FROM: RSC Staff
TO: RSC Members
RE: Chevron Deference

The Supreme Court is poised to scale back, or even overturn, a judicial doctrine known as "Chevron deference". This memo is meant to provide greater background for RSC offices on Chevron deference, the relevant litigation, and the implications this decision could have for Congress.

If Chevron is rolled back or overturned, this will be a landmark decision which could open the door to Congress reclaiming its Article One Authority, rolling back Biden's woke and weaponized administrative agenda, and providing for further pro-growth regulatory policy.

Chevron Deference
Chevron deference is the "doctrine of judicial deference given to administrative actions. In *Chevron*, the Supreme Court set forth a legal test as to when the court should defer to the agency's answer or interpretation, holding that such judicial deference is appropriate where the agency's answer was not unreasonable, so long as Congress had not spoken directly to the precise issue at question."

In short, there are two steps to *Chevron* deference in reviewing agency regulations:

Step 1) a court must determine whether Congress expressed intent in statute or if the statute's intent is ambiguous.

Step 2) in the case of a statute's intent being ambiguous, a court must determine whether an agency's interpretation is reasonable.

Constitutional Flaws of Chevron

The separation of powers among the legislative, executive, and judicial branches of government is laid out clearly in the United States Constitution. However, Chevron deference has given agencies the ability to regulate on matters where Congress is silent or ambiguous. Allowing the agencies to engage in rulemaking beyond Congress's clear direction conflicts with Article I of the Constitution.

Furthermore, it encroaches on the courts' responsibility to weigh in on how a statute should be interpreted. Article III vests the judicial power of the United States in the federal courts. The Administrative Procedures Act affirms this structure, directing courts 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." Under Chevron, courts typically defer to agency interpretation of statute, incentivizing federal agencies to push the boundaries of their statutory authority. Chevron's two-step process gives agencies a pass to over-regulate since they would only

need to justify to a court that Congress delegated authority to the executive branch and that their interpretation of statute in creating this regulation was "reasonable."

Such deference therefore makes the government less accountable to the people. It empowers unelected bureaucrats to assume the role of policymakers and strips federal courts of their judicial power to decide questions of law. In short, Chevron deference undermines the Constitution's system of checks and balances while empowering the "administrative state."

Relevant Litigation

Origins of Chevron Deference - *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. et al.*

In 1981, the Environmental Protection Agency (EPA) issued a regulation under the Clean Air Act (CAA) that allowed states to treat all pollution-emitting devices in the same industrial grouping, as though they were a single "bubble." Several environmental groups challenged the bubble provision, claiming it conflicted with the intent of the CAA.

Ultimately, the Supreme Court had to decide whether the EPA, based on vague language in the CAA, had broad authority to interpret a statutory term that Congress hadn't clearly defined and issue regulations accordingly. The Supreme Court held that the EPA's regulation was a reasonable interpretation of the term "stationary source" in the CAA. Because Congress did not have a clear or specific intention for the EPA's interpretation of the term, the EPA's regulation was a reasonable policy interpretation.

As a result of this finding, *Chevron* deference was established.

Judicial Skepticism Towards Excess Agency Authority – *West Virginia v EPA*

In 2022, the Supreme Court issued a major ruling on administrative authority in *West Virginia v. EPA*. Specifically, the Court ruled that the EPA did not have clear congressional authorization under the CAA to carry out President Obama's "Clean Power Plan," which sought to force power plants to radically shift towards generating power from renewable sources. SCOTUS found that the EPA relied upon an "unprecedented" interpretation of authority under Sec. 111(d) of the CAA that Congress had not delegated. Though the ruling did not address *Chevron* specifically and instead addressed the "major questions" doctrine, it signaled that SCOTUS has become increasingly skeptical of federal agencies claiming vast power to impose sweeping regulations through authority conferred through vague statute.

Pending Cases - *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce.*

The Supreme Court will make a ruling before the end of its 2024 term that will determine whether *Chevron* should be overturned or limited. This ruling will come from *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. Both cases involved challenges to a National Marine Fisheries Service (NFMS) regulation under the Magnuson-Stevens Act that forced domestic fishing vessel operators to cover the costs of onboard inspectors. The DC Circuit Court and First Circuit Court upheld NMFS's regulation, applying *Chevron* deference to NMFS's interpretation of the law to assert that the regulation was reasonable despite the fact that Congress had never specifically weighed in.

