In the Supreme Court of Ohio

TWISM Enterprises, LLC d/b/a valuCADD Solutions,	:	Case No. 2021-1440
Appellant,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	
State Board of Registration for Professional Engineers and Surveyors,	:	Court of Appeals Case Nos. C-200411 & C-210125
Appellee.	:	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF NEITHER PARTY

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INTRODUCTION

This case asks whether the Ohio Constitution permits courts to defer to executive agencies' legal interpretations. It unequivocally does not. "Frequently an issue" of constitutional significance "will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). "But this wolf comes as a wolf." *Id*.

"The judicial power of the state is vested in" its courts—not in the legislature, not in the executive, and not in any other entity. Ohio Const., art. IV, §1; *see City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶117. Courts exercise that power by adjudicating legal issues in the cases that come before them. Deciding these cases requires courts to decipher the law's meaning. And from that power arises a "duty … to say what the law is." *Adams v. DeWine*, 2022-Ohio-89, ¶22 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *see also Rutherford v. McFaddon*, 2001-Ohio-56 at 3 (1807) (unpublished). Courts abrogate that duty every time they defer to an administrative agency's legal interpretation. This practice "wrests from Courts the ultimate interpretative authority to 'say what the law is,' … and hands it over to the Executive." *State ex rel. McCann v. Del. Cnty. Bd. of Elections*, 155 Ohio St. 3d 14, 2018-Ohio-3342, ¶31 (DeWine, J., concurring in judgment only) (quoting *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring)).

This merging of the executive and judicial powers in the executive agencies violates the separation-of-powers principles inherent in our constitutional framework. *See State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶42; *see also Michigan*, 576 U.S. at 761 (Thomas, J., concurring).

Ohio's doctrine of administrative deference has come under increased scrutiny. *See, e.g., McCann*, 155 Ohio St. 3d 14, ¶¶26–34 (DeWine, J., concurring in judgment only); Justice R. Patrick DeWine, *A Few Thoughts on Administrative Deference in Ohio*, Yale J. Reg.: Notice and Comment (October 26, 2020), https://perma.cc/24RC-3F2U. But this Court has been reluctant to reconsider the doctrine without a case that "squarely puts th[is] issue" front and center. *McCann,* 155 Ohio St. 3d 14, ¶33 (DeWine, J., concurring in judgment only). This is that case. The Court should "conscientiously perform [its] constitutional dut[y]" to protect the Ohio Constitution's separation of powers. *Norwood*, 110 Ohio St. 3d 353, ¶117. More precisely, the Court should hold that the Ohio Constitution bars Ohio courts from deferring to administrative agencies' legal interpretations.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. As the chief law officer, the Attorney General has a duty to faithfully uphold Ohio's Constitution. The separation of the judicial, executive, and legislative powers is an "essential principle" animating both the

federal and state constitutions. *Bodyke*, 126 Ohio St. 3d 266, ¶44 (quotation omitted). Accordingly, the Attorney General has a strong interest in ensuring that the interpretation of the State's laws is done in a manner that faithfully preserves the separation of powers essential to our constitutional framework.

STATEMENT OF THE CASE AND FACTS

This major case arises from a rather minor statute. R.C. 4733.16 regulates engineering firms. Relevant here, it prohibits firms from providing engineering services unless they obtain a certificate. To obtain this certificate, a firm must, among other things, "designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering or professional surveying activities and decisions." R.C. 4733.16(D).

TWISM Enterprises, LLC applied for a certificate with the State Board of Registration for Professional Engineers and Surveyors. *TWISM Enterprises, LLC v. State Board of Registration for Professional Engineers and Surveyors*, 2021-Ohio-3665, ¶3 (1st Dist.). TWISM designated James L. Cooper, a licensed professional, as the "full-time … manager[]" responsible for, and in charge of, TWISM's engineering services. *Id.* (TWISM did not designate any other managers, partners, members, officers, or directors.) Cooper, who is now retired, served TWISM as an independent contractor, *not* as an employee. *Id.* at ¶4. He provided services on TWISM's behalf throughout the application process, and in turn,

billed TWISM for those services. *Id.* As an independent contractor, Cooper received no employment benefits.

