TESTIMONY OF JOHN D. WALKE

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HEARING ON H.R. 4768, THE "SEPARATION OF POWERS RESTORATION ACT OF 2016"

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM

COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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Thank you, Chairman Marino, and Ranking Member Johnson for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council ("NRDC"). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 2.4 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency, and prior to that a private attorney in a corporate law firm in Washington, D.C.

H.R. 4768, the "Separation of Powers Restoration Act of 2016," is a deeply flawed and harmful bill that should not become law. The legislation overthrows a longstanding and well-founded framework for judicial review—a framework that acknowledges a regulatory process that is grounded in extensive administrative records, lengthy processes of public input and expert evaluations. That framework is ultimately carried out by officials appointed and confirmed by elected officials, and working under an elected president.

H.R. 4768 substitutes for that system one in which the judiciary may nullify agencies' reasonable regulations because one judge or a set of judges may prefer a different reasonable regulation or outcome. The judicial decisions will be based on non-expert evaluation of the same administrative record *de novo*, but in the much more abbreviated time period of court cases and compressed page limits of legal briefs, with input from a vastly smaller body of litigants rather than from the public at large.

H.R. 4768 permits the judiciary to ignore administrative records and expertise and to substitute its own inexpert views and limited information. To impose this kind of judicial fiat seems especially odd coming from Members of Congress who have repeatedly declaimed against supposed judicial overreach and who constantly point out that the judiciary is "unelected." It seems that the bill's sponsors are so intent on overturning our system for protecting the public through regulation, that they are willing to empower a federal judiciary that they have long inveighed against, even though Congress has the Constitutional authority to change regulatory statutes or to alter or reject individual regulations any time it wishes. But Congress does not do that because the public won't support it.

The Supreme Court has provided instructive views on what a system would look like in which all the courts of appeals undertake *de novo* reviews of agency interpretations of statutes in a judicial search for congressional intent or what judges consider more "reasonable." Ruling for the majority in *City of Arlington, Tex. v. F.C.C.*, Justice Scalia wrote:

> Rather, the dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards at all to guide

> this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). It would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an *ad hoc* judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron.* The excessive agency power that the dissent fears would be replaced by chaos.

City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1874 (2013) (emphases in original). So too with the "Separation of Powers Restoration Act": it would destroy the whole stabilizing purposes of *Chevron*. Chaos and randomness would replace the agency power that its sponsors profess to fear. Even if some members or corporate lobbyists are prepared to accept the chaos and regulatory uncertainty that this legislation would create as the price for facing fewer regulations that safeguard Americans, Congress should not accept this reckless outcome.

My testimony will examine some of the harmful and irresponsible consequences that I believe the "Separation of Powers Restoration Act of 2016" (hereinafter "H.R. 4768") would yield. These include impaired safeguards for public health, safety, the environment, financial markets, consumer rights, civil rights and other social concerns that federal regulatory statutes address. Additional harms include less political accountability, even more overburdened courts, increased judicial forum shopping, greater uncertainty for regulated entities, and the waste of public resources and tax dollars.

Before turning to these harmful outcomes, however, I first would like to address the political and legislative context in which this bill is being introduced.

I. Congressional Opposition to Reasonable Regulations and the Executive Branch

Since the start of the 112th Congress, there has been a wave of legislation embodying conservative political and corporate attacks on our modern system of federal regulation and law enforcement by the executive branch. H.R. 4768 is the latest bill to join that wave. Other bills include the Regulatory Accountability Act;[1] the Regulations of the Executive in Need of Scrutiny (REINS) Act;[2] the Secret Science Reform Act;[3] the Searching for and Cutting

[1] Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/185 (weakens and delay federal safeguards; tailor regulations to impose the least costs on corporations even if that denies Americans vastly higher net benefits).

[2] Regulations from the Executive in Need of Scrutiny Act of 2015, H.R. 427, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/427 (adopts a one-house legislative veto to block regulations and obstruct executive branch law enforcement).

Regulations that are Unnecessarily Burdensome Act;[4] and the Sunshine for Regulatory Decrees and Settlements Act,[5] among others. This irresponsible legislative agenda, unsuccessful thus far, is attempting a roots-and-branches dismantling of a system of federal regulation that has worked for decades to protect clean air, clean water, food safety, financial markets, workers, consumers, and all Americans.

