism of the Crain and Crain study,¹²³ anti-regulatory activists have issued other studies on the cost of regulation.¹²⁴ Nevertheless, CRS, in another exhaustive report in released in January 2016, debunked the methodology of these studies as well.¹²⁵ 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.”¹²⁶ CRS likewise observed that by any methodology, estimates of the cost of regulation have “inherent—and potentially insurmountable—flaws . . . rais[ing] the question of the utility of using such figures in the regulatory reform debate.”¹²⁷ *The Washington Post* raised similar concerns in 2015, referring to the regulatory cost estimates most frequently cited by regulatory reform proponents as “simply an idiosyncratic guesstimate” with “serious methodological problems.”¹²⁸

State, COMPETITIVE ENTERPRISE INSTITUTE (2014), <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf>; Clyde Wayne Crews, Jr. *Tip of the Costberg*, COMPETITIVE ENTERPRISE INSTITUTE (2015), <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf>.

¹²⁰Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ-08-M-0466 (Sept. 2010), available at <http://archive.sba.gov/advo/research/rs371tot.pdf>.

¹²¹CURTIS W. COPELAND, CONG. RESEARCH SERV., R41763, *ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2011).

¹²²*Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

¹²³*See, e.g.*, Sidney Shapiro *et al.*, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, CENTER FOR PROGRESSIVE REFORM (Feb. 2011), http://www.progressivereform.org/articles/sba_regulatory_costs_analysis_1103.pdf; Lisa Heinzerling & Frank Ackerman, *The \$1.75 Trillion Lie*, 1 MICH. J. ENVTL. & ADMIN. L. 127 (2012).

¹²⁴*See, e.g.*, Clyde Wayne Crews, Jr. *Tip of the Costberg*, COMPETITIVE ENTERPRISE INSTITUTE (2015), <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf> (“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.”).

¹²⁵MAEVE CAREY, CONG. RESEARCH SERV., R44348, *METHODS OF ESTIMATING THE TOTAL COST OF FEDERAL REGULATIONS 1* (2016).

¹²⁶*Id.* at 2.

¹²⁷*Id.* at 3.

¹²⁸Glenn Kessler, *The Claim That American Households Have a 15,000 Regulatory ‘Burden’*, WASH. POST (Jan 14, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/01/14/the-claim-that-americanhouseholds-have-a-15000-regulatory-burden/>.

2. Regulations Do Not Have Any Major Adverse Impact on Employment

While the Majority asserts that employment and economic growth are inhibited by regulations, the evidence is to the contrary.¹²⁹ For example, Professor Sidney Shapiro testified in 2011 that “[a]ll of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment.”¹³⁰ Similarly, leading administrative law scholars at the University of Pennsylvania examined the impacts of regulation on an economy-wide basis and concluded in 2014 that “regulation plays relatively little role in affecting the aggregate number of jobs in the United States.”¹³¹ Professors Cary Coglianese and Christopher Carrigan, the authors of this study, 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 implement 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.¹³²

Economic literature and empirical analysis of the impact of regulations on the unemployment rate bolster these analyses. Economic policy experts, writing for the Federal Reserve Bank of San Francisco, observed in 2013 that while businesses’ concerns about the effects of regulation and taxes rose during the recession, “there is no evidence that job losses were larger in states where businesses were more worried about these factors,” whereas unemployment spiked “precisely when businesses began worrying about poor sales.”¹³³ Similarly, Richard Morgenstern, a senior fellow at Resources for the Future who served as a regulatory policy expert for over two decades under both Republican and Democratic Adminis-

¹²⁹ See, e.g., Shapiro et al., *supra* note 123.

¹³⁰ *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (prepared statement of Prof. Sidney Shapiro, Professor, Wake Forest School of Law).

¹³¹ 6 CARY COGLIANESE, ADAM M. FINKEL & CHRISTOPHER CARRIGAN, DOES REGULATION KILL JOBS? (2014).