The Board denied TWISM's application. It concluded that, because Cooper was an independent contractor rather than an employee, he was ineligible to serve as a "full-time … manager[]" under R.C. 4733.16(D). *Id.* at ¶5. TWISM administratively appealed the decision. *Id.* at ¶6. But the Board upheld its initial determination, concluding again that Cooper was an independent contractor and thus did not qualify as a "full-time … manager[]" under R.C. 4733.16(D).

TWISM appealed the Board's decision. The trial court reversed. It concluded that Cooper was the full-time manager in charge of TWISM's engineering activities, and that he therefore satisfied R.C. 4733.16(D). In reaching this ruling, the trial court observed that the Board had interpreted the phrase "full-time … manager[]" as encompassing only employees—independent contractors did not count. But the court held that this interpretation improperly created a substantive requirement not found in the statute. *Id.* at ¶11. It thus declined to follow that interpretation.

The First District Court of Appeals reversed. It determined that the phrase "full-time manager" is ambiguous. *Id.* at ¶¶23–29. And it determined that the Board's interpretation of this ambiguous phrase was entitled to deference, as long as it was reasonable. *Id.* at ¶¶30–32. After concluding that the phrase could reasonably be construed to exclude

independent contractors, the First District deferred to the Board's interpretation and reversed.

TWISM timely appealed to this Court. TWISM presented three propositions of law. First, it argued that administrative deference deprives parties of due process and violates separation-of-powers principles by infringing on the judiciary's exclusive role to say what the law is. Mem. Jur. 8–14. Second, TWISM argued that independent contractors can be full-time managers under R.C. 4733.16(D). Mem. Jur. 14–15. Finally, TWISM argued that, should it prevail, it would be entitled to attorney's fees. Mem. Jur. 15. This Court accepted the first two propositions of law.

ARGUMENT

The Attorney General's brief addresses process, not outcome. He takes no position on the question of which party ought to win this case. But he urges the Court, in resolving the matter, to hold that agencies' legal interpretations are not entitled to any deference.

***Amicus Curiae's* Proposition of Law:**

> *The Ohio Constitution forbids courts from deferring to administrative agencies' interpretations of state law.*

The Supreme Court of the United States has long held that *federal* courts must defer to *federal* agencies' reasonable interpretations of *federal* laws. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). And this Court has held that *state* courts must defer to *state* agencies' reasonable interpretations of *state* laws. *State, ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 155 (1982). The federal deference

doctrine—often referred to as the "*Chevron* doctrine"—has come under increased scrutiny. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from denial of *certiorari*); *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty 475, 497–507 (2016); *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting); Phillip Hamburger, *Is Administrative Law Unlawful?* (2014); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103 (2018); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). So has the parallel Ohio doctrine. *See In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St. 3d 651, 2020-Ohio-5450, ¶71 (DeWine, J., concurring in judgment only); *McCann*, 155 Ohio St. 3d 14, ¶31 (DeWine, J., concurring in judgment only).

Perhaps the federal courts will abandon *Chevron* deference. Perhaps not. But this Court is under no duty to follow their lead. Whatever the Supreme Court of the United States interprets the federal constitution to permit, this Court has an independent duty to construe the Ohio Constitution. *See* Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* 184–85, 211 (2022); *accord State v. Hubbard*, 2021-Ohio-3710, ¶15; *State v. Smith*, 162 Ohio St. 3d 353, 2020-Ohio-4441, ¶28; *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St. 3d 567, 2018-Ohio-5088, ¶¶28–30 (Fischer, J., concurring); *Cap.*