Consider public health and environmental regulations. A House Energy and Commerce Committee minority staff report[6] cataloged 553 votes by the majority to weaken environmental and health safeguards during the 112th and 113th Congresses. Predictably, these attacks failed in the Senate or faced veto threats by the White House, in part because the environmental and health safeguards they attack are widely popular with Americans. Facing repeated failure with direct attacks on substantive laws, the conservative Congressional response turned to undermining the backbone legal principles of the modern administrative state.

This wave of regulatory reform legislation should be seen as an example of ongoing political subversion. Having failed, despite repeated attempts, to weaken substantive, organic laws they do not support, anti-regulatory politicians have retreated to broad attacks on the legal infrastructure backing federal regulations: manipulating cost-benefit analysis; undermining the legal norms governing regulation and the scientific process; departing from constitutional legislative norms to authorize one-house legislative vetoes of regulations; and restricting the power of the courts to redress harms suffered by citizens. Finally, in the "Separation of Powers Restoration Act," this political agenda seeks to scuttle the standards by which judges review and uphold reasonable agency interpretations of federal statutes the executive branch is bound to enforce.

It is instructive to compare H.R. 4768 to another notorious regulatory reform bill, the so-called "Regulations from the Executive in Need of Scrutiny" Act. Conservative congressional

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[3] Secret Science Reform Act of 2015, H.R. 1030, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/1030 (stops federal agencies from using the best peer-reviewed science to better protect Americans' health and environment).

[4] SCRUB Act of 2016, H.R. 1155, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/house-bill/1155 (adopts a mindless "cut-go" system to eliminate an existing regulation for every new one adopted).

[5] Sunshine for Regulatory Decrees and Settlements Act of 2015, S. 378, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/378 (undermines citizens' ability to hold government accountable when it breaks the law, and obstructs enforcement of important federal safeguards).

[6] U.S. House of Representatives, Committee on Energy and Commerce, Minority Staff, The Anti-Environment Record of the U.S. House of Representatives 113th Congress (1st Session), December 2013 *available at* https://www.hsdl.org/?view&did=748326.

opponents of regulation are pushing the extreme and harmful REINS Act, which transfers basic law enforcement and implementation powers away from the executive branch to the legislative branch. Corporate and congressional REINS Act backers profess their commitment to greater political accountability[7] that they claim resides in Congress more so than with the elected executive branch and its pejoratively dubbed 'unelected bureaucrats.'[8] On the other hand, these same politicians and corporate lobbyists are pushing the "Separation of Powers Restoration Act," which transfers law enforcement and implementation powers again away from an executive branch headed by a politically accountable president to unelected judges who are not politically accountable to Americans.

So what unites the political promotion of the REINS Act and the "Separation of Powers Restoration Act," since it is certainly not accountability? The answer is political opposition to regulatory safeguards and protections, and hostility to law enforcement and implementation by the executive branch.[9]

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[7] The REINS Act is certainly not about accountability. Its core feature—a one-chamber legislative veto—would allow only one of the two chambers in Congress to refuse or fail to authorize enforcement of federal statutes. By refusing to authorize a regulation that carries out federal law, one congressional chamber would nullify operation of that federal law without any need by the other chamber to vote; the REINS Act requires both chambers to approve a regulation, meaning only one legislative chamber is needed to veto the execution of federal laws. So one chamber escapes any accountability to the public.

But the REINS Act goes even further. Nothing in the legislation stops political leaders in either chamber from refusing to hold votes on resolutions to approve or disapprove a rule before the deadline by which that rule may not become effective by automatic operation of the legislation. And despite elaborate procedures in the REINS Act that pretend to *force* Congress to hold such votes, the bill tellingly notes that either chamber may change its rules at any time, and that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." Accordingly, when Congress wishes to 'violate' the Act's (non)requirement to hold votes on approval resolutions, it may either alter that requirement (with no need for legislation first) or ignore the elaborate procedures, fully aware that no omission or action shall face judicial review. Both outcomes belie any claim to accountability over the substance or benefits of the rule that was quietly nullified.

