IN THE SUPREME COURT OF OHIO

TWISM ENTERPRISES, LLC, D/B/A VALUCADD SOLUTIONS Plaintiff-Appellant, v. STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND SURVEYORS, Defendants-Appellants.	:	Case No. 2021-1440 On Appeal from the First Appellate District Case No. C-200411

AMENDED AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANT TWISM ENTERPRISES, LLC, D/B/A VALUCADD SOLUTIONS

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal levels. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3).

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Ohio Constitution and the Constitution of the United States, against government overreach. More and more often, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is not just government overreach, but the insulation of important public policy decisions from political or judicial accountability. This rule by regulatory agencies—particularly when those agencies' statutory interpretations are granted judicial deference on questions of legal interpretation—is incompatible with representative democracy and the Constitution's system of checks and balances.

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for free-market, pro-growth policies at the local, state, and federal levels of government. The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

II. STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Case set forth in the Appellant's Jurisdictional Brief.

III. ARGUMENT AND LAW

A. The State of Administrative Deference

1. Introduction

As members of this Court have recognized, Ohio's jurisprudence regarding what deference is due to administrative interpretations of statutes and rules is, at best, muddled. The state of the law is so unclear that Justice DeWine admitted last year in the Yale Journal of Regulation's Notice & Comment blog that even as a sitting member of this Court, he was unsure that he could articulate Ohio's doctrine of administrative law deference because no coherent doctrine exists:

> It's not that I haven't tried to synthesize our case law on the topic. The problem is that our Court has never systematically outlined what deference looks like in Ohio—and what the Court has said on the topic is far from consistent. Our deference "doctrine" is not really a doctrine at all; it more like Hogwart's Room of Requirement, where a judge or practitioner truly in need can always find some bit of law equipped for the seeker's purpose.

R. Patrick DeWine, *A Few thoughts on Administrative Deference in Ohio*, YALE JOURN. REG., Notice and Comment Blog (Oct. 26, 2020), *available at* https://tinyurl.com/e96mzmwb (accessed November 29, 2021).

This amicus brief surveys the state of the law regarding administrative deference in the federal courts as well as Ohio and also examines how other states have balanced the benefit of agency expertise with the constitutional separation of powers and the judiciary's special role in a tripartite system of government.

Although federal cases such as *Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 865–66, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984) and *Auer v. Robbins*,

519 U.S. 452, 117 S.Ct. 905, 907, 137 L.Ed.2d 79 (1997)[1] might provide useful models, this Court is not bound to follow them. And there are good reasons not to follow those models. First, the *Chevron* doctrine has received increasing criticism from legal scholars and U.S. Supreme Court Justices. *See* Administrative Deference And Its Critics, *infra* at 5-6. But of more direct relevance to the instant case, in recent years at least four members of this Court have also expressed doubt over *Chevron*, *Auer*, and whether the judiciary can ever cede its authority to "say what the law is" to an administrative agency:

> Judicial deference to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions. It has long been understood that part of the judicial power is to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

State ex rel. McCann v. Delaware County Bd. of Elections, 155 Ohio St. 3d 14, 21, 118 N.E.3d 224, 230 (Ohio 2018) (DeWine, J., concurring in judgment, with an opinion joined by Fischer, J.). Justice DeWine went on to highlight the importance that the separation of powers plays in Ohio's constitutional system:

> The Ohio Constitution, like the federal Constitution, allocates power among three distinct branches of government. "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Ohio Constitution, Article IV, Section 1.

Id.

