118TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
118–83

SEPARATION OF POWERS RESTORATION ACT OF 2023

JUNE 1, 2023.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 288]

The Committee on the Judiciary, to whom was referred the bill (H.R. 288) to amend title 5, United States Code, to clarify the nature of judicial review of agency interpretations of statutory and regulatory provisions, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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39–006

The amendment is 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 2023" or "SOPRA".

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—".

Purpose and Summary

H.R. 288, the Separation of Powers Restoration Act of 2023 or "SOPRA," introduced by Rep. Scott Fitzgerald (R–WI), amends the Administrative Procedure Act to legislatively override the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[1] *Auer v. Robbins*,[2] *Kisor v. Wilkie*,[3] and *Skidmore v. Swift & Co.*[4] judicial deference doctrines and requires courts to decide de novo all questions of law, including the interpretation of statutes, rules, and guidance.

Background and Need for the Legislation

I. THE ADMINISTRATIVE PROCEDURE ACT AND JUDICIAL DEFERENCE TO AGENCIES

The Administrative Procedure Act (APA) requires that courts reviewing agency actions "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and . . . hold unlawful and set aside agency . . . conclusions found to be . . . not in accordance with law."[5] As provided by the statute, this scheme is consistent with the bedrock principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[6]

However, a series of Supreme Court decisions have turned the APA's statutory scheme—and the Constitution's separation of powers—on its head. When applicable, these cases require courts to enforce an agency's "reasonable" interpretation of the law—regardless of "whether the agency has the *correct* interpretation"—instead of saying what the law actually is.[7] For example, the Court's decision

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[1] 467 U.S. 837 (1984).
[2] 519 U.S. 452 (1997).
[3] 588 U.S. ———, 139 S. Ct. 2400 (2019).
[4] 323 U.S. 134 (1944).
[5] 5 U.S.C. § 706.
[6] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[7] *Reining in the Administrative State: Reclaiming Congress's Legislative Power: Hearing Before the Subcomm. on the Administrative State, Regulatory Reform, and Antitrust of the H. Comm. on the Judiciary*, 118th Cong. 1 (2023) (statement of Allyson N. Ho, Partner, Gibson, Dunn & Crutcher LLP).

in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* requires courts to "defer[ ] to administrative interpretations" of ambiguous statutes rather than to exercise their independent judgment as to statutory meaning.[8] Similarly, its decisions in *Auer v. Robbins*[9] and *Kisor v. Wilkie* require courts to "[d]efer[ ] to reasonable agency interpretations of ambiguous rules" instead of determining what those rules actually provide.[10] Further, the Court's decision in *Skidmore v. Swift & Co.* may require courts to defer even to persuasive agency "rulings, interpretations and opinions"—i.e., guidance documents that have neither been passed by Congress nor subjected to the APA's notice-and-comment procedures.[11]

As Justice Neil Gorsuch explained on behalf of himself and Justice Clarence Thomas in a concurring opinion in Kisor, the effect of these judicial deference doctrines is "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[12] Representative Hageman amplified this concern during the Committee's consideration of this bill:

> Judicial deference is a harmful doctrine placing the American people at a distinct disadvantage in court when going up against what has become an all too powerful administrative state. . . .
>
> It also undermines the very purpose of judicial review by creating systemic judicial bias in favor of administrative agencies, which at this point in time have become far too powerful and far too dictatorial in their actions. . . .
>
> [W]hat the deference doctrine actually does is it places the thumb on the scale of the administrative agency against the citizens of this country, the exact opposite of what is the foundation of America and what is the foundation of our form of government.[13]

Further, deference to the administrative state reduces incentives for legislative compromise and promotes instability—and therefore illegitimacy—in the law.[14] Former United States Solicitor General Paul Clement remarked in May 2023:

> If you ask yourself, "why is it that Congress passes less and less major legislation each year?," I think that a large share of the blame actually goes to the administrative state and the *Chevron* doctrine. And the reason, I think, is straightforward. I mean, the way you used to get legislation passed is you'd get some kind of legislative compromise between folks on the right and folks on the left. . . . Well, with the *Chevron* doctrine and the ability of agencies to essentially take anything that looks like an ambiguity and do rulemaking, the reason you don't get compromise, in my view, is that at any given time, about half the people in Congress can get their friends in the executive branch to do what they want just through an ad-

