**STATEMENT OF ALLYSON N. HO**

**Before the United States House of Representatives Judiciary Committee**

**Subcommittee on the Administrative State, Regulatory Reform, and Antitrust**

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Thank you for inviting me here today to testify about reining in the administrative state.

I'm heartened to see this issue being debated in Congress. Our system of checks and balances can only work when Congress is active in its engagement with the other branches, including the executive branch. That is particularly important when we're discussing the modern administrative state, where the executive branch regularly runs the risk of encroaching on the authority of the legislative branch.

So regardless of what actions this Congress chooses to take in response to the rise of the administrative state, I think this hearing alone serves an important function in Congress fulfilling its responsibilities under the Constitution.

In my remarks today, I want to discuss one specific issue that has coincided with—and likely accelerated—the rise of the administrative state: doctrines that force courts to defer to agency interpretations.

The most well-known of these doctrines is *Chevron* deference, which originates from a 1984 Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That case holds that when a court is reviewing an agency's interpretation of a statute that it administers, the court should defer to the agency's interpretation if the statute is ambiguous and the agency's interpretation is reasonable.

There are other types of judicial deference to agencies as well. For example, *Auer* Deference holds that courts should give "controlling weight" to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997).

There are several significant flaws with judicial deference to agency interpretations.

First, it flies in the face of a bedrock principle underlying the rule of law: A law means what it says. A statute, or a regulation, has a correct interpretation and it is that *correct* interpretation which should govern our actions. Deference to an agency's interpretation turns that fundamental principle on its head. Courts no longer care whether the agency has the *correct* interpretation—just whether the interpretation

is reasonable. And suddenly this reasonable interpretation, which may or may not be correct, becomes law.

To enforce an agency's interpretation of the law, even though it is not the best interpretation, is inconsistent with the judicial branch's constitutional duty "to say what the law is," contrary to Congress's directive in the Administrative Procedure Act, and harmful to confidence in our legal system.

Second, deference doctrines have become a tool for agencies to expand their power and influence, often at the expense of individual rights and freedoms. One of the biggest problems with deference is that it allows agencies to effectively write their own laws.

Because courts are required to defer to an agency's interpretation of a statute if it's reasonable, agencies have an incredible amount of discretion to interpret laws in a way that gives them more power and authority. This can result in regulations that are far more burdensome and restrictive than anything Congress intended when it passed the underlying law.

Third, these deference doctrines encourage agency overreach and abuse of power. When agencies know their interpretations of laws or regulations will be given significant deference by courts, they may be more inclined to stretch their authority and push the boundaries of what's allowed under the law.

Finally, these deference doctrines undermine the separation of powers that is so critical to our system of government. When agencies are given broad authority to essentially write a regulation that has the force of law, they are stepping into the role that Congress has—not the executive.

Moreover, even though agencies are technically within the executive branch, the rise of the civil service and the vast expansion of the federal bureaucracy has effectively made them a fourth branch of government, with the power to make laws and enforce them with little political oversight.

Elected officials are supposed to be accountable to the people who elected them, but the administrative state is often staffed by unelected bureaucrats who are difficult to hold accountable—even by the executive. This can make it hard for the public to have a say in the laws and regulations that affect their lives. The more you believe in democracy, the more you should be concerned about the rise of the administrative state.

So what can be done? There are many solutions, but part of the growth of the administrative state comes from Congressional neglect. When Congress passes laws that are open-ended, when Congress doesn't react to cabin agencies that are acting

outside the bounds of their authority—all of that only empowers agencies to continue expanding their influence.

So, to end where I began, I'm grateful for the Committee's invitation to testify today. I hope I can answer any questions you all have and help in any way I can in your efforts to rein in the administrative state.