[8] See, *e.g.*, https://toddyoung.house.gov/reins/faqs/.

[9] Professor Sid Shapiro at the Wake Forest University School of Law, for example, has rightly noted that "the REINS Act. . . isn't about [regulatory] capture; it's about gumming up the regulatory process." http://www.progressivereform.org/CPRBlog.cfm?idBlog=962E84F3-A9F3-3EA9-BEA5D2FC1972753A. See also https://www.nrdc.org/experts/david-goldston/reins-act-

Both the REINS Act and the "Separation of Powers Restoration Act" have been designed to undo the fundamental structure and viability of the regulatory system that has improved food safety; cleaned our air and water; protected workers; reduced discrimination; limited economic instability and protected Americans in countless other ways. REINS would make it virtually impossible to promulgate any new regulations, and would return the U.S. to a failed regulatory process that was thrown out at the end of the 19th Century. H.R. 4768 is almost as sweeping.

The similar flaws in the two bills are striking. Both bills envision federal agencies spending years on rulemakings involving advanced notices of proposed rulemakings, regulatory proposals and final rules; stakeholder engagements, solicitations of public comment and responses to those comments; preparation of extensive administrative records often involving complex and technical analyses, literature reviews, and detailed justifications; all conducted by agency officials with subject matter expertise in the sciences, medicine, engineering, statistics, accounting, economics and financial markets, and the full gamut of professional disciplines.

The REINS Act empowers one chamber of Congress, or even refusal by Congress to act,[10] to nullify rules emerging from those lengthy, robust processes without considering *any* of that extensive information or expertise. The "Separation of Powers Restoration Act" also allows single judges and panels of circuit court judges to nullify rules if the judges conclude the rules should have been based on a given reasonable interpretation different than the reasonable interpretation the agency relied on. *De novo* judicial review and consideration of vast administrative records would be limited to the time available on already-crowded judicial dockets. Third-party input would be limited to small pools of litigants operating under the constraints of page limits for legal briefs under federal rules. In both instances, reasonable statutory interpretations and reasonable rules to enforce federal laws could be summarily rejected in a manner completely incommensurate with the time, resources, consideration, expertise and public input occurring with the agency.[11]

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why-congress-should-hold-its-horses & https://www.nrdc.org/experts/john-walke/frequently-asked-questions-about-reins-act.

[10] See *supra,* fn. 7.

[11] Indeed, some opponents of EPA regulations are arguing to the Supreme Court now that the Administrative Procedure Act requires the automatic *vacatur* of all federal regulations found to be unlawful in some respect. Mot. to Govern of Certain States and Industry Petitioners, No. 12-1100, *White Stallion Energy Center v. EPA*, Sept. 24, 2015, Document #1574809 *available at* https://www.edf.org/sites/default/files/content/white_stallion_v_epa_-_state_industry_petitioners_motion_to_vacate_-_9-24-15.pdf. While this outlier view is not the law, its adoption would greatly exacerbate the harms created by the "Separation of Powers Restoration Act" from empowering judges to more easily find regulations unreasonable.

I have worked as an attorney for a federal agency, and it is easy to predict how federal agencies would react. 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 insulate themselves from adverse judgments by judges conducting *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.

Third, for the same reason, regulations will contain far fewer details to assist state and local co-regulators with implementation. Fourth, regulations will contain fewer details and instructions about complex compliance obligations for regulated entities, but without excusing the statutory compliance obligation. This will leave hundreds of thousands of regulated businesses across the country to sort out these details for themselves, knowing they must still comply with the statutory obligations and directives.

A second form of the regulatory chaos that Justice Scalia described will then ensue: state and local co-regulators will settle on wildly varying approaches to implementing and enforcing federal regulations, resulting in different and conflicting approaches to carrying out the same uniform national laws. Compliance responses and decisions by thousands of regulated entities will be even more varied, divergent and conflicting. Many of those decisions will be subpar and at odds with congressional intent. Sporadic and infrequent resolutions of these conflicts and variances, coupled with failures to comply with federal statutes, will necessitate more enforcement actions by federal and state officials as well as citizens. This will significantly increase the need for federal and state judges in civil, criminal and administrative courts to address inconsistent compliance with unclear regulations in enforcement proceedings. Complaints and defenses by regulated entities about a lack of fair legal notice in those costly proceedings will skyrocket. Federal agencies like EPA will face greater pressures and need to order legal corrections of deficient state and local programs or even withdraw those delegated authorities to carry out the federal regulations.