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[8] 467 U.S. 837, 844 (1984).
[9] 519 U.S. 452 (1997).
[10] 588 U.S.———, 139 S. Ct. 2400, 2422 (2019).
[11] 323 U.S.134, 140 (1944).
[12] *Kisor*, 588 U.S.———, 139S. Ct. at 2425 (Gorsuch, J., concurring).
[13] *Markup of H.R.288 Before the H. Comm. on the Judiciary*, 118th Cong. 376:8,694–395:9,139.
[14] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents. . . .").

> ministrative rule. So why compromise? If you can get the immediate objective through an administrative rule, why compromise for a long-term solution that's in legislation?
>
> And then of course that creates the other dynamic, which is the fundamental law and some of the most important issues in our society changes every four years, or at least every time there is a new administration. Because instead of having a compromise law that becomes the law of the land across administrations, you have a rule that's over here in one administration and then it flips all the way to the other side in the next administration.[15]

More fundamentally, the judicial deference doctrines infringe upon the constitutional separation of powers and reduce the accountability of government to the American people. Deference gives federal agencies "broad authority to essentially write a regulation that has the force of law" and allows them to "step[ ] into the role that Congress has—not the executive."[16] Further, as Justice Antonin Scalia once explained, it "violate[s] a fundamental principle of separation of powers" for "the power to write a law and the power to interpret it [to] rest in the same hands"—as it does when courts defer to agency interpretations of their own rules and guidance.[17] In addition, increasing the power of the administrative state further removes and insulates policymakers from electoral accountability because, unlike Congress and the President, federal "agencies are not directly accountable to the people."[18]

II. THE SEPARATION OF POWERS RESTORATION ACT

The Separation of Powers Restoration Act (SOPRA) is a good step toward remedying the foregoing problems that have been caused by the administrative state's ambition and encroachment. The bill would amend the APA to expressly require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies."[19] This standard would restore the courts' role as the branch that interprets the law under the Constitution and the APA. The bill would "level the playing field" for Americans in litigation against their government.[20] It will promote better legislative outcomes and stability in the law. Most significantly, SOPRA would help to restore the constitutional separation of powers between the legislative, executive, and judicial branches; enhance the electrical accountability of policymakers; and reduce the power of the administrative state.

SOPRA would legislatively override the *Chevron* doctrine of judicial deference to agency interpretations of ambiguous statutes. The bill expressly requires courts to review de novo—i.e., without deference—agency interpretations of statutes. Similarly, SOPRA would overrule the *Auer-Kisor* doctrine of judicial deference to agency interpretations of ambiguous rules.

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[15] Paul D. Clement, Remarks at the Republican National Lawyers Association 2023 National Policy Conference (May 12, 2023).
[16] *See* Ho, *supra* note 7, at 2.
[17] *Decker v. Nw. Env't Def. Ctr.,* 568 U.S. 597, 619 (2013) (Scalia, J., concurring).
[18] *Chevron*, 467 U.S. at 865.
[19] SOPRA, H.R. 288, 118th Cong. § 2 (2023).
[20] *Markup of H.R. 288 Before the H. Comm. on the Judiciary, supra note* 13, at 376:8,709.

Moreover, SOPRA would repeal the *Skidmore* doctrine of judicial deference to persuasive agency guidance. The bill expressly applies de novo review to "all relevant questions of law," which include the interpretation of guidance.[21] Further, the definition of rule under the APA includes both "interpretative rules" and "general statements of policy"—i.e., agency guidance documents.[22] As Representative Hageman explained the bill's intention: "Because guidance is by definition intended to guide something related to a statute or regulation it must also be subject to de novo review under this bill's language The judicial de novo review of all relevant questions of law includes questions of law surrounding agency guidance."[23]

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the following hearing was used to develop H.R. 288: "Reining in the Administrative State: Reclaiming Congress's Legislative Power," a hearing held on March 10, 2023, before the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust. The Committee heard testimony from the following witnesses:

- Allyson N. Ho, Partner and Co-Chair of Appellate and Constitutional Law, Gibson, Dunn & Crutcher LLP;
- Jonathan Wolfson, Chief Legal Officer and Policy Director, Cicero Institute;
- Ryan Cleckner, Co-Founder, Gun University LLC and Owner, Law office of Ryan M. Cleckner; and
- Emily Hammond, Professor, George Washington University Law School.