¹³² Christopher Carrigan and Cary Coglianese, *Informing the Debate over Regulation’s Impact on Jobs*, REGBLOG (Mar. 10, 2014), <http://www.regblog.org/2014/03/10/10-carrigan-coglianese-informing-debate>.

¹³³ *Id.*

trations, concluded that there is little economic evidence that environmental regulations “are causing major job losses or major job gains.”¹³⁴ Applying data from the Bureau of Labor Statistics, the Economic Policy Institute found that less than 0.5% of employees lost their jobs during the recession due to Federal regulation.¹³⁵ If anything, regulations can *promote* job growth and put Americans back to work. For instance, the BlueGreen Alliance, 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 1970.¹³⁶

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 the “main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies.”¹³⁷ 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.¹³⁸ Recent polling conducted by the American Sustainable Business Council, which represents over 200,000 businesses and more than 325,000 business professionals, likewise indicates that most small businesses understand the importance of Federal regulation, reporting that “78% of small employers agree regulations are important in protecting small businesses from unfair competition and leveling the playing field with big business.”¹³⁹ 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 create jobs and get our country on a path to a strong economic future, what

¹³⁴ Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Is Minimal*, WASHINGTON POST (Nov. 13, 2011), https://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gI1QALRF5IN_story.html.

¹³⁵ Isaac Shapiro & John Irons, *Regulation, Employment & the Economy: Fears of Job Loss Are Overblown* (Env'tl. Pol'y Inst., Briefing Paper No. 305, 2011), http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf.

¹³⁶ Letter to U.S. Rep. Lamar Smith (R-TX), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary, from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Comm. on the Judiciary, Democratic staff).

¹³⁷ Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring*, WALL ST. J. (July 18, 2011), <http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html>.

¹³⁸ 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) (“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.”), <http://www.nfib.com/press-media/press-media-item?cmsid=58190>.

¹³⁹ Letter from American Sustainable Business Council to H. Comm. on the Judiciary at 2 (Jan. 4, 2016) (on file with the H. Comm. on the Judiciary, Democratic Staff).

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.¹⁴⁰

Even conservative policy experts have refuted 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.”¹⁴¹ A George Washington University study confirms this result.¹⁴²

Other conservatives have also acknowledged that, in light of improvements in the economy and unemployment rate, it is becoming increasingly difficult to argue that the current regulatory environment has any effect on jobs or growth. Douglas Holtz-Eakin, president of the American Action Forum, commented in October 2015 that “[w]ith low unemployment and rising wages, the Republicans’ job gets a lot harder,” while also referring to recent employment growth as “promising.”¹⁴³ Gregory Valliere, a chief global strategist at Horizon Investments, echoed this sentiment, noting that “Republicans . . . can no longer credibly claim that the economy is terrible.”¹⁴⁴ 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 sim-

¹⁴⁰ Letter to U.S. Rep. Lamar Smith (R-TX), Chair, & U.S. Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary, from Jim Houser, Co-Chair, The Main Street Alliance, *et al.*, at 1–2 (Nov. 2, 2011) (on file with the H. Comm. on the Judiciary, Democratic Staff).

¹⁴¹ *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. (2011) (prepared statement of Christopher DeMuth, American Enterprise Institute); see also Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal*, WASH. POST (Nov. 13, 2011), http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/g1QALRF5IN_story.html?hpid=z1 (“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.”).

¹⁴² See Regulation, Jobs, and Economic Growth: An Empirical Analysis, The George Washington University Regulatory Studies Center Working Paper, at 27 (Mar. 2012) (finding that the “macroeconomic effects of regulation are uncertain” and that the study’s “results reveal no impact” when considering either the impact of regulations on the “total economy or strictly the private sector”), http://regulatorystudies.gwu.edu/images/pdf/032212_sinclair_vesey_reg_jobs_growth.pdf.

¹⁴³ Heather Long, *Obama Economy: 8.7 Million Jobs*, CNNMONEY (Nov. 6, 2015), <http://money.cnn.com/2015/11/06/news/economy/obama-jobs>.