Similarly, Justice Kennedy, who has voiced concern that the judiciary might be deserting its constitutional post through administrative deference, dissented in *McCann,* finding that the statute in question was unambiguous and thus did not require any deference analysis, but stating

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[1] *Auer* deference, as modified by *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L.Ed. 841 (2019), instructs courts that an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Although the Court of Appeals' decision does not mention *Auer,* its deference to the Board's interpretation of its own rule (Ohio Admn. Code 4733-39-02) essentially applies the *Auer* decision.

that she "will leave for another day the issue whether the judicial branch truly owes deference to administrative agencies' interpretations of statutes." *McCann*, 155 Ohio St. 3d at ¶44, fn. 2 (Kennedy, J. dissenting). *See also In re 6011 Greenwich Windpark, LLC*, 134 N.E.3d 1157, 1169 (Ohio 2019) (Kennedy, J. dissenting, with an opinion joined by DeWine and Stewart, JJ.) (stating that the interpretation of a statute is a question of law, and therefore judicial review of an agency interpretation should be "de novo and *without deference*") (emphasis in original). Here, the Court of Appeals applied deference to the Appellee's interpretation of Ohio Rev. Code 4733.16(D) and Ohio Adm. Code 4733-39-02(B) to hold that the Appellant's 1099 employee could qualify as a "full-time manager" for purposes of obtaining an engineering certificate of authorization only if he was paid as a W-2 employee rather than as an independent contractor, a requirement that exists nowhere in the statute or the rule

The Buckeye Institute respectfully submits that the day to determine "whether the judiciary truly owes any deference to administrative agencies' statutory interpretation" has arrived, *McCann*, 155 Ohio St. 3d at ¶44, fn. 2 (Kennedy, J. dissenting), and that in articulating Ohio's deference doctrine, this Court should hew to Justice Marshall's words and—like seven other state supreme courts—hold that *any* deference to administrative agencies invades the Court's "***exclusive*** province [ ] to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)(emphasis added); *see, e.g., Bd. of Educ. of Fayette Cty. v. Hurley-Richards*, 396 S.W.3d 879, 885 (Ky. 2013) (citing *Marbury* and holding "[i]ssues of statutory construction are matters of law for the courts to resolve, and the reviewing court is not bound by an administrative body's interpretation of a statute"); *Ellis-Hall Consultants v. Pub. Serv. Commission*, 2016 UT 34, 379 P.3d 1270, ¶ 33 (Utah 2016) (citing *Marbury* to hold "[w]e accordingly review the Commission's interpretation . . . without affording any deference to the Commission."); and *Tetra Tech EC, Inc.*

v. Wisconsin Dept. of Revenue, 382 Wis.2d 496, 2018 WI 75, 914 N.W.2d 21, ¶ 50 (Wis. 2018) (citing *Marbury* to that hold that "administrative decisions are afforded no deference.").

2. Administrative Deference And Its Critics

The U.S. Supreme Court's *Chevron* doctrine has been the "800-pound gorilla in modern statutory interpretation" and has dominated the landscape of administrative law since its creation in 1984. John F. Duffy and Richard Hynes, *Statutory Domain & the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 30 (2016). *Chevron's* well-known holding can be summarized as requiring that where an agency has statutory authority to interpret its authorizing statute, judges must defer to the agency's reasonable interpretation of ambiguous text. *Id.*

When *Chevron* was decided, it seemed to promise the best of both worlds—administrative expertise along with political accountability. *See,* Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 556 (2014). Indeed, the case was decided unanimously, albeit with three Justices not participating. But time and experience have exposed its flaws and placed *Chevron's* continued salience in doubt. *See e.g.*, Michael Hertz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015) ("This decision, though seen as transformatively important, is honored in the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty."); *see also*, Catherine M. Sharkey, *Cutting In On the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2448 n. 2 ("Today, there are calls to abandon *Chevron*, originating not only in academia but from the halls of Congress and chambers of judges as well. Recent U.S. Supreme Court opinions, eliding *Chevron* altogether or declining to defer for one reason or another, have led some scholars to proclaim the "terminal" state of the venerable doctrine of agency deference in statutory interpretation."). Justice Alito has aptly

described *Chevron* as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent . . . ." *Pereira v. Sessions*, 138 S.Ct. 2105, 2121 (2018) (Alito, J., dissenting).

