



June 5, 2023

Dear Representative:

The Coalition for Sensible Safeguards (CSS), which includes more than 160 diverse labor, consumer, public health, food safety, financial reform, faith, environmental, and scientific integrity groups representing millions of Americans, strongly opposes the Separation of Powers Restoration Act, H.R. 288.

Congress should be looking for ways to strengthen our country's regulatory system by identifying gaps and instituting new safeguards for the public. Unfortunately, this legislation does the opposite by placing even more obstacles before agencies as they work to provide new public health, safety, and financial security protections for the public.

The legislation will make our system of regulatory safeguards weaker by enabling judicial policymaking at the expense of agency expertise and congressional authority, thereby resulting in unpredictable outcomes and regulatory uncertainty for all stakeholders. If passed, H.R. 288 would prevent many critical updates to public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy.

This problematic legislation attempts to reverse a fundamental and well-settled legal principle that has long effectively guided our regulatory system and provided a vital check on judicial overreach. It strives to abolish judicial deference to agencies' statutory interpretations in rulemaking by requiring a court to decide all relevant questions of law *de novo*, including all questions concerning the interpretation of constitutional, statutory, and regulatory provisions of final agency actions. Such deference was established as bedrock administrative law by the Supreme Court in the 1984 case *Chevron v. Natural Resources Defense Council* and came to be referred to as *Chevron* deference. *Chevron* deference has been upheld by hundreds of federal courts since and has been endorsed by both conservative and liberal Supreme Court justices and federal court judges.

In practice, abolishing *Chevron* deference will make the current problems in our country's regulatory process much worse in several ways. H.R. 288 will lead to even more regulatory burdens and delays, particularly for those "economically significant" or "major" new rules that provide the greatest benefits to the public's health, safety, and financial security.

There is substantial academic literature and expert consensus that intrusive judicial scrutiny of agency rulemaking is one of the main drivers of regulatory paralysis. Thus, increasing litigation risk for agency rules, which is exactly what this bill would accomplish by spawning hundreds of

new lawsuits per year, will mean many more missed congressional deadlines and a regulatory process that fails to efficiently and effectively protect the public as Congress requires. This further “chilling” of rulemaking will certainly benefit special interests who will further pressure regulators to carve out loopholes, weaken safety standards, or otherwise obstruct new rulemakings with the greatly enhanced threat of a lawsuit waiting in the wings.

Of even greater concern, eliminating judicial deference to agency rulemaking would empower reviewing courts to substitute their policy preferences for those of the agency. One of the primary policy rationales for *Chevron* deference is that agencies have considerable and superior expertise in the regulatory sectors they oversee as compared to generalist judges with far less expertise. Thus, H.R. 288 aims to make it easier for the courts to overturn an agency’s highly technical, resource-intensive, and science-based rulemaking without the expertise needed to make such determinations.

Further, abolishing *Chevron* review would actually undermine congressional authority, an irony given the name of the bill. *De novo* review of the scope and nature of congressional grants of authority to agencies invites courts to create law, ignore congressional intent, or both. In particular, it defeats a deliberate choice by Congress to confer on agencies the authority to resolve complex policy questions based on their expertise and the public input they receive during the rulemaking process.

Perhaps the most telling critique of attempts to replace *Chevron* deference with *de novo* review comes from former Justice Antonin Scalia, a vocal supporter of *Chevron* deference during his career and an indication of just how broad the support is for maintaining such deference. Writing for the majority in *City of Arlington v. F.C.C.*, Justice Scalia argued that requiring that “every agency rule must be subjected to a *de novo* judicial determination” without any standards to guide this review would result in an “open-ended hunt for congressional intent,” rendering “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).]

H.R. 288 aims to achieve an unprecedented and dangerous move away from traditional judicial deference towards a system of enhanced powers for Big Business lobbyists and weakened protections for consumers and working families. **We strongly urge opposition to the Separation of Powers Restoration Act, H.R. 288.**

Sincerely,  
Coalition for Sensible Safeguards