¹⁴⁴ *Id.*

ply asserted as self-evident and repeated endlessly throughout the conservative echo chamber.¹⁴⁵

3. *Cost Estimates of Regulations Tend To Be Overstated*

Far from an exact science, regulatory costs are notoriously difficult to calculate and are often dramatically over-inflated.¹⁴⁶ Robert Glicksman, professor of environmental law at The George Washington University Law School, has testified 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.”¹⁴⁷ In 2013, Public Citizen conducted a retrospective study on claims linking job losses and regulations and found that none “proved remotely accurate.”¹⁴⁸ For instance, automakers who 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.¹⁴⁹ Notwithstanding these claims, automobile sales grew during the first year the rule went into effect, and automobile costs fell to an all-time low, tailpipe-hydrocarbon emissions fell by more than 57%, all without any evidence of job losses.¹⁵⁰ In 2015, Robert Weissman, the President of Public Citizen, explained:

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.¹⁵¹

Indeed, the Office of Management and Budget (OMB) observed in its first annual report on the costs and benefits of Federal regulations that there are “enormous data gaps in the information avail-

¹⁴⁵ Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs*, N.Y. TIMES ECONOMIX (Oct. 4, 2011), <http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment/>.

¹⁴⁶ *The Office of Information And Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) (prepared statement of Noah Sachs, Professor, University of Richmond School of Law), http://progressivereform.org/articles/Sachs_testimony_HJud_OIRA_071515.pdf.

¹⁴⁷ *The Obama Administration's Regulatory War on Jobs, the Economy, and America's Global Competitiveness: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (prepared statement of Robert Glicksman, The George Washington Law School).

¹⁴⁸ Taylor Lincoln, *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*, PUBLIC CITIZEN 4 (2013), <http://www.citizen.org/documents/regulations-are-to-blame-unemployment-death-report.pdf>.

¹⁴⁹ *Id.* at 6–7.

¹⁵⁰ *Id.* at 9.

¹⁵¹ *Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 29 (2015) (prepared statement of Robert Weissman, President, Public Citizen), <http://www.citizen.org/documents/weissman-senate-judiciary-testimony-regulatory-protections.pdf>.

able on regulatory benefits and costs.”¹⁵² In a review of several dozen environmental and occupational safety regulations, researchers repeatedly found that “cost estimates tend to be much higher than real-world compliance costs.”¹⁵³ This is particularly true for the initial estimates of costs, which were at least twice their actual cost, and “could be seen more in the nature of debating points than objective assessments of costs.”¹⁵⁴

4. *Congressional Inaction, Not Regulation, Undermines Wage Growth*

Anti-regulatory proponents also argue that regulations handicap wage growth and that public health and safety regulations reflect the “preferences of high-income households but increases prices and reduces wages for all households.”¹⁵⁵ This argument ignores the economic literature and is unsupported by any serious evidence.¹⁵⁶ In fact, the evidence used to generate these studies—the World Bank’s Doing Business dataset, which measures “business regulation and reform in different cities and regions within a nation”¹⁵⁷—is substantively identical to the underlying data used by the Crain and Crain Study, which was roundly debunked.¹⁵⁸ Indeed, as CRS noted in its exhaustive criticism of that study, the authors of the World Bank report expressed concerns with extrapolating the underlying data of the report, which is not based on actual cost estimates and reflects opinion polling, for secondary purposes.¹⁵⁹

Notwithstanding the lack of support for these claims, there is evidence that wages have stagnated or declined for most workers despite increases in productivity and education levels.¹⁶⁰ Senior economists for the Federal Reserve Bank of San Francisco, however, attribute this stagnation to “downward nominal wage rigidity,” which describes the “hesitancy of employers to reduce wages and the reluctance of workers to accept wage cuts, even during recessions.”¹⁶¹ Under normal market conditions, unemployment and

¹⁵² OFFICE OF MANAGEMENT AND BUDGET, 1998 *Report of OMB to Congress on the Costs and Benefits of Federal Regulations* 2 (1998).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Regulatory Accountability Act of 2013: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (prepared statement of Diana Thomas, Associate Professor in the Economics, Creighton University), [http://mercatus.org/sites/default/files/Thomas EffectsRegulationLowIncome testimony 070813.pdf](http://mercatus.org/sites/default/files/Thomas%20EffectsRegulationLowIncome%20testimony%20070813.pdf).