In *City of Arlington Tex. v. F.C.C.*, Chief Justice Roberts observed that the "Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." Although "[i]t would be a bit much to describe the result as 'the very definition of tyranny'"—as James Madison, the Father of the Constitution, famously did—"the danger posed by the growing power of the administrative state cannot be dismissed." 569 U.S. 290, 320, 133 S. Ct. 1863, 1882 (2013). In that same vein, Justice Gorsuch, while serving on the Tenth Circuit Court of Appeals, described the *Chevron* doctrine as "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151-52 (10th Cir. 2016). Other circuit court judges have opined as well, with Judge Carlos Bea of the U.S. Court of Appeals for the Ninth Circuit plainly stating that "[w]e should reconsider all the assumptions underlying *Chevron* deference and consider *Chevron's* abandonment altogether. In other words, let's junk *Chevron*. Carlos T. Bea, *Who Should Interpret Our Statutes and How It Affects Our Separation of Powers*, Heritage Foundation Lecture No. 1272 (Feb. 1, 2016), *available at https://tinyurl.com/bdha9pt7* (accessed November 29, 2021).

3. Ohio's Current Administrative Deference Jurisprudence Needs Clarification

Regardless of *Chevron's* efficacy or continued viability at the federal level, Ohio's inconsistent approach to deference cries out for clarity. Ohio's pre-*Chevron* law on deference is sparse. Before *Chevron*, this Court addressed issues of agency deference only twice. *See State, ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 155, 438 N.E.2d 120, 123 (1982); *Jones Metal Prods. Co. v. Walker*, 29 Ohio St. 2d 173 (1972). Notably, in both of those cases the issue

was deference to a *federal* agency's interpretation of a *federal* statute. For example, in *State, ex rel. Brown v. Dayton Malleable, Inc.*, this Court interpreted a state statute that was tied to an EPA rule promulgated under the Federal Water Pollution Control Amendments of 1972. There, the Court held that the statute was "plain and unambiguous" and required no construction, yet in dicta cited pre-*Chevron* federal law to state that even if interpretation was required, "[i]t is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.'" *Id.* at 155 (citations omitted); *see also,* DeWine, *supra.*

Since 1984, however, as the scope and depth of state regulations have expanded, so have legal challenges to their interpretation. According to Justice DeWine, "[i]n the 36 years since the *Chevron* decision, the Ohio Supreme Court has issued more than three dozen opinions that have applied some form of deference to agencies' interpretations of either the statutory framework that they administer or to the agencies' own regulations. And in at least 20 other cases, we have mentioned deference principles but ultimately have decided an agency's interpretation was not entitled to deference." DeWine, *supra.*

This Court, however, has neither explicitly adopted *Chevron* nor clearly endorsed an alternative standard. For example, in a case involving the Bureau of Worker's Compensation's interpretation of its governing statute, this Court held two years after *Chevron* and without reference to *Chevron* that it "must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command." *State, ex rel. McLean v. Indus. Com'n of Ohio*, 25 Ohio St.3d 90, 92, 495 N.E.2d 370, 372 (1986). Unlike *Chevron*, the deference due under *McLean* seems to arise only under a specific delegation of authority and is

premised on the agency's "substantial expertise." While this standard appears clear at first blush, the dissent in *McLean* points to an apparently contradictory statute stating that "the Worker's Compensation Act shall be construed liberally in favor of injured employees." *Id.* at 94 (citing R.C. 4123.95 (Brown, C.J., dissenting)). The Court left unanswered what happens to an agency's interpretation of a statute when a second statute—also presumably within the agency's purview—directs a certain construction. Does the Court owe "due deference" to the agency's interpretation of what construing the Act "liberally in favor of injured employees" means?

Two years later in another Bureau of Workers Compensation case, a unanimous Court reiterated the "due deference" standard set forth in *McLean,* but appeared to apply a reasonableness analysis instead. *See Swallow v. Industrial Com'n of Ohio*, 36 Ohio St. 3d 55, 56, 521 N.E. 2d 778 (1988) ("Although there may be underlying tension between these two principles [statutory interpretation favoring the claimant and agency deference], in the instant case the issue is whether the commission formulated a reasonable rule . . . ."). These holdings possess the confounding magic that concerned Justice DeWine: "a judge or practitioner truly in need can always find some bit of law equipped for the seekers purpose." DeWine, *supra.*