The ultimate consequence is actually the most insidious and most obvious: compliance with federal laws, through the adoption of necessary implementing regulations, will plummet. The objectives and promises of federal laws will not be satisfied. This will be true even with good-faith actions by regulated entities and federal, state and local officials. The uncertainties and confusion and contradictory practices and chaos, to use Justice Scalia's term, will simply be too pervasive and too inevitable to fulfill the purposes of a uniform system of national laws with legally required roles for regulators and judges.

It is revealing to examine the reasons offered by co-sponsors of the "Separation of Powers Restoration Act" to show the bill's true motivations. Congressional supporters have justified the

bill by denouncing Clean Water Act protections,[12] energy efficiency regulations and the Affordable Care Act,[13] among other safeguards. As with the regulatory "reforms" discussed above, it is not the regulatory process itself that some proponents of H.R. 4768 challenge, but rather the substantive outcomes of certain rulemakings that do not turn out the way that some members prefer, under statutes that those members are unsuccessfully trying to weaken. Members have promoted H.R. 4768 by condemning a "runaway administrative state" that is "mushrooming out of control."[14] It is clear that support for the bill is motivated as much by regulatory animus as it is by the tug-of-war over separations of powers between the branches.

Tellingly, some of the very regulations that H.R. 4768 co-sponsors invoke as justification for the legislation have been upheld by courts, including the Supreme Court. It is not that agencies are breaking the law that so infuriates; it is that courts are concluding agencies are not. Equally revealing, *Congress* has not disapproved these contested regulations using the Congressional Review Act or other legislation. Nor has Congress mustered the votes to amend the underlying federal statutes that produced regulations that some members find objectionable. This is consistent with the pattern of over 500 votes in the 112th and 113th Congress attacking health and environmental safeguards that did not become law, followed by the continuing wave of so-called "reform" legislation targeting the executive branch, law enforcement, the infrastructure of administrative law and now judicial review.

II. Corporate Opposition to Reasonable Regulations

Corporations and their lobbyists have joined the attacks on regulations, administrative law, the ability of citizens to hold government accountable for lawbreaking and now judicial review of reasonable agency interpretations enforcing federal laws. The U.S. Chamber of Commerce, for example, has written a letter supporting the "Separation of Powers Restoration Act of 2016."[15] The Chamber's letter fundamentally mischaracterizes the legislation, however, writing that "[l]imiting the degree of deference that courts grant to agencies would restrain those agencies from writing regulations that exceed their legal authority." This is wrong. Courts today already reject agency regulations that exceed their legal authority under the longstanding *Chevron*

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[12] See *supra*, fn. 8.

[13] Press Release, "Rep. Ratcliffe Introduces Bill to Rein In Power of Unelected Bureaucrats," March 17, 2016, *available at* https://ratcliffe.house.gov/media-center/press-releases/rep-ratcliffe-introduces-bill-rein-power-federal-bureaucrats.

[14] Press Release, "Senate, House Leaders Introduce Bill To Restore Regulatory Accountability Through Judicial Review," March 17, 2016, *available at* http://www.hatch.senate.gov/public/index.cfm/2016/3/release-senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review.

[15] Letter from R. Bruce Josten, U.S. Chamber of Commerce, to U.S. Congress, March 18, 2016 *available at* https://www.uschamber.com/sites/default/files/documents/files/3.18.16-_hill_letter_to_congress_supporting_h.r._4768_and_s._2724_the_separation_of_powers_restoration_act.pdf.

framework, if those regulations contravene the plain language of the statute, or if the agency action is arbitrary or capricious or impermissible where the statute is silent or ambiguous with respect to the specific issue.

What the Chamber letter supports, and H.R. 4768 produces, is judges empowered henceforth to void safeguards rooted in *reasonable* statutory interpretations that would be found *not to exceed* the agency's legal authority under the *Chevron* doctrine. Judicial review tests in place both before and after H.R. 4768 became law still would find unreasonable agency interpretations to be unlawful; only the "Separation of Powers Restoration Act" would empower judges to find *reasonable* agency interpretations unlawful in favor of merely different reasonable interpretations or outcomes preferred by judges.