¹⁵⁶ Patrick A. McLaughlin and Laura Stanley, *Regulation and Income Inequality: The Regressive Effects of Entry Regulations* (Mercatus Working Paper, Mercatus Center at George Mason University, 2016), <http://mercatus.org/sites/default/files/McLaughlin-Regulation-Income-Inequality.pdf> (discussing state licensing and using data from the World Bank’s Doing Business dataset).

¹⁵⁷ World Bank Group, *About Doing Business*, THE WORLD BANK, <http://www.doingbusiness.org/about-us>.

¹⁵⁸ See, e.g., Sidney Shapiro *et al.*, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs*, CENTER FOR PROGRESSIVE REFORM (Feb. 2011), http://www.progressivereform.org/articles/sba_regulatory_costs_analysis_1103.pdf; Lisa Heinzerling & Frank Ackerman, *The \$1.75 Trillion Lie*, 1 MICH. J. ENVTL. & ADMIN. L. 127 (2012); Copeland, *supra* note 122.

¹⁵⁹ Copeland, *supra* note 122.

¹⁶⁰ *How the Administration’s Regulatory Onslaught is Affecting Workers and Job Creators: Hearing Before the H. Comm. on Education & Workforce*, 114th Cong. 4 (2015) (prepared statement of Christine L. Owens, Executive Director, National Employment Law Project), <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/Testimony%20of%20Christine%20Owens.Final.12-07-2015.pdf>.

¹⁶¹ Mary C. Daly & Bart Hobijn, *Why Is Wage Growth So Slow?* FRBSF ECONOMIC LETTER (Jan. 5, 2015), <http://www.frbsf.org/economic-research/publications/economic-letter/2015/january/unemployment-wages-labor-market-recession>.

wages are closely tied such that a decline in unemployment normally yields higher wages. Downward wage rigidities, however, disrupt this relationship, resulting in delayed wage growth even in a period of economic recovery:

Downward rigidities prevent businesses from reducing wages as much as they would like following a negative shock to the economy. This keeps wages from falling, but it also further reduces the demand for workers, contributing to the rise in unemployment. Accordingly, the higher wages come with more unemployment than would occur if wages were flexible and could be fully reduced. As the economy recovers, the situation reverses and the pressure to cut wages dissipates. However, the accumulated stockpile of pent-up wage cuts remains and must be worked off to put the labor market back in balance. In response, businesses hold back wage increases and wait for inflation and productivity growth to bring wages closer to their desired level. Since it takes some time to fully exhaust the pool of wage cuts, wage growth remains low even as the economy expands and the unemployment rate declines.¹⁶²

Progressive economic experts, meanwhile, attribute wage stagnation to congressional inaction, particularly with regard to minimum-wage increases.¹⁶³ Lawrence Mishel, president of the Economic Policy Institute, argues that intentional policy choices have greatly contributed to wage stagnation.¹⁶⁴ “[T]he most glaring policy choices that worsened unemployment, and therefore contributed to wage stagnation,” Mr. Mishel argues, “are Congress’s embrace of fiscal austerity and state and local governments’ spending cut-backs.”¹⁶⁵ Christine Owens, executive director of the National Employment Law Project, similarly refutes the assumption that regulations have depressed wage growth, and instead points to the vital protections that regulations provide for the workforce:

