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

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BRIEF OF THE JOHN LOCKE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT ALVIN MITCHELL

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QUESTION PRESENTED

Under North Carolina law, when, if ever, should a court defer to an administrative agency's interpretation statutes and regulations?

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 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 the movement's historical background and recent development.

ARGUMENT

I. Historical Background

In 1610, in his report of *Dr. Bonham's Case*, Sir Edward Coke asserted on behalf of the courts of England what we now call the power of judicial review, i.e., the power to judge the legality of acts by the other branches of government. 8 Co. Rep. 113b, 77 Eng. Rep.

646 (C.P. 1610). In support of that assertion, Coke cited an ancient legal maxim: "iniquum est aliquem suae rei esse judicem" [it is unfair for someone to be a judge in his own affairs]. *Id.*, 118b, 654.

The power of judicial review was eventually lost in England, as Parliament successfully asserted its supremacy. On the North American side of the Atlantic, however, the power of judicial review survived and flourished.

North Carolina's original state constitution of 1776 guaranteed the status of the judiciary as an independent and equal branch of government by declaring that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other," and that declaration has been a part of the state constitution ever since. N.C. Const. of 1776, Declaration of Rights § IV (1776); N.C. Const. of 1868, art. I, § 6 (1868); N.C. Const. art. I, § 6 (1971). Moreover, within a few years of the founding the North Carolina courts had begun to assert their power as an independent and equal branch to review acts by the other branches. *Bayard v. Singleton*, 1 Martin (N. Car.) 42 (1787).

At the federal level, the status of the judiciary as an independent equal branch of government was guaranteed by the fact that the United States Constitution explicitly assigns the legislative, executive, and judicial powers to three separate and implicitly equal branches of government. U.S. Const. arts. I, II, and III. As in North Carolina, the federal courts wasted little time in asserting their power of review under the new constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Sadly, even here in America, the power of judicial review has withered significantly since the days of the founding. Beginning early in the 20th century, "progressive" scholars, jurists, and politicians sought to replace the American system of government, with its separation of powers and its checks and balances, with a unified regulatory state in which all governmental power was assigned to wise and beneficent technocrats in the executive branch. "Progressive" legislators at the federal and state levels did their part by delegating their power to make legally binding rules to administrative agencies. As a result, most of the legally binding rules governing the conduct of Americans in general and North Carolinians in particular consist, not of statutes enacted by their

elected representatives in Congress or in their state legislatures, but of executive orders and regulations promulgated and enforced by federal and state administrative agencies.

The state and federal courts ought to have carefully reviewed those delegations to determine whether they violated any provisions of the relevant constitutions, including provisions guaranteeing the separation of powers. Instead, they abdicated their power of review and adopted a doctrine known as "legislative deference" under which laws are presumed to be the constitutional unless they are clearly irrational or appear to violate a handful of rights regarded as "fundamental."

By allowing administrative agencies to acquire legislative as well as executive power in this way, legislative deference seriously eroded the separation of powers, but worse was to come. When disputes over the meaning of delegating statutes and of administrative rules promulgated under those statutes arose, the courts should have evenhandedly adjudicated those disputes. Instead, the federal courts and most state courts began to defer to the agencies themselves regarding the meaning of those statutes and rules.

The result of this "administrative deference" was that all three functions of government became concentrated in the executive branch. That clearly violates the separation of powers guaranteed by the relevant constitutional provisions. Ironically, it also violates the ancient principle that Coke invoked when he originally made the case for judicial review, i.e., *It is unfair for someone to be a judge in his own affairs*. That principle applies to private actors of course, but, as Coke emphasized in *Dr. Bonham's Case*, it applies to governmental actors as well, and the right to a fair trial depends on it. For centuries that right had been considered fundamental under Anglo-American law. However, a tribunal that defers to one of the parties to a dispute can hardly be said to be impartial.

Fortunately, the situation regarding administrative deference is beginning to change. In response to a large and growing body of commentary,[2] the United States Supreme Court has signaled a willingness to reconsider the deference doctrines that it developed in the

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[2] 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).

past.[3] Furthermore, as explained below, many states have already taken steps to curtail or eliminate administrative deference within their jurisdictions.

North Carolina would do well to follow their example, and this case gives the North Carolina Supreme Court an opportunity to lead the way.

II. Recent Developments.

At least nine state supreme courts have issued opinions restricting or eliminating administrative deference. The most recent of these was handed down by the Ohio Supreme Court in 2022. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 172 Ohio St.3d 225, 2022-Ohio-4677. It makes a rigorous and compelling case against administrative deference and should serve as an inspiration and model to other courts. 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.

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[3] See Petr.'s New Br. 44-45.

> [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.

The Ohio court's opinion followed a string of previous decisions restricting or eliminating administrative deference. In the first of these, in 1987, the South Dakota Supreme Court found "no reason to give deference to agency conclusions of law." *Permann v. S.D. Dep't of Lab., Unemployment Ins. Div.*, 411 N.W.2d 113, 117 (S.D. 1987). Twelve years later the Delaware Supreme Court made a similar finding. *Pub. Water Supply Co. v DiPasquale*, 735 A2d 378, 382 (DEL. 1999) ("Statutory interpretation is ultimately the responsibility of the courts."). In 2008, the Michigan Supreme Court handed down a decision in which it declined

"to import the federal [deference] regime into Michigan's jurisprudence" and held that "courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation." *SBC Michigan v. Pub. Serv. Comm.*, 482 Mich. 90, 754 N.W.2d 259, 271-72 (2008).