The hearing addressed the growth of the administrative state and the effect of judicial deference doctrines on the separation of powers.

Committee Consideration

On May 10, 2023, the Committee met in open session and ordered the bill, H.R. 288, favorably reported with an amendment in the nature of a substitute, by a roll call vote of 15 to 5, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House rule XIII, the following roll call votes occurred during the Committee's consideration of H.R. 288:

1. Vote on Amendment #1 to H.R. 288 ANS, offered by Mr. Schiff, failed 5–15

2. Vote on Amendment #2 to H.R. 288 ANS, offered by Mr. Nadler, failed 5–15

3. Vote on favorably reporting H.R. 288, as amended, passed 15–5

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[21] SOPRA, H.R. 288, 118th Cong. § 2 (2023).

[22] 5 U.S.C. § 553(b)(3)(A); *see Chrysler*, 441 U.S. at 302 n. 31; *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Not all 'rules' must be issued through the notice-and-comment process," and "the notice-and-comment requirement 'does not apply' to 'interpretative rules [or] general statements of policy.'")

[23] *Markup of H.R. 288 Before the H. Comm. on the Judiciary, supra* note 13, at 376:8,713–378:8,745.

COMMITTEE ON THE JUDICIARY

Date: 5/10/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Schiff Amndt (#1) to HR 288 ANS

Roll Call #: 17

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*		✓		MR. NADLER (NY) *Ranking Member*	✓		
MR. ISSA (CA)				MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)				MR. COHEN (TN)			
MR. JOHNSON (LA)		✓		MR. JOHNSON (GA)	✓		
MR. BIGGS (AZ)		✓		MR. SCHIFF (CA)	✓		
MR. McCLINTOCK (CA)		✓		MR. CICILLINE (RI)			
MR. TIFFANY (WI)				MR. SWALWELL (CA)			
MR. MASSIE (KY)				MR. LIEU (CA)			
MR. ROY (TX)				MS. JAYAPAL (WA)			
MR. BISHOP (NC)		✓		MR. CORREA (CA)			
MS. SPARTZ (IN)		✓		MS. SCANLON (PA)			
MR. FITZGERALD (WI)		✓		MR. NEGUSE (CO)			
MR. BENTZ (OR)		✓		MS. McBATH (GA)	✓		
MR. CLINE (VA)		✓		MS. DEAN (PA)			
MR. GOODEN (TX)		✓		MS. ESCOBAR (TX)			
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)			
MR. NEHLS (TX)		✓		MS. BUSH (MO)			
MR. MOORE (AL)		✓		MR. IVEY (MD)	✓		
MR. KILEY (CA)							
MS. HAGEMAN (WY)		✓					
MR. MORAN (TX)							
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)		✓					

Roll Call Totals: Ayes: 5 Nays: 15 Present:

Passed: _____ Failed: X

COMMITTEE ON THE JUDICIARY

Date: 5/10/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Nadler Amndt (#2) to HR 288 ANS