Though opponents of these actions castigate them as “job-killers,” the reality is quite different: The regulations and sub-regulatory guidance, along with the President’s labor-related executive orders, do not deter economic growth or cost us jobs. Instead, they are essential to our nation’s workforce—to workers’ ability to earn pay commensurate with the work they do and the time they spending doing it, to balance their personal and professional obligations, to labor free of insidious discrimination, and to work in environments that do not put their health, well-being and very lives in danger. Mischaracterizing these actions as bad for employers, bad for workers and bad for the economy ignores the crucial role that thoughtful, tailored regulatory action plays in building a robust economy on the foundation of safe and healthy workplaces, where workers

¹⁶² *Id.*

¹⁶³ Lawrence Mishel, *Causes of Wage Stagnation*, ECONOMIC POLICY INSTITUTE (Jan. 6, 2015), <http://www.epi.org/publication/causes-of-wage-stagnation>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

earn living wages and have fair opportunities to advance.¹⁶⁶

5. Regulations Help Promote Greater Entrepreneurship, Competition, and Innovation

Some anti-regulatory proponents argue that regulations may be “detrimental to economic prosperity to the extent that it deters entrepreneurship.”¹⁶⁷ Higher levels of regulation, they assert, may benefit large incumbent firms while placing disproportionate compliance costs on smaller competitors.¹⁶⁸ Alex Tabarrok, an economics chair at the Mercatus Center, refuted this argument in a 2015 study on the effects of regulation on entrepreneurship.¹⁶⁹ Applying the same data set as the anti-regulatory studies, Mr. Tabarrok found that “industries with greater regulatory stringency have higher startup rates,” as well as similarly high job-creation rates.¹⁷⁰ 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.¹⁷¹ For example, regulating toxic chemicals has resulted in new competition by firms and startups in the chemical manufacturing industry.¹⁷² 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.¹⁷³

Regulatory reform proposals, meanwhile, would undermine competition and small-business creation. David Levine, CEO of the American Sustainable Business Council, states that anti-regulatory legislation would “only worsen the uneven economic playing field” for small businesses, providing incumbent and large businesses with a competitive advantage.¹⁷⁴ Views in this light, a deregulatory

¹⁶⁶ *How the Administration’s Regulatory Onslaught is Affecting Workers and Job Creators: Hearing Before the H. Comm. on Education & Workforce*, 114th Cong. 4 (2015) (prepared statement of Christine L. Owens, Executive Director, National Employment Law Project), <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/Testimony%20of%20Christine%20Owens.Final.12-q07-2015.pdf>.

¹⁶⁷ James Bailey & Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment* (Mercatus Working Paper, Mercatus Center at George Mason University, 2015), <http://mercatus.org/publication/regulating-away-competition-effect-regulation-entrepreneurship-and-employment>.

¹⁶⁸ *Id.*

¹⁶⁹ Nathan Goldschlag & Alexander Tabarrok, *Is Regulation to Blame for the Decline in American Entrepreneurship?* (Mercatus Working Paper, Mercatus Center at George Mason University, 2014), <http://mercatus.org/sites/default/files/Bailey-Regulation-Entrepreneurship.pdf>.

¹⁷⁰ Alex Tabarrok, *Is Regulation to Blame for the Decline in American Entrepreneurship?* MARGINALREVOLUTION (Feb. 18, 2015), <http://marginalrevolution.com/marginalrevolution/2015/02/is-regulation-to-blame-for-the-decline-in-dynamism.html>.

¹⁷¹ *Tangled in Red Tape: New Challenges for Small Manufacturers: Hearing Before the H. Comm. on Small Business*, 114th Cong. 4 (2015) (prepared statement of James Goodwin, Senior Policy Analyst, Center for Progressive Reform), [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).

¹⁷² *Id.*

¹⁷³ *Regulatory Flexibility Act Compliance: Is EPA Failing Business?: Hearing Before the H. Comm. on Small Business*, 112th Cong. 3 (2012) (prepared statement of Frank Knapp, President, South Carolina Small Business Chamber of Commerce), http://smallbusiness.house.gov/uploadedfiles/6-27_knapp_testimony.pdf.