Care Network of Toledo v. Ohio Dep't of Health, 153 Ohio St. 3d 362, 2018-Ohio-440, ¶66 (O'Connor, C.J., dissenting). Indeed, by overruling the deference doctrine and reinvigorating Ohio's separation-of-powers doctrine, this Court could join the eight other state supreme courts that have already rejected deference doctrines under their own state constitutions, thereby setting an example for the high court at One First Street to follow. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259 (2008); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723 (2013); *Hughes Gen. Contrs., Inc. v. Utah Labor Comm'n*, 2014 UT 3, 322 P.3d 712, ¶25; *Ellis-Hall Consultants v. Pub. Serv. Comm.*, 2016 UT 34, 379 P.3d 1270, ¶28; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 914 N.W.2d 21, ¶¶3, 82–84, n.3; *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018); *Delcon Partners, LLC v. Wyoming Dep't of Revenue*, 2019 WY 106, 450 P.3d 682, ¶7; *Myers v. Yamato Kogyo Co., Ltd.*, 2020 Ark. 135, at 5, 597 S.W.3d 613; *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999). Throughout our country's history, state courts have led the way in pioneering important doctrinal shifts. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). They are doing so again on the issue of deference. This Court should join them.

1. Ohio's Constitution divides power by vesting the legislative, executive, and judicial powers exclusively in separate branches of government. *Bodyke*, 126 Ohio St. 3d 266, ¶¶43–44. In that respect, it is hardly unique. While most Americans most closely

associate separation-of-powers principles with the federal government, those principles were also independently endorsed by States in their own constitutions, some even leading the way before the United States Constitution's ratification. *See, e.g.*, Mass. Const. Pt. 1, art. XXX (1780), N.H. Const. Pt. 1, art. 37 (1784); *see also* Md. Const. Declaration of Rights, art. 8; Va. Const., art. III, §1; Miss. Const., art. 1, §§1–2; Ark. Const., art. 4, §1; Utah Const., art. V, §1; Mich. Const., art. 3, §2.

While the practice of dividing governmental authority came of age in America, it was born on the other side of the Atlantic. John Locke, in particular, had an outsized influence on the development of divided powers. *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 75–76 (2015) (Thomas, J., concurring in judgment); Douglas H. Ginsburg & Steven J. Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251, 254 (2010). In Locke's view, liberty did not mean "freedom from all constraint." *Ass'n of Am. R.R.*, 575 U.S. at 75–76 (Thomas, J., concurring in judgment) (citing J. Locke, *Second Treatise of Civil Government* §22, p. 13 (J. Gough ed., 1947)). To the contrary, Locke recognized that, "[w]here there is no law"—no enforceable rules protecting citizens' rights against private and public "restraint and violence"—"there is no freedom." Locke, *Second Treatise* §57; *accord State v. Gibson*, 108 Idaho 202, 203 (Ct. App. 1985). Instead, Locke regarded liberty as consisting of freedom from "the inconstant, uncertain, unknown, arbitrary will of another man." *Ass'n of Am. R.R.*, 575 U.S. at 75–76 (Thomas, J., concurring in judgment) (quoting Locke, *Second Treatise of Civil Government* §22). According to Locke, "[i]f a person

could be deprived of" life, liberty, or property "on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free." *Id.* at 76 (citing David P. Currie, *The Constitution in the Supreme Court: The First One Hundred Years, 1789–1888*, p.272 & n.268 (1985)).

"Steeped in the political theories of … Locke" and others, "those who framed the constitutions of our states and of the federal government believed that separating the functions of government and assigning the execution of those functions to different branches was fundamental to good government and the preservation of civil liberties." *Dep't of Transp. v. Armacost*, 311 Md. 64, 77–78 (1987). As they saw it, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or "if the power of judging be not separated from the legislative and executive powers." The Federalist, No. 47, at 325 (J. Madison) (Cooke ed., 1961) (quotation omitted). To them, the "accumulation" of "powers, legislative, executive and judiciary, in the same hands" was "the very definition of tyranny." *Id*. at 324.

If that sounds hyperbolic, consider what one would sacrifice by merging the legislative, executive, and judicial powers. Start with fair notice. One of the most elemental requirements for a just society is fair notice; no citizen should face consequences for conduct he could not have known was illegal. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Summa Holdings, Inc. v. Comm'r of Internal Revenue*, 848 F.3d 779, 781 (6th Cir. 2017) (per Sutton, J.); Note, *Textualism As Fair Notice*, 123 Harv. L. Rev. 542, 543–51 (2009).