Roll Call #: 18

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*		✓		MR. NADLER (NY) *Ranking Member*	✓		
MR. ISSA (CA)				MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)				MR. COHEN (TN)			
MR. JOHNSON (LA)		✓		MR. JOHNSON (GA)	✓		
MR. BIGGS (AZ)		✓		MR. SCHIFF (CA)	✓		
MR. McCLINTOCK (CA)		✓		MR. CICILLINE (RI)			
MR. TIFFANY (WI)				MR. SWALWELL (CA)			
MR. MASSIE (KY)				MR. LIEU (CA)			
MR. ROY (TX)				MS. JAYAPAL (WA)			
MR. BISHOP (NC)		✓		MR. CORREA (CA)			
MS. SPARTZ (IN)		✓		MS. SCANLON (PA)			
MR. FITZGERALD (WI)		✓		MR. NEGUSE (CO)			
MR. BENTZ (OR)		✓		MS. McBATH (GA)	✓		
MR. CLINE (VA)		✓		MS. DEAN (PA)			
MR. GOODEN (TX)		✓		MS. ESCOBAR (TX)			
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)			
MR. NEHLS (TX)		✓		MS. BUSH (MO)			
MR. MOORE (AL)		✓		MR. IVEY (MD)	✓		
MR. KILEY (CA)							
MS. HAGEMAN (WY)		✓					
MR. MORAN (TX)							
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)		✓					

Roll Call Totals: Ayes: 5 Nays: 15 Present: Passed: _____ Failed: X

COMMITTEE ON THE JUDICIARY

Date: 5/10/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Final passage of HR 288, as amended

Roll Call #: 19

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*	✓			MR. NADLER (NY) *Ranking Member*		✓	
MR. ISSA (CA)				MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)				MR. COHEN (TN)			
MR. JOHNSON (LA)	✓			MR. JOHNSON (GA)		✓	
MR. BIGGS (AZ)	✓			MR. SCHIFF (CA)		✓	
MR. McCLINTOCK (CA)	✓			MR. CICILLINE (RI)			
MR. TIFFANY (WI)				MR. SWALWELL (CA)			
MR. MASSIE (KY)				MR. LIEU (CA)			
MR. ROY (TX)				MS. JAYAPAL (WA)			
MR. BISHOP (NC)	✓			MR. CORREA (CA)			
MS. SPARTZ (IN)	✓			MS. SCANLON (PA)			
MR. FITZGERALD (WI)	✓			MR. NEGUSE (CO)			
MR. BENTZ (OR)	✓			MS. McBATH (GA)		✓	
MR. CLINE (VA)	✓			MS. DEAN (PA)			
MR. GOODEN (TX)	✓			MS. ESCOBAR (TX)			
MR. VAN DREW (NJ)	✓			MS. ROSS (NC)			
MR. NEHLS (TX)	✓			MS. BUSH (MO)			
MR. MOORE (AL)	✓			MR. IVEY (MD)		✓	
MR. KILEY (CA)							
MS. HAGEMAN (WY)	✓						
MR. MORAN (TX)							
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)	✓						

Roll Call Totals: Ayes: 15 Nays: 5 Present:

Passed: ✓ Failed: _____

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, 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

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget Act of 1974* and with respect to the requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. The Chairman of the Committee shall cause such estimate and statement to be printed in the *Congressional Record* upon its receipt by the Committee.

Congressional Budget Office Cost Estimate

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, a cost estimate provided by the Congressional Budget Office pursuant to section 402 of the *Congressional Budget Act of 1974* was not made available to the Committee in time for the filing of this report. The Chairman of the Committee shall cause such estimate to be printed in the *Congressional Record* upon its receipt by the Committee.

Committee Estimate of Budgetary Effects

With respect to the requirements of clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the *Congressional Budget Act of 1974*.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 288 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 288 would amend the Administrative Procedure Act to legislatively override the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, *Auer v. Robbins*, *Kisor v. Wilkie*, and *Skidmore v. Swift & Co.* judicial deference doctrines and require courts to decide de novo all questions of law, including the interpretation of statutes, rules, and guidance.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 288 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of House Rule XXI.

Federal Mandates Statement

An estimate of federal mandates prepared by the Director of the Congressional Budget office pursuant to section 423 of the *Unfunded Mandates Reform Act* was not made available to the Committee in time for the filing of this report. The Chairman of the Committee shall cause such estimate to be printed in the *Congressional Record* upon its receipt by the Committee.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the *Federal Advisory Committee Act* were created by this legislation.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the *Congressional Accountability Act* (Pub. L. 104–1).

Section-by-Section Analysis

Section 1. Short Title. This section sets forth the short title of the bill as the "Separation of Powers Restoration Act of 2023."