The confusion does not abate when *Chevron*—which this Court has cited only nine times since 1984—enters the picture. *Chevron's* Ohio debut comes in 1994, ten years after it was decided. *See State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St. 3d 377, 627 N.E. 2d 538 (1994). In *National Lime & Stone Co.*, the Court cited *Brown* and *Jones Metal Prods.* for "the long-accepted principle that considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer." *Id.* Yet in applying the "considerable deference" standard, the majority nevertheless held that "any uncertainty with regard to the interpretation of R.C. Chapter 3704 and rules promulgated thereunder should be construed in favor

of the person or entity (manufacturer or otherwise) affected by the law." *Id.* at 385. In other words, "considerable deference" appears to be less than considerable. The dissent cited *Chevron*, arguing that the majority failed to apply the "considerable deference" standard that it articulated. *Id.* at 386 (Resnick, J. dissenting). Of course, *Chevron* does not require "considerable deference," it requires absolute deference to any reasonable agency interpretation of an ambiguous regulatory statute. Thus, although the dissent points to *Chevron*, its argument seems to be that the majority failed to properly apply a different test.

Later that same year, in *State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 643, N.E. 2d 1113 (1994), the State Employees Relations Board (SERB) argued that its "policy" prohibiting an Ohio public employer from unilaterally withdrawing recognition of, or refusing to bargain with an incumbent union was entitled to deference despite a good faith doubt that the union maintains majority support among bargaining unit members. Justice Resnick, this time writing for a nearly unanimous Court (with two Justices concurring in judgment only), explained that "[i]n assessing SERB's policy, this court must afford deference to SERB's interpretation of Chapter 4117" and cited *Chevron* for that proposition. *Id.* at 353. Thus, in a single year, the Court appears to have applied two contradictory standards of deference.

Seven years later, in *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 750 N.E. 2d 130, 2001-Ohio-190 (1991), the Court cited *Swallow* (applying pre-*Chevron* "due deference" standard) and described the standard as requiring "due deference to the agency's reasonable interpretation of the legislative scheme." But the Court also included a "see, also" citation to *Chevron*'s command that "if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The reader is thus left to puzzle out whether there is any difference

between "great deference," "considerable deference," "due deference" and *Chevron* deference, as well as whether that deference extends only to matters specifically delegated to the agency or implicitly delegated by legislative silence.

As *Chevron's* star sinks towards the horizon at the federal level, this Court has become increasingly skeptical of deference and more protective of its own powers. Accordingly, in *State ex rel. Lucas Cty. Republican Party Executive Commt. v. Brunner*, 125 Ohio St.3d 427 (Ohio 2010), Justice DeWine wrote in concurrence that any deference to the secretary of state regarding statutory interpretation seemed "unwarranted." *Id.* And in 2016, Justice Kennedy, writing for a majority in which Justices O'Donnell and French joined, indicated that deference was appropriate to the Public Utilities Commission of Ohio (PUCO) in matters of rate design because the issues were "highly specialized" and were of the sort "where agency expertise" would help to discern the General Assembly's intent, but qualified that holding by affirming that "this Court has 'complete and independent power of review as to all questions of law' . . . ." *In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 442, 67 N.E.3d 734, 739 (Ohio 2016). As Justice DeWine pointed out, it is difficult, if not impossible to harmonize these holdings into a coherent doctrine.

And even if it were possible to patch together the Court's disparate holdings of the last 35 years, Ohio must still wrestle with the significant constitutional separation of powers issue that multiple members of the U.S. Supreme Court and this Court have identified:

> Deference to an administrative agency's interpretation of the law, however, "wrests from Courts the ultimate interpretative authority to 'say what the law is,' * * * and hands it over to the Executive." *Michigan v. Environmental Protection Agency*, —— U.S. ——, 135 S.Ct. 2699, 2712, 192 L.Ed.2d. 674 (2015) (Thomas, J., concurring), quoting *Marbury* at 177. In following this rule, we abandon our role as an independent check on the executive branch. *See Perez v. Mtge. Bankers Assn.*, —— U.S. ——, 135 S.Ct. 1199, 1219, 191 L.Ed.2d 186 (2015) (Thomas, J., concurring). In addition, judicial deference to administrative agencies on matters of legislative interpretation aggrandizes the power of the administrative state at the expense of the judiciary and officials directly accountable to

> the people. *See Arlington, Texas v. Fed. Communications Comm.*, 569 U.S. 290, 312-317, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (Roberts, C.J., dissenting).