But there can be no fair notice in a system without divided powers; the same official could draft the rules, apply them, and then adjudicate the correctness of that application. People would be "required to guess" whether their actions comport with the law. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

Consider also another foundational principle of justice, this one so longstanding that it has a Latin name: "no man ought to be a judge in his own cause ('Nemo debit esse judex in propria causa.')." *Vill. of Monroeville v. Ward*, 27 Ohio St. 2d 179, 191 (1971) (Corrigan, J., dissenting), *rev'd by Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972). A system in which the officials charged with enforcing the law can dictate the legality of their actions runs counter to this longstanding principle. And this arrangement would inevitably "exert bias toward the government and against other parties." Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. at 1212.

2. Of course, it is one thing to separate the powers and another to ensure that they remain separate. The framers of our state and federal constitutions recognized this, and adopted various means of protecting against "the 'gradual concentration of the several powers in the same department.'" *Ass'n of Am. R.R.*, 575 U.S. at 75 (quoting The Federalist, No. 51, at 321 (J. Madison)). Two stand out.

First, by vesting the legislative, executive, and judicial powers in different branches, they barred the branches from giving away their power. This followed from what was then regarded as "an elementary maxim of the law of agency, *delegata potestas*

non potest delegari—delegated powers cannot be further delegated." Ginsburg & Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. at 254. "Once the people had delegated power to the legislature it could pass no further lest it elude the people's oversight." *Id.*

Second, the Framers provided each branch with a means to check the others. This is the most important protection of all. The "Framers recognized 'the insufficiency of a mere parchment delineation of the boundaries' to achieve the separation of powers." *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting) (quoting The Federalist, No. 73, at 442 (A. Hamilton) (C. Rossiter ed., 1961)). They allowed that, "[i]f men were angels," government officials could perhaps be trusted to hew to the limits of their lawful authority. The Federalist, No. 51, at 349 (J. Madison). But then again, if men were angels, "no government would be necessary." *Id*. Government officials are human, and human nature tends "toward aggrandizement of individual power and influence." Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 Tex. A&M L. Rev. 323, 325 (2019). Thus, government officials, if left unfettered, will tend to exceed the powers they are granted.

Rather than wishing human nature were otherwise, early constitutionalists embraced it. *See Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). They saw that "the great security against a gradual concentration of the several powers in the same department, consists in giving to … each department, the necessary constitutional means,

and personal motives, to resist encroachments of the others." The Federalist, No. 51, at 349 (J. Madison). "Ambition must be made to counteract ambition." *Id*. By separating the legislative, executive, and judicial powers, and by giving each branch the authority to check the excesses of the others, the Framers created a means by which the branches' "opposite and rival interests" might counteract one another's overreaches. *Id.*

3. Judicial deference to agency interpretations of the laws that agencies are charged with administering subverts the Ohio Constitution's separation of powers. This Court's doctrine of administrative deference dilutes the Constitution's structural protections, thereby eviscerating the "central guarantee of a just government"; deference contradicts the principle that ours is "a government of laws and not of men." *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) (quoting Mass. Const. Pt. 1, art. XXX (1780)). This Court should abandon it.

To see why, start with the basics. Ohio's Constitution vests judicial power in the courts alone. *State ex rel. Feltner v. Cuyahoga Cnty. Bd. of Revision*, 160 Ohio St. 3d 359, 2020-Ohio-3080, ¶¶20–21 (Fischer, J., concurring in the judgment only); *see* Ohio Const., art. IV, §1. It says: "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 Const., art. IV, §1. The judicial power is "the authority vested in some tribunal to hear and determine the rights of persons or property, or the propriety of doing an act." *Stanton v. State Tax*

Comm'n, 114 Ohio St. 658, 671 (1926); *accord Geauga Lake Improvement Ass'n v. Lozier*, 125 Ohio St. 565, 573 (1932). In carrying out that power, courts must interpret the applicable laws. And in doing so, they have a "duty … to say what the law is." *Adams*, 2022-Ohio-89, ¶22 (quoting *Marbury*, 5 U.S. at 177).