Section 2. Judicial Review of Statutory and Regulatory Interpretations. This section amends the Administrative Procedure Act to provide that courts shall decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules made by agencies.

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.

Minority Views

I. INTRODUCTION

H.R. 288, the "Separation of Powers Restoration Act" or "SOPRA," represents another effort by Republicans to dismantle the administrative state by modifying the scope of judicial review for agency actions by authorizing courts to decide *de novo* (i.e., without giving deference to the agency's interpretation) all relevant questions of law, including (1) rules made by agencies, and (2) constitutional and statutory provisions. Effectively, this bill eliminates the decades-old precedent set by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] in which the courts use a legal test to decide when the court should defer to the agency's answer or interpretation of statutory authority. In short, the doctrine of "Chevron deference" holds that judicial deference to an agency's interpretation is appropriate as long as it is not unreasonable, and Congress has spoken directly to the precise issue at question. Although the courts have eroded the doctrine of Chevron deference somewhat

[1] 468 U.S. 837 (1984).

in recent years, it remains an important tenet of administrative law.

Among its many flaws, SOPRA would encourage judicial activism by requiring judges to second-guess the carefully crafted regulations from agencies. The bill would also make the rulemaking process even more time-consuming and costly by forcing agencies to adopt even more detailed factual records and explanations to withstand judicial scrutiny, thus delaying the finalization of critical, and possibly lifesaving, regulations. By requiring this deeper report, the agency rulemaking process would be skewed in favor of those with significant resources as they have an edge against smaller groups to overwhelm the process with possibly bogus reports, paperwork, demands, and litigation.

Along with Democrats, who were united in opposition to SOPRA, Rep. Matt Gatez (R–FL) spoke in opposition to the bill, arguing that judicial deference to the executive has deep roots in our country and that to undermine this precedent would mean that we are opening the doors to judicial activism and policy making from the bench.

During markup, Rep. Adam Schiff (D–CA) offered an amendment that would prohibit the law from taking effect until the Judicial Conference certifies to Congress that each court of the U.S. has a code of conduct in effect. This amendment was defeated along party lines. Rep. Nadler (D–NY) offered an amendment to exclude the FDA from the bill, which was also defeated along party lines.

II. CONCERNS

Most administrative law scholars reject the need for a legislative override of judicial deference because it would make the rulemaking process more costly and time-consuming by forcing agencies to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking.[2] This cumulative burden would have the effect of further ossifying the rulemaking process or dissuading agencies from undertaking rulemakings altogether.[3] Accordingly, the Coalition for Sensible Safeguards (CSS)—a coalition of more than 160 consumer, labor, scientific, research, faith, community, environmental, small business, good government, public health and public interest groups—opposes SORPA.[4]

Heightened judicial review would also increase the risk of judicial activism by allowing generalist courts to supplant the expertise of Federal agencies with their views. Finally, as a general matter, administrative law experts believe that there is no need to amend fundamentally the Administrative Procedure Act (APA), including

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[2] 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 Sens. Carper and Coburn 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).

[3] *See id.*

[4] *The Separation of Powers Restoration Act*, COALITION FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/issues/separation-powers-restoration-act/ (last visited May 31, 2023).

its treatment of judicial review.[5] 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.[6] 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." [7]

Since the late 1980's, administrative law scholars have complained that heightened scrutiny of agency rulemaking has played a major role in regulatory ossification and avoidance (i.e., dissuading agencies from pursuing regulations in the first place).[8] For example, Professor Richard Pierce of the George Washington University Law School contends that "the judicial branch is responsible for most of the ossification of the rulemaking process." [9] He further notes that enhanced judicial review may have the effect of rewriting the statutory requirements under the APA for informal rulemaking, and could even invalidate roughly half of rules on appeal.[10]

The non-partisan Congressional Research Service (CRS) also observes that enhanced judicial 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.[11] CRS warns that enhanced judicial review "will cause delay, complexity, and uncertainty in the administrative process which may be seen to have its most severe and direct impact on the ability of public interest representatives to effectively participate in the process." [12]

In addition, 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.[13] 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.[14]