¹⁷⁴ Letter from American Sustainable Business Council to H. Comm. on the Judiciary at 2 (Jan. 4, 2016) (on file with the H. Comm. on the Judiciary, Democratic Staff).

business environment would serve as a serious impediment for startups and innovation.

B. Proponents of Anti-Regulatory Legislation Ignore the Net Benefits of Regulations

Anti-regulatory proponents frequently fail to account for the benefits of regulation, even though they often greatly exceed regulatory costs.¹⁷⁵ In its critical report on the Crain and Crain study, CRS concluded that “a valid, reasoned policy decision can only be made after considering information on both costs and benefits” of regulation.¹⁷⁶ The Economic Policy Institute reached a similar conclusion.¹⁷⁷ The Government Accountability Office (GAO) observes that while the cost of regulations “are estimated to be in the hundreds of billions of dollars,” the “benefits estimates are even higher.”¹⁷⁸ The Office of Management and Budget (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 in the aggregate between \$57 billion and \$85 billion, while the benefits were estimated to be between \$216 billion and \$812 billion.¹⁷⁹ Therefore, even if one uses OMB’s highest estimate of costs and its lowest estimate of benefits, regulations issued over the past 10 years have produced net benefits of \$216 billion to our society. Such estimates were consistent across Democratic and Republican administrations.¹⁸⁰ Given that the benefits of regulations consistently exceed the costs, the need for any legislation that would make the issuance of regulations more difficult or time consuming is certainly in question.

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.¹⁸¹ 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 2020.¹⁸²

CONCLUSION

By mandating that Federal courts review *de novo* all agency rulemakings and statutory interpretations, H.R. 4768, the “Separa-

¹⁷⁵ *The Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) (prepared statement of Noah Sachs, Professor, University of Richmond School of Law), http://progressivereform.org/articles/Sachs_testimony_HJud_OIRA_071515.pdf.

¹⁷⁶ Copeland, *supra* note 122.

¹⁷⁷ 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 INSTITUTE (July 19, 2011), <http://w3.epi-data.org/temp2011/IssueBrief308.pdf>.

¹⁷⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-939T, REGULATORY REFORM: PRIOR REVIEWS OF FEDERAL REGULATORY PROCESS INITIATIVES REVEAL OPPORTUNITIES FOR IMPROVEMENTS 1 (2007), <http://www.gao.gov/assets/120/112084.pdf>.

¹⁷⁹ OFFICE OF MANAGEMENT AND BUDGET, DRAFT 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 2, https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf

¹⁸⁰ *Id.*

¹⁸¹ ENVIRONMENTAL PROTECTION AGENCY, BENEFITS AND COSTS OF THE CLEAN AIR ACT, SECOND PROSPECTIVE STUDY: 1990 TO 2020 (2011), <http://www.epa.gov/air/sect812/prospective2.html>

¹⁸² *Id.*; 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> (noting that an estimated 11,000 deaths will be prevented by pending mercury rule under the Clean Air Act).

tion of Powers Restoration Act of 2016,” overrides longstanding and well-reasoned Supreme Court precedent establishing judicial deference to agencies’ statutory interpretations, which acknowledges the intrinsic value of agency expertise and political accountability in rulemaking. The direct effect of H.R. 4768 is that it would empower a generalist court to nullify agency action solely on policy grounds. As a result, 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, which would further delay the promulgation of critical rules safeguarding public health, safety, and the environment. Furthermore, the bill presents possible separation of power concerns because the measure fails to impose any constraint on its heightened standard of judicial review, thereby allowing courts to substitute their policy for the agencies’ expertise and congressionally delegated authority. And, like many other anti-regulatory initiatives proposed by the Majority, H.R. 4768 is a very ill-conceived solution in search of a non-existent problem.

For the foregoing reasons, we strongly oppose H.R. 4768 and we urge our colleagues to join us in opposition.

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