Over the course of the next decade and a half, the flow of decisions restricting or eliminating administrative deference accelerated. The Supreme Court of Kansas handed down such a decision in 2011. *Cochran v. Dept. of Agriculture, Water Resources Div.*, 291 Kan. 898, 904, 249 P.3d 434 (2011) ("[T]his court no longer gives deference to an agency's interpretation of a statute."). The Supreme Court of Mississippi followed suit in 2013. *King v. Miss. Mil. Dep't*, 245 So. 3d 404, 408 (Miss. 2018) ("In deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution ... provides for the courts and the courts alone, to interpret statutes.") Between 2013 and 2016, the Supreme Court of Utah handed down three relevant decisions. In *Murray v. Utah Lab. Comm'n*, it held that "an administrative grant to administer a statute is not to be confused with a grant of discretion to interpret the

statute." 308 P3d 461, 471 (Utah 2013) (citation omitted). In *Hughes Gen. Contractors, Inc v. Utah Labor Comm'n*, it declined to "pick sides in the policy debate engaged in by the parties in their briefs before us." 2014 UT ¶ 27, 322 P.3d 712, 717. And in *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, it explained that "to defer to the agency's interpretation of law of its own making ... would place the power to write the law and the power to ... interpret it in the same hands [which] would be troubling, if not unconstitutional." 2016 UT 34, ¶¶ 32, 379 P.3d 1270, 1275.

In 2018 the Wisconsin Supreme Court handed down a particularly noteworthy opinion that includes a thorough review of the history of administrative deference in the state as well as an equally thorough analysis of the arguments for and against administrative deference. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W. 2d 21. In the course of the later it observes:

> Ceding judicial power to an administrative agency is, from a separation of powers perspective, unacceptably problematic; it is problematic along a different axis when that agency appears in our courts as a party. The non-agency party may reasonably ask whether our deference doctrine will deprive him of an impartial decisionmaker's exercise of independent judgment, and, thereby, the due process of law.

Id., ¶ 63. At the end of its analysis the court announces:

> Today, the core judicial power ceded by our deference doctrine returns to its constitutionally-assigned residence. Henceforth, we will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo.

Id., ¶ 84.

Arkansas was the last state supreme court to issue an opinion restricting or eliminating administrative deference prior to the Ohio Supreme Court's doing so in 2022. In *Myers v. Yamamoto Kogyo Co., Ltd.*, the Arkansas Supreme Court declared, "[W]e clarify today that agency interpretations of statutes will be reviewed de novo. After all, it is the province and duty of this Court to determine what a statute means." 2020 Ark. 135, 5, 597 S.W. 3d 613, 617 (2020).

It might be objected that in most of the listed cases the underlying issue was deference to an administrative agency's interpretation of a statute, whereas in the present case the issue is an agency's interpretation of its own regulations. However, that fact has little significance in the context of this discussion. It certainly does not imply that the state supreme courts in question would defer to agency

interpretations of their own regulations. Instead, in almost all of them it simply indicates that cases involving agencies' interpretation of their own rules have yet to come before those courts.

More importantly, the underlying arguments against administrative deference articulated in those cases apply regardless of whether the agency is interpreting a statute or a rule of its own making. Indeed, the arguments based on the separation of powers and the right to a fair trial—which appear in virtually all of the listed cases—are actually strongest regarding agencies that are interpreting their own rules. As the Utah Supreme Court observed, "[T]o defer to the agency's interpretation of law of its own making ... would place the power to write the law and the power to ... interpret it in the same hands [which] would be troubling, if not unconstitutional." Ellis-Hall, ¶¶ 32, 379 P.3d 1270. 1275. And as the Wisconsin Supreme Court observed, under those circumstances, "The non-agency party may reasonably ask whether our deference doctrine will deprive him of an impartial decisionmaker's

exercise of independent judgment, and, thereby, the due process of law." *Tetra Tech EC,* ¶ 84.[4]

Most importantly of all, the fact that most of the listed cases involve agency interpretation of statutes is irrelevant to the primary point of this discussion, which is to call the court's attention to the strong and growing movement to restrict or eliminate administrative deference of all kinds. The fact that state supreme courts have become increasingly willing to rein in administrative deference is one indication of the strength of that movement. Recent signals from the United States Supreme Court are another. And a third is that fact that several states have put a stop to administrative deference by other means.

In 2018, Florida's voters ratified the following constitutional amendment:

> 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.

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[4] For a detailed analysis of the arguments made in many of these cases, see Daniel Ortner, Ending Deference? Why Some State Supreme Courts Have Chosen to Reject Deference and Others Have Not, CSAS Working Paper 21-20 (2020), https://administrativestate.gmu.edu/paper/ending-deference-why-some-state-supreme-courts-have-chosen-to-reject-deference-and-others-have-not/.

Fla. Const. art. V, Section 21.

That same year, the Arizona legislature enacted a similar categorical reform:

> 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 in 2022, the Wisconsin legislature enacted 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.

* * *

The movement to restrict or eliminate all forms of administrative deference is clearly gaining momentum, and it is not too late for North Carolina to become a leader rather than a follower in that movement. This case provides the Court an opportunity to do just that.

CONCLUSION

This court should declare that under the North Carolina Constitution the power and the duty to interpret laws and regulations

rest with the courts rather than with regulatory agencies and remand this case for reconsideration in light of that declaration.

Respectfully submitted this 29th day of May 2024.

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