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[5] *See* Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 Admin. L.J. Am. U. 89, 89 (1996).
[6] *See id.*
[7] 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).
[8] Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 309 (1988) ("Courts also have diminished agency interest in systematic policymaking by imposing requirements that agencies 'find' unfindable facts and support those findings with unattainable evidence."). Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 61 (1995) ("Many agencies avoid rulemaking because of the fear that after years of effort and expenditure of millions of dollars, a rule will be struck down by the courts on judicial review."). For additional background on regulatory ossification, *see generally* Brian J. Shearer, *Outfoxing Alaska Hunters: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 AM. U. L. REV. 167, 169–70 (2012) ("The [ossification] theory contends that rulemaking has become increasingly burdensome for agencies due to congressionally-imposed and judicially-fabricated procedures.").
[9] Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).
[10] *Id.*
[11] Morton Rosenberg, *The Future of Public Participation in Informal Agency Rulemaking Under Pending Regulatory Reform Proposals*, CONG. RESEARCH SERV. REPORT FOR CONGRESS 47–47 (1982).
[12] *Id.* at 44.
[13] *Id.*
[14] *Id.*

Eliminating judicial deference may also incentivize judicial activism by allowing a reviewing court to substitute its policy preferences for those of the agency.[15] Rather than deferring to agencies' substantive expertise, enhanced judicial review would enable generalist courts to make policy by applying their policy preferences to their review of an agency rule, whether they do so consciously or not. Activist judges, however, lack the political accountability and expertise of agencies.[16] As Professor Pierce notes, courts lacked explicit authority to review most agency rulemaking until the late Nineteenth century.[17] Over the past century, however, the Supreme Court has routinely held that it is the "exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." [18] The Court emphatically made this point in *Chevron:*

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . 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.[19]

Lastly, H.R. 288 is a solution to a non-existent problem. Notwithstanding the debate surrounding deference principles,[20] the American Bar Association (ABA) Administrative Law Section has clarified that judicial review remains "relatively stable" today, combining the features of *Chevron* deference with the careful scrutiny of the hard-look doctrine:

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[15] *Id.* at 48–51.

[16] *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.").

[17] T*he 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 Prof. Richard Pierce) ("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 *House Hearing*].

[18] See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").

[19] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[20] *Hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015;" and, H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015" 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) ("The cases explaining when *Chevron* deference should apply are confusing, and even experts and Supreme Court justices do not seem to agree on what the test is.").

> 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.[21]

Professor Levin similarly notes that agencies succeed on appeal in roughly 70% of cases regardless of whether the court applies *Chevron* or hard-look review, suggesting that many other factors ultimately affect the outcome of a court's review.[22]

Judicial deference to agency rulemaking is also constitutionally sound. 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."[23]

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

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[21] 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).

[22] *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), at 41 https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94906/pdf/CHRG-114shrg94906.pdf [hereinafter *Senate hearing*]; *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).

[23] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

> being too quick to substitute their judgments for those of politically accountable administrators.[24]

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."[25] 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.[26]

III. CONCLUSION

SOPRA represents the latest step in the Republicans' decades-long attack on the regulatory process, trying to add hurdle after hurdle to the rulemaking process to prevent regulations, including those that protect public health and safety, from taking effect. H.R. 288 would undermine decades-old Supreme Court precedent and allow for policy making from the bench as judges would be statutorily prevented from granting deference to agencies' decisionmaking. Instead of deferring to the expert, deliberate, and carefully crafted rules made by our agencies, the bill would instead allow for judges to substitute their own decisionmaking for that of the informed agency. The bill would also create more opportunities for corporate interests to skew the rulemaking process and judicial review of that process in their favor. Finally, the bill would create more cost and delay in agency rulemaking, thus undermining the many economic benefits regulations bring and delaying critical rules and regulations.

For all of these reasons, I dissent and urge all of my colleagues to oppose this legislation.

JERROLD NADLER,
Ranking Member.

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[24] *Senate Hearing, supra* note 21, at 48 (statement of Prof. Ron Levin).
[25] Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 109 (1996).
[26] *House Hearing, supra* note 16, at 9 (statement of Prof. Richard Pierce).