No. 121A23 TWENTY-FIRST JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

ALVIN MITCHELL,

Petitioner-Appellant,

v.

THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS,

Respondent-Appellee.

From Forsyth County
19-CVS-3758
COA21-639

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BRIEF OF THE JOHN LOCKE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT ALVIN MITCHELL'S PETITION FOR DESCRETIONARY REVIEW

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QUESTION PRESENTED

Whether this Court should grant Petitioner-Appellant's Petition for Discretionary Review.

STATEMENT OF INTEREST[1]

[1] No person or entity other than the undersigned amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

Founded in 1990, the John Locke Foundation ("Locke") advocates state-based policies to encourage competition and innovation for the benefit of North Carolinians. Locke has always opposed all forms of extreme judicial deference, not just because they are unfair and unconstitutional, but also because they undermine the judiciary's role in upholding the rule of law and create perverse incentives for legislatures and executive officers and agencies.

A movement to reform administrative deference doctrine is currently sweeping the country. Because the present case provides this Court with an opportunity to join and possibly lead that movement, Locke has as interest in ensuring the Court is fully informed regarding its historical background and recent development.

ARGUMENT

"No man can be judge in his own case."

– Edward Coke
Institutes of the Laws of England,
§ 212, 141 (1628).

I. Historical Background.

North Carolina's founders were well acquainted with the works of the great 17th century English jurist Sir Edward Coke. In their minds, "Coke was more than

just a legal authority; he was a heroic advocate for liberty." Jon Guze, *North Carolina's Anti-Monopoly Clause*, 2 Political Economy in the Carolinas 102, 103 (2019). It is safe to assume, therefore, that when the Members of North Carolina's Fifth Provincial Congress met to draft a state constitution in 1776, they knew well and fully understood the significance of the well-known aphorism quoted above. No doubt that is one of the reasons why, in the constitution they adopted declares that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." N.C. Const. of 1776, Declaration of Rights § IV (1776).

More recent generations of North Carolinians may not have been as familiar with Coke's works, but they probably knew of Coke's famous aphorism. More importantly, they undoubtedly understood the fundamental truth that it encapsulates: *no one can be trusted to be impartial where their own actions and interests are concerned, and that is emphatically true, not just for individuals acting in their private capacities, but for public officials acting in their public capacities as well*. That understanding at least partially explains why North Carolina's 1868 and 1971 constitutions also declare that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other." N.C. Const. of 1868, art. I, § 6 (1868); N.C. Const. art. I, § 6 (1971).

Like North Carolina's founders, the founders of the American republic were also well acquainted with the works of Edward Coke, including his famous aphorism, and they also understood its implication.[2] Which is no doubt why the United States Constitution explicitly assigns the legislative, executive, and judicial powers to three *separate* branches of government.

Despite the separation of powers implied by the United States Constitution and explicitly guaranteed by the North Carolina Constitution, most of the laws governing the conduct of North Carolinians—and Americans in general—consist, not of statutes enacted by their elected representatives in Congress or their state legislature, but of executive orders and rules promulgated by federal and state administrative agencies. Relying on vaguely worded enabling statutes, executive branch officers and agencies have promulgated countless legally binding rules of conduct that they, themselves, have then gone on to enforce. That clearly violates the separation of power between the legislative and executive branches. Making matters worse, when disputes over the meaning of laws and administrative rules have arisen, the federal courts and most state courts have generally refused to act as

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[2] See, e.g., Federalist No. 10, at 44 (James Madison) (Gideon Ed.2001) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment.").

independent adjudicators. Instead, citing various judge-made doctrines as justification, they have simply "deferred" to agency interpretations of the relevant enabling statutes and the administrative rules promulgated pursuant to those statutes. *That* clearly violates the separation of power between the judiciary and the other two branches of government.

Fortunately, the situation regarding administrative deference is beginning to change. In response to a large and growing body of commentary,[3] the United States Supreme Court has signaled that it is willing to reconsider the deference doctrines that it developed in the past,[4] and—as explained below—many states have already taken steps to reign in or eliminate administrative deference within their jurisdictions. North Carolina would do well to follow their example.

II. Recent Developments.

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[3] See, e.g., Philip Hamburger, *Chevron Bias*, 84 Geo.Wash.L.Rev. 1187, 1211 (2016); Evan D. Berick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16:27 Geo. J. L. & Pub. Pol'y 27 (2018); Andrew Hessick, *The Future of Administrative Deference*, 41 Campbell L. Rev. 421 (2019).

[4] As noted in Petitioner-Appellant's Brief, "[I]n 2019, the U.S. Supreme Court fell just one vote shy of eliminating *Auer* deference altogether," and earlier this month "the U.S. Supreme Court granted certiorari to determine whether it 'should overrule *Chevron*' or limit its scope." Petr.'s Br. 15-16.