Accordingly, it is evident that the Chamber letter and other corporate lobbyists' support for the legislation reflect a greater preference for reduced and halted safeguards than for regulatory certainty. (Not surprisingly, these corporate lobbyists also support the extreme REINS Act and other deregulatory bills discussed earlier.)

It is important to examine briefly the far greater regulatory uncertainty that the "Separation of Powers Restoration Act" and REINS Act would produce. As Professor Pierce put it at this Subcommittee's March 15th hearing, "the *Chevron* test reduces geographic differences in the meaning given to national statutes by reducing the number of splits among the circuits that were produced by circuit court applications of [less deferential judicial review tests]."[16] Similarly, within the same circuit exercising exclusive jurisdiction under a particular federal statute, greater significance will attach to the make-up of the panel selected to review a given regulation, in contrast to today's *Chevron* regime.

As a result, some corporate lobbyists' preference for regulatory laxity over regulatory certainty is shortsighted. Businesses operating in different parts of the country, including Chamber members, would be subject to different interpretations of national regulatory statutes depending upon whether the state and circuit in which that business operated had given a different reasonable interpretation to a statute versus other circuits. Litigation would multiply, judicial forum shopping would increase, and divergent regulatory outcomes of previously uniform national statutes would become the norm.

Finally, it is worth mentioning the impact that H.R. 4768 would have on *deregulatory* rules by federal agencies, including deregulation that NRDC might strenuously oppose. The judicial deference doctrines under *Chevron* and its progeny apply equally to regulation and deregulation. If an administration more ideologically opposed to regulation wishes to take advantage of the

[16] U.S. Cong., House Committee of the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Hearing on *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*, March 15, 2016, 114th Cong. (2016), Statement of Professor Richard J. Pierce, Jr., at 6 (hereinafter "Pierce Testimony").

inevitable vagueness, conflicts and gaps in federal statutes, it may adopt the least protective regulation permissible under a federal law. An agency may even repeal more protective existing regulations, so long as (1) the agency's action is based on a permissible construction of the statute, and (2) the agency adequately explains its interpretive reversal under the 1983 Supreme Court decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*.[17] H.R. 4768 interferes with the ability of agencies to adopt such deregulatory rules that would be considered reasonable under today's *Chevron* test, if a future judge or set of judges overturns the deregulation under the judges' differently reasonable interpretation.

NRDC has lost its fair share of lawsuits challenging federal agency rules that were deregulatory or that failed to fulfill statutory promises to protect public health and the environmental, when judges decided that the challenged agency interpretations were permissible under the *Chevron* test. By jettisoning *Chevron* deference, H.R. 4768 also would incentivize more frequent and more wide-ranging lawsuits challenging deregulatory actions by agencies under administrations committed to that agenda. It is true that starkly deregulatory rulemakings in prior administrations have foundered more often at the first step of *Chevron*, by contravening the plain language of statutes.[18] That would continue to be the case were H.R. 4768 to become law. One suspects, therefore, that political and corporate opponents of regulation and proponents of deregulation have made a calculation that H.R. 4768 would have disproportionate adverse impacts on regulations protecting the public. That is almost certainly true, and it is the central reason why this irresponsible legislation has no business becoming law.

III. Federal Agencies and Judicial Review Doctrines

Well-established judicial review doctrines headlined by *Chevron v. Natural Resources Defense Council* establish that reviewing courts defer to a federal agency's interpretation of a federal statute that is silent or ambiguous with respect to a particular issue, if that statutory construction is permissible or reasonable. Professor Richard J. Pierce, Jr. outlined these judicial review doctrines in his March 16 testimony before this Subcommittee.[19] In short, for present purposes, the *Chevron* doctrine states:

> First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the

[17] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983).

[18] See, *e.g.*, John Walke, Setting the Record Straight on the Obama EPA's Clean Air Act Track record in Court (Feb.2013), https://www.nrdc.org/experts/john-walke/setting-record-straight-obama-epas-clean-air-act-track-record-court (discussing Bush administration EPA deregulatory rules under the Clean Air Act overturned for violating plain language of the law).