The Supreme Court granted the writ of certiorari to both cases and will evaluate "Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial power

expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

Oral arguments for both cases were heard in January 2024, and a final decision is expected imminently. While Chevron clearly impacts energy and environment-related issues, such as the Clean Power Plan and the NMFS rule (according to one study, courts have applied Chevron to energy cases 96% of the time), SCOTUS's decision in this case will reverberate throughout the administrative state should it overturn or modify *Chevron*.

Congressional Implications:

Should Chevron deference be overturned or scaled back, Congress and the Judiciary have an opportunity to reclaim their respective constitutional authority. Specifically, Congress would be able to reassert its Article I authority, ensuring lawmaking is reserved only for the legislative branch, not the "administrative state." Ultimately, this will ensure that the will of the American people, carried out through laws written by their elected representatives, is not substituted for the supposed "expertise" of bureaucrats. Similarly, Congress could ensure that judicial review of regulatory actions is left to the courts not agencies. Finally, Congress could enact further limitations and guardrails to prevent burdensome regulation and ensure transparency in rulemaking.

While it will take time for Congress to undue the negative impacts of Chevron deference following the Supreme Court ruling, below is a list of policies and ideas which RSC has historically advocated for to streamline regulation and take power away from the administrative state:

Reverse Chevron Permanently:

H.R. 288, Separation of Powers Act (SOPRA) (Rep. Fitzgerald, R-WI) – The House passed SOPRA on June 15, 2023, which if enacted would codify a post-Chevron doctrine by requiring federal courts to conduct de novo review of any agency action.

Increase Congressional Oversight:

Congress has an opportunity to scrutinize the Biden administration's radical regulatory agenda.

House Committees have an opportunity to review any regulatory action that was justified by Chevron deference toward agency interpretation. Biden's regulatory agenda has impacted everything from the economy to America's energy and agricultural production to Title IX. Each House Committee should scour Biden era regulatory actions and highlight any that should be considered for judicial review post-Chevron. Similarly, House conservative should seek opportunities to advocate for Congress to repeal or defund such regulations.

Other Bold Regulatory Reforms:

Rep. Kat Cammack's (R-FL) REINS Act of 2023 - The House passed the REINS Act on June 14, 2023, which if enacted would require Congress to approve any regulations that have an annual economic impact of $100 million or more.

Rep. Jack Bergman's (R-MI) REVIEW Act of 2023 (Rep. Jack Bergman, R-MI) - This legislation would require a federal agency to postpone the effective start date of any high- impact rule until completion of any judicial proceedings challenging the rule. The bill defines a high-impact rule as one that has an annual negative economic impact of more than $1 billion.

Require Agency Data Disclosure in Support of New Proposed Rules – Federal agencies are not required to disclose a complete record of data upon which a rulemaking is based off. Congress could require agencies to provide all data supporting their proposed rulemaking as part of the Administrative Procedure Act (APA) process.

Close existing regulatory loopholes for independent agencies - Independent agencies are generally exempt from having to comply with a number of statutes applicable to the rulemaking process, namely the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the Data Quality Act. Sadly, independent agencies promulgate some of the most far-reaching and economically impactful regulations in our nation, including actions that advance Biden's ESG agenda.

Rep. Virginia Foxx's Unfunded Mandates Information and Transparency Act – This legislation would provide a framework for a more accountable regulatory process by increasing transparency of the true costs of federal mandates on state and local governments, as well as the private sector.

RSC Budget and Spending Taskforce Chairman Ben Cline's (R-VA) Ensuring Accountability in Agency Rulemaking Act – This legislation would require rules be signed and issued by an individual appointed by the President and confirmed by the Senate, rather than unknown bureaucrats.

Additionally, Rep. Cline's (R-VA) Small Business Regulatory Flexibility Improvements Act would require agencies to review existing rules that significantly impact a substantial number of small businesses and determine whether to leave the rule as is, improve its effectiveness, or repeal it.

Senator Ted Budd's (R-NC) Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act – This legislation would require the elimination of two existing regulations for every new regulation.

Rep. Good's (R-VA) ALERT Act – This legislation would require agencies to provide detailed monthly disclosures on regulations to OMB for every rule an agency expects to propose or finalize in the coming year.

Oversight and Reform Chairman James Comer's (R-KY) Guidance Out Of Darkness (GOOD) Act - This legislation would help to remedy disclosure issues with respect to regulatory guidance documents. This commonsense legislation would require all guidance documents to be published for transparency considerations.

Rep. Blaine Luetkemeyer's (R-MO) Providing Accountability Through Transparency Act – This legislation would require each agency to include a 100-word, plain-language summary of a proposed rule when providing notice of a rulemaking.