McCann, 155 Ohio St. 3d at 22 (DeWine, J., concurring) (internal citations omitted).

Likewise, in 2019, in a dissent joined by Justices DeWine and Stewart, Justice Kennedy rejected the majority's deference to the Ohio Power Siting Board's interpretation of "two unambiguous statutes," noting that when courts are asked to interpret statutes, they are answering questions of law and, as such, should review an agency "interpretation de novo and *without deference*." *In re 6011 Greenwich Windpark, LLC*, 157 Ohio St. 3d 235, 252, 134 N.E.3d 1157, 1169 (2019) (emphasis in original). To do otherwise "abdicates this court's judicial duty and authority to 'say what the law is.'" *Id.* (citing *Marbury* at 177).

The instant case involves an administrative agency relying on judicial deference to impose a condition that does not appear anywhere in the governing rule or statute. On its face, the requirement that the Board seeks to impose on the Appellant does not rest on any technical expertise in engineering or surveying. Given the substantial uncertainty regarding what deference is owed to administrative agencies, the Court should take this opportunity to clarify what deference—if any—Ohio courts should afford to administrative agencies. In so doing, this Court should reject *Chevron* and *Auer* deference, and reassert that it is the proper role of the judiciary to say what the law is.

4. Administrative Deference in Other States

In articulating what the law of Ohio is, this Court has numerous potential paths to take. Scholars note that "the majority of states have deference doctrines meaningfully different from *Chevron's*." Saiger, *supra* at 556. In fact, "states that apply pure *Chevron*-style review are outnumbered by states that apply less deferential standards by more than a 2-to-1 ratio. Fourteen states and the District of Columbia apply *Chevron*-type deference, while thirty-six states have de

novo review or hybrid standards." Luke Phillips, *Chevron in the States? Not So Much*, 89 MISS. L.J. 313, 315 (2020). Moreover, "[t]here is a remarkable variation of deference doctrines among the states." *Id.* Half of the states apply de novo review to statutory questions regardless of an agency's interpretation. *Id.*[2]

This does not mean, however, that courts place no weight on agency interpretation, but rather that they do not defer and accept an agency's interpretation as a matter of law. For example, Michigan does not afford any legal deference to an agency's interpretation, but grants "great weight" to a "consistent interpretation of a statute by an agency charged with its administration" *Kinder Morgan Michigan, L.L.C. v. City of Jackson*, 277 Mich. App. 159, 172–73, 744 N.W.2d 184, 193 (internal citations omitted). Still, such "a longstanding administrative interpretation cannot overcome the intent of the Legislature." *Id.* Similarly, Wisconsin courts do not defer to agency interpretations as a matter of law, but give "due weight . . . to the experience, technical competence, and specialized knowledge of the agency involved." *Tetra Tech EC, Inc. v. Wisconsin Dept. of Revenue*, 382 Wis.2d 496, 2018 WI 75, 914 N.W.2d 21, ¶ 77. Utah, on the other hand, grants "great deference" to administrative fact-finding, but reviews "an agency's general interpretations of law for correctness, "granting little or no deference to the agency's determination." *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas, & Min.*, 2012 UT 73, 289 P.3d 558, ¶ 9.

Of the states with hybrid deference models, some, such as Pennsylvania, Oregon, and North Dakota, distinguish between different types of rules and assign different levels of deference to

[2] The states that follow this standard are as follows: Arizona, Delaware, Florida, Kansas, Michigan, Mississippi, Montana, Nevada, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin, Wyoming, Nebraska, Missouri, New Mexico, California, Louisiana, Maryland, Massachusetts, Washington, and New Hampshire. Phillips, *supra* at 315.

them. For example, in Pennsylvania, "agency interpretations that are promulgated in published rules and regulations" are accorded *Chevron* deference, and "enjoy a presumption of reasonableness" while "non-legislative rules, also known as 'interpretive rules' or 'guidance documents,' such as 'manuals, interpretive memoranda, staff instructions, policy statements, circulars, bulletins, advisories, [and] press releases' are accorded 'a lesser quantum of deference[,]'" which "allows an agency's interpretation to be disregarded when a court is 'convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent.'" *Harmon v. Unemp. Comp. Bd. of Rev.*, 652 Pa. 23, 35–52, 207 A.3d 292, 299–300 (Pa. 2019) (internal citations omitted).