Judicial deference to an agency's interpretation of a statute runs counter to all this. The judicial power "requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment)). Requiring courts to defer to the statutory interpretations of agencies tasked with executing the law "precludes judges from exercising that judgment." *Id*. Any such deference, "wrests from Courts the ultimate interpretative authority to 'say what the law is,' … and hands it over to the Executive." *McCann*, 155 Ohio St. 3d 14, ¶31 (DeWine, J., concurring in judgment only) (quoting *Michigan*, 576 U.S. at 761 (Thomas, J., concurring)); *accord Tetra Tech*, 2018 WI 75, ¶59; *King*, 245 So.3d at 408. This "wholesale transfer of legal interpretation from courts to agencies" violates "the most basic notion of judicial review that it is the province of the courts to say what the law is." Ginsburg & Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty at 507. And that transfer of authority is irreconcilable with any sound notion of separated powers. *In re Determination of Existence of Significantly Excessive Earnings*, 162 Ohio St. 3d 651, ¶86 (DeWine, J., concurring in judgment only); *Michigan*, 576 U.S. at 761 (Thomas, J., concurring); *accord Tetra Tech*, 2018

WI 75, ¶59; *King*, 245 So.3d at 408; *Myers*, 2020 Ark. 135, at 5; *Ellis-Hall Consultants*, 379 P.3d 1270, ¶32 n.4; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. at 102.

One cannot escape the problem by insisting that "agencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all." *Michigan*, 576 U.S. at 762 (Thomas, J., concurring). On this way of thinking, statutory ambiguity "becomes an implicit delegation of rule-making authority" that empowers agencies "to formulate legally binding rules to fill in gaps based on" their independent "policy judgments." *Id*. That evasion will not do, however, for at least two reasons. First, it contradicts R.C. 1.49. That section provides that courts construing ambiguous statutes "*may* consider … [t]he administrative construction of a statute," R.C. 1.49 (emphasis added), not that they *must*. Absent some more-specific statute stating otherwise, this permissive approach shows that the General Assembly has not delegated rulemaking power to administrative agencies simply by leaving ambiguity in a statute. Second, and more fundamentally, this approach to the problem substitutes legislative abdication for judicial abdication. *Only* the legislature can make laws. *See* Ohio Const., art. II, §1. It follows that agencies cannot constitutionally exercise such "rule-making authority." *See Michigan*, 576 U.S. at 762 (Thomas, J., concurring). Therefore, any attempt to defend deference on the ground that it respects the legislature's implicit delegation of policymaking power merely reframes the separation-of-powers issue—it does not avoid it.

In addition to erasing the separation of powers, judicial abdication of the duty to exercise independent judgment presents another unconstitutional consequence: systematically biased judgment in cases where the government is a party or a party in interest. Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. at 1211–13. No one would dispute that relying on an employer's interpretation of the law in an employment dispute or a prosecutor's interpretation of the law in a criminal case would put a thumb on the scale for the employer or the State. *Id*. at 1209. And yet, although judges do not defer to the judgments of prosecutors or of employers, in administrative cases "they regularly defer to the judgments of executive and other administrative agencies." *Id*. That deferential outlook "exert[s] bias toward the government and against other parties." *Id*. at 1212. Thus, transferring "the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). Just as foxes ought not be permitted to guard henhouses, agencies must not be permitted to issue binding interpretations of the laws that are supposed to bind them.