In a working paper published by the Center for the Study of the Administrative State, Daniel Ortner provides a survey of administrative deference doctrine in all 50 states. *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* (2020), https://administrativestate.gmu.edu/wp-content/uploads/2021/04/Ortner-the-End-of-Deference.pdf. Ortner summarizes his findings by saying:

> While only a small number of states have fully rejected deference, many of those that have done so have done so with significant fanfare and a vocal rejection of the notion that the judiciary can delegate the power of judicial interpretation to the executive branch. Even states that have not gone so far as to reject deference have shown increasing skepticism and apply deference in only a narrow and narrowing category of circumstances. ... This move away from deference has the force of momentum and powerful arguments in its favor.

Id., at 67.

In addition to describing deference doctrine as it existed in all the states at the time he wrote his report,[5] Ortner provides a detailed account of "the shift away from deference in the states that have abandoned it since 2008," *Id.*, at 2, beginning with three states that recently eliminated administrative deference altogether. The first of

[5] Ortner classifies North Carolina as a "Skidmore deference" state. As this case illustrates, that is, at best, an oversimplification.

these states is Florida, where voters ratified the following constitutional amendment in 2018:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

Fla. Const. art. V, Section 21. The second is Arizona, where the legislature enacted a similar categorical reform by statute in April of that year:

> In a proceeding brought by or against a regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.

Ariz. Rev. Stat. Ann. § 12-910. And the third is Wisconsin, where the legislature followed suit in December by enacting a statute that states, "No agency may seek deference in any proceeding based on the agency's interpretation of any law." Wis. Stat. Ann. § 227.10.

More relevant to the present case, perhaps, Ortner also identifies seven recent instances in which state supreme courts curtailed or eliminated administrative deference. These include the supreme courts of Arkansas, Delaware, Kansas, Michigan, Mississippi, Utah, Wisconsin, and Wyoming. *Myers v. Yamato Kogyo Co.*, 2020 Ark. 135, 597 S.W.3d 613 (2020); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del.1999); *Cochran v. Dept. of Agriculture, Water Resources Div.*, 291 Kan. 898, 904, 249 P.3d

434 (2011); *SBC Michigan v. Pub. Serv. Comm.*, 482 Mich. 90, 103, 754 N.W.2d 259 (2008); *King v. Mississippi Military Dept.*, 245 So.3d 404, ¶ 12 (Miss. 2018); *Murray v. Utah Labor Comm'n* 2013 UT 38, ¶ 33, 308 P.3d 461, 472; *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, ¶ 25, 322 P.3d 712, 717; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 535, 914 N.W.2d 21, 40; C*amacho v. State ex rel. Dep't of Workforce Servs., Workers' Comp. Div.*, 2019 WY 92, 448 P.3d 834 (Wyo. 2019).

Since Ortner published his survey in 2021, the Ohio Supreme Court has also weighed in on the topic of administrative deference. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*. Slip Opinion No. 2022-Ohio-4677. The opinion, which was handed down last December, makes a rigorous and compelling case against administrative deference and is well worth reading in full. Here are some excerpts:

> We reaffirm today that it is the role of the judiciary, not administrative agencies to make the ultimate determination about what the law means. Thus, the judicial branch is never required to defer to an agency's interpretation of the law.

Id., at 2.

> [T]he American experiment has long been thought to rest on the idea that " 'there can be no liberty ... if the power of judging, be not separated from the legislative and executive powers.' " The Federalist

> No. 47, at 251 (James Madison) (Gideon Ed.2001), quoting Montesquieu, *The Spirit of Law* 181 (1748).

Id. at 11.

> In a case like this one, a court is charged with adjudicating a dispute between a government agency and a private party. But how can the judiciary fairly decide the case when it turns over to one party the conclusive authority to say what the law means? To do so would fly in the face of the foundational principle that *no man ought to be a judge in his own cause*. For this reason, it has been said that mandatory deference creates systematically biased judgment in cases where a government agency is a party. [Quotation marks and citations omitted. Emphasis added.]

Id., at 12.

If, as seems likely, the wave of administrative deference reform described by Ortner continues to spread, the Ohio Supreme Court's reasoning in *TWISM v. State Bd. of Registration* will likely serve as a model for other supreme courts in the months and years to come.

CONCLUSION

The movement to reform administrative deference doctrine is clearly gaining momentum, and it is not too late for North Carolina to become a leader rather than a follower in that movement. Granting Respondent-Appellee's Motion for Discretionary Review will give this Court an opportunity to clarify the level of deference that should be afforded to administrative agencies, ideally in a way that

ensures such deference is never mandatory and that the courts have the ultimate say regarding the meaning of both the statutes that delegate rule-making power to those agencies and the rules those agencies promulgate pursuant to those statutes. The Court should grant that motion, seize that opportunity, and remand the case for reconsideration in light of a clear and well-reasoned rule specifying what level of deference—if any—should be afforded to administrative agencies.

Respectfully submitted this 9th day of May 2023.

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