B. Rejecting Administrative Deference is Consistent with The Framer's Vision of Separation of Powers as a Guarantor of Liberty.

As Chief Justice Roberts' invocation of Madison in his *City of Arlington* dissent shows, the question of whether and under what circumstances executive branch agencies are entitled to deference from the judicial branch goes to the fundamental structure of our federal and state governments. And although the questions of what deference is owed to administrative agencies based on their technical expertise to address the complexities of the administrative state may seem distinctly modern, the real problem is as old as the nation. Madison described the challenge aptly in Federalist 51:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51, (James Madison), New York Packet, (1788).

Judging by the system of checks and balances he championed in the Constitution, Madison appreciated that the second task was more difficult than the first. But for a republican form of government to survive, it was also the more important one. Writing in Federalist No. 10, Madison

anticipated the fundamental risk of allowing agencies to interpret their own statutes and rules to the exclusion of the judiciary:

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time.

THE FEDERALIST No. 10, at 59 (James Madison) (Jacob Cooke ed., 1961).

When unelected bureaucrats appear to have the authority to be both judges and parties, public trust in government is diminished. And the absence of an easily articulated and discernable standard regarding when courts are free to exercise their own judgment weighs on the public's perception of the judiciary—even beyond the harm caused by perpetuating uncertainty among judges, lawyers, and the regulated community. As Justice Kavanaugh explained, unclear standards lead to institutional distrust:

> The upshot is that judges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among a wealth of canons of construction. Those decisions leave the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2118-19 (2016).

Yet the level of deference, if any, this court gives to administrative interpretations impacts far more than public perception. As this case shows, Ohio's deference doctrine has real world consequences for businesses and individuals. Ohio's regulatory regime is "organized into several cabinet or administrative departments across more than 20 agencies." The State Of Ohio, State Agencies, https://tinyurl.com/2p8bafaa (accessed November 29, 2021). Administrative law, at both the state and federal levels, "constrain[s] Americans in all aspects of their lives, political, economic, social, and personal," having become "the government's primary mode of controlling Americans." Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014).

And how the courts approach deference largely determines whether agency interpretations will prevail in legal disputes. Professor Walker of The Ohio State University Moritz College of Law examined how varying deference standards impacted the judicial approval or disapproval of agency rule interpretations. He found that in circuit courts of appeals, "when *Chevron* was referenced in a published opinion, agency interpretations were significantly more likely to prevail under *Chevron* (77.4%) than *Skidmore* (56.0%) or, especially de novo review (38.5%)." Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review* 16 GEO. J. L & PUB. POL'Y 103, 124. Simply put, the level of deference afforded is determinative of the outcome of a significant part of the State's public policy. The Buckeye Institute respectfully submits that in a representative government, public policy should—indeed must—be set by the elected members of the Ohio General Assembly. When agencies rewrite or re-interpret Ohio statutes with the blessing of judicial deference, such actions do damage to both representative government and the independent judiciary.

IV. CONCLUSION

The issues presented by this case speak to the fundamental separation of powers in Ohio's Constitution. This Court's decision concerning when and how much deference to afford administrative agencies will affect every Ohio citizen and every Ohio business in ways that cannot be foreseen in administrative rules that have yet to be written. In the face of such uncertainty, one thing is clear: This Court should adhere to our Nation's founding principles and reject any doctrine that assigns the authority to say "what the law is" to administrative agencies, and not the Judiciary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Brief In Support of Appellant was served on all counsel of record via the Court's electronic filing system and e-mail this 18th day of April 2022.

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