Consider one more potential consequence of administrative deference. What should courts do when interpreting statutes that have both civil and criminal applications? "When King James I tried to create new crimes by royal command, the judges responded that 'the King cannot create any offence by his prohibition or proclamation,

which was not an offence before.'" *Whitman v. United States*, 574 U.S. 1003 (2014) (Statement of Scalia, J., respecting the denial of certiorari) (quoting *Case of Proclamations,* 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)). "James I, however, did not have the benefit of *Chevron* deference." *Id*. Deference doctrines, in their applications to criminal laws, thus confer on executive agencies a power that even British monarchs lacked: the power to create criminal laws by issuing binding interpretations. A more flagrant violation of separation-of-powers principles is hard to imagine. Our Constitution, just like the federal constitution, "ensures that the government cannot imprison a person without a consensus from all three branches." *Gun Owners of America, Inc. v. Garland*, 19 F.4th 890, 921 (6th Cir. 2021) (*en banc*) (Murphy, J., dissenting). The legislature "must enact a criminal law," the executive branch "must initiate a prosecution, and a court must adjudicate the case." *Id*. Giving deference to criminal law perverts this system, causing defendants to face criminal punishment for acts that the legislature never deemed criminal. And in addition to raising separation-of-powers concerns, deference to laws with criminal application bumps up against the rule of lenity, which requires ambiguous criminal laws to be interpreted in favor of the defendants and against the government. *State v. Elmore*, 122 Ohio St. 3d 472, 481 (2009); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring). Although there is some debate whether the "domain" of deference doctrines overlaps with the "rule of lenity's domain," this much is absolutely certain: "A hands-off judicial approach to dual-role federal statutes has consequences for

liberty," especially where the government-favoring deference doctrine prevails over the defendant-favoring rule of lenity. Sutton, *Who Decides?* at 227; *accord Gun Owners*, 19 F.4th at 922–23 (Murphy, J., dissenting).

With constitutional problems at every turn, it is no surprise that administrative deference has faced unrelenting criticism from judges and scholars alike. More and more, people are starting to recognize that deference doctrines "appear[] to violate separation of powers principles." *CSX Transp.*, 867 F.2d at 1445 (Edwards, J., dissenting); *see also, e.g.*, *Baldwin*, 140 S. Ct. at 691–92 (Thomas, J., dissenting from denial of cert.); *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring); DeWine, *A Few thoughts on Administrative Deference in Ohio*; Ginsburg & Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty at 497–507; Hamburger, *Is Administrative Law Unlawful?*; Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Policy 103; Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187.

The federal courts have not yet abandoned *Chevron* deference altogether. But they have dramatically weakened its relevance. Today, "[f]ar fewer judges are willing to rely on" *Chevron* deference in adjudicating disputes. Sutton, *Who Decides?* at 228. And the Supreme Court, for its part, has embraced rules limiting *Chevron*'s application. For example, the major-questions doctrine generally forbids deferring to agency interpretations on issues of broad economic and political significance. *NFIB v. Dep't of Labor*, 142 S. Ct.

661, 665 (2022) (*per curiam*); *see also* Ginsburg & Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty at 502.

The States, however, need not wait for the federal government to abolish *Chevron* before abolishing their own state-law analogues. Indeed, they *must not* wait. The "Ohio Constitution is a document of independent force." *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 42 (1993). This Court is dutybound to respect its terms even when—perhaps *especially* when—the Supreme Court of the United States falls short in upholding the federal constitution. *See, e.g.*, *Norwood*, 110 Ohio St. 3d 353, ¶76; *see McCann*, 155 Ohio St. 3d 14, ¶¶31–34 (DeWine, J., concurring in judgment only). Take, for example, then-Justice O'Connor's opinion for the Court in *Norwood*. 110 Ohio St. 3d 353. There, this Court interpreted Ohio's Takings Clause, Ohio Const., art. I, §19, as providing more protection than its federal analogue. *Norwood*, 110 Ohio St. 3d, ¶76.