[19] See *supra*, fn. 16, Pierce Testimony.

> court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.

Pierce Testimony at 5, quoting *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984). Professor Pierce correctly noted that by designing the doctrine thusly, the Supreme Court deferred to the relevant administrative agency on "issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue."[20] Further, Professor Pierce notes that "[t]he *Auer* doctrine is similar in its effects to the *Chevron* doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules."[21] Neither doctrine approaches the radical framework that *de novo* review would impose upon judicial review of agency regulations. As Professor Emily Hammond noted in her March 16 testimony before this Subcommittee, "[e]ven prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies' legal interpretations in many circumstances."[22]

Federal agencies today exercise their subject-matter expertise and understanding in promulgating regulations, utilizing the appropriate subject matter experts for a rulemaking—scientists, doctors, economists, engineers and other technical experts who supply valuable input into the regulatory process. Further, these administrative rulemakings can involve lengthy public processes, large administrative records with hundreds or thousands of technical documents and comments, including input from many stakeholders. Through these sometimes lengthy and highly technical processes, agencies finalize complex rulemakings over fairly long time horizons. Saddling the judicial branch with such time-intensive, complex, and technical reviews of each challenged rulemaking would grind the judicial branch to a halt. The judicial system is already extremely resource-constrained, and H.R. 4768 would compound those problems immeasurably.

Professor Emily Hammond notes in greater depth the implications of a *de novo* review regime, as proposed in H.R. 4768. In particular, she notes that "there are [] important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes."[23] Further, "Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate." *Id.* In contrast to *de novo* review,

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[20] *Id.*, at 6.
[21] *Id.*, at 8.
[22] U.S. Cong., House Committee of the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Hearing on *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies,* March 15, 2016, 114th Cong. (2016), Statement of Professor Emily Hammond, at 2 (hereinafter "Hammond Testimony").
[23] *Id.*, Hammond Testimony, at 2.

"*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." *Id.*

It is well-documented that the federal judiciary is overburdened handling current litigation dockets. Chief Justice John Roberts, in his annual report on the state of the federal judiciary, notes that federal judges are "faced with crushing dockets."[24] Further, the Chief Justice notes that overburdened court dockets are threatening the public's interest in speedy, fair, and efficient justice.[25] The American Bar Association affirms that the federal judiciary is overtaxed, and that this problem is compounded by increasing numbers of vacancies on the federal bench. Specifically,

> persistently high numbers of judicial vacancies deprive the nation of a federal court system that is equipped to serve the people. This has real consequences for the financial well−being of businesses and the personal lives of litigants whose cases may only be heard by the federal courts−e.g. cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.[26]

Currently, there are over 87 judicial vacancies on the federal bench.[27] The ABA notes that these twin pressures of increased vacancies and overtaxed dockets, if left unchecked, "inevitably will alter the delivery and quality of justice and erode public confidence in our federal judicial system."[28]

The *de novo* review standard advanced in today's draft legislation would add further pressure to this plight by greatly incentivizing judicial forum shopping. Where *Chevron* has "increased geographic uniformity in interpretation of national statutes," today's legislation would have the opposite effect.[29] Regulated entities and other constituents dissatisfied with a national rulemaking or the outcome of a challenge to the same, could try their luck in numerous jurisdictions, with different plaintiffs.[30] Uneven application of national laws would adversely impact the certainty with which businesses could operate across the country, and would bias

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[24] U.S. Supreme Court, Chief Justice's Year-End Report on the Federal Judiciary, at 10, *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.
[25] *Id.*, at 11.
[26] American Bar Association, *Judicial Vacancies, available at* http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies.html.
[27] U.S. Federal Courts, *Judicial Vacancies* (last updated May 13, 2016) *available at* http://www.uscourts.gov/judges-judgeships/judicial-vacancies.
[28] *See supra,* fn. 25.
[29] *See* Pierce Testimony, *supra* fn. 16, at 6.
[30] *Id.*

outcomes and justice in favor of those possessing the resources to challenge a federal agency decision in multiple circuits.

For all these reasons, I urge members of the Subcommittee to oppose this legislation.