So far, the federal courts have been content to prune the *Chevron* doctrine. This Court must extirpate its state-law analogue. It would have plenty of company. At least ten States have expressly rejected any interpretive deference to agencies. Sutton, *Who Decides?* at 211. Of those, three States have rejected administrative deference by constitutional amendment or statute. *In re Determination of Existence of Significantly Excessive Earnings*, 162 Ohio St. 3d 651, ¶86 (DeWine, J., concurring in judgment only) (citing Fla. Const., art. V, §21; Ariz. Rev. Stat. Ann. 12-910; Wis. Stat. Ann. 227.10); *accord* Sutton, *Who Decides*? at 211. The other eight have abrogated deference through decisions by their state

supreme courts. *See above* at 7. These courts have recognized that state judiciaries' abdicating "core" judicial power violates the separation of powers inherent in state constitutional design. *Tetra Tech*, 2018 WI 75, ¶48; *In re Complaint of Rovas Against SBC Michigan,* 482 Mich. at 111; *King*, 245 So.3d at 408; *Myers*, 597 S.W.3d at 617. This "abdication of core judicial power to the executive" is a concern for both state courts as well as the federal judiciary: that is, the criticisms of *Chevron* deference apply equally to state doctrines of administrative deference when the state constitution is built upon the separation of powers. *Tetra Tech,* 2018 WI 75, ¶58; *see id.* ¶¶42–54, 59–62. "Ceding judicial power" to state agencies "is, from a separation of powers perspective, unacceptably problematic." *Id.* ¶63; *accord In re Complaint of Rovas Against SBC Michigan,* 482 Mich. at 111; *King*, 245 So.3d at 408; *Myers*, 2020 Ark. 135, at 5. By merging the judicial and executive powers and allowing the government to "act[] as judge of its own cause," States effectively strip non-governmental parties of the due process of law in their courts. *Tetra Tech,* 2018 WI 75, ¶¶63–70. In light of these concerns, the state courts have rejected state-law deference doctrines, thus restoring a constitutional design that protects the separation of powers. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich. at 111; *Douglas*, 296 Kan. at 559; *Hughes Gen. Contrs.*, 322 P.3d 712, ¶25; *Ellis-Hall Consultants*, 379 P.3d at 1275, ¶28; *Tetra Tech*, 2018 WI 75, ¶¶3, 82–84, n.3; *King*, 245 So.3d at 408; *Delcon Partners, LLC*, 450 P.3d 682, ¶7; *Myers*, 2020 Ark. 135, at 5.

This Court should follow suit. Under Ohio law as it stands today, courts must defer to agency interpretations of ambiguous statutes. *See, e.g., Cleveland Clinic Found. v. Bd. of Zoning Appeals*, 141 Ohio St. 3d 318, 2014-Ohio-4809, ¶29; *Wells Fargo Bank, N.A. v. Isaacs*, 1st Dist., No. C-100111, 2010-Ohio-5811, ¶10. At times, Ohio's deference doctrine is (at least arguably) even broader than *Chevron*, requiring courts to defer to agencies' "reasonable" interpretations without regard to whether those statutes are ambiguous. *See, e.g., State ex rel. Lucas Cnty. Republican Party Executive Comm. v. Brunner*, 125 Ohio St. 3d 427, 2010-Ohio-1873, ¶23; *In re Columbus S. Power Co.*, 138 Ohio St. 3d 448, 2014-Ohio-462, ¶29. This practice "wrests from Courts the ultimate interpretative authority to 'say what the law is,' … and hands it over to the Executive." *McCann*, 155 Ohio St. 3d 14, ¶31 (DeWine, J., concurring in judgment only) (quoting *Michigan*, 576 U.S. at 761 (Thomas, J., concurring)). While courts may consider an agency's interpretation or construction of the statute without violating separation-of-powers principles, *see* DeWine, *A Few Thoughts on Administrative Deference in Ohio*; *see also* R.C. 1.49, they may not regard agency interpretations as binding. By requiring courts to hold otherwise, Ohio's deference doctrine forces the judiciary to "abandon [its] role as an independent check on the executive branch" and "aggrandizes the power of the administrative state at the expense of the judiciary and officials directly accountable to the people." *McCann*, 155 Ohio St. 3d 14, ¶31 (DeWine, J., concurring in judgment only) (citing *Arlington v. Fed. Communications*

Comm'n, 569 U.S. 290, 312–17 (2013) (Roberts, C.J., dissenting)). The practice has persisted too long already. It ought not last another day.

CONCLUSION

This Court should overrule its doctrine of administrative deference.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Neither Party was served this 18th day of April, 2022, by e-mail on the following:

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