

# CLIENT ALERT

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## OHIO SUPREME COURT REIGNS IN “ADMINISTRATIVE STATE”

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### Landmark *TWISM* Ruling Curbs State Agency Power to Interpret the Law

On December 29, 2022, in a 4-3 opinion authored by Justice Pat DeWine, the Ohio Supreme Court held in *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, that it is the role of the judiciary, not administrative agencies, to decide what the law means.<sup>1</sup> Ohio state courts, per *TWISM*, are never required to defer to an administrative agency's interpretation of the law. The Court further explained that “an agency interpretation is simply ‘one consideration’ a court may take into account in rendering the court's own independent judgment as to what the law is.”<sup>2</sup>

The Court reached that conclusion, reversing the First District Court of Appeals decision to defer to the Board of Registration for Professional Engineers and Surveyors (“Board”)s interpretation of R.C. 4733.16(D), a statute governing the requirements a firm must meet to provide engineering services in Ohio. R.C. 4733.16(D) requires an engineering firm to “designate one or more full-time partners, managers, members, officers, or directors” as in “responsible charge” of its engineering activities to receive a certificate of authorization from the Board. In the Board's view, a full-time manager had to be a “W-2” employee rather than a “form-1099” independent contractor. Citing the widely-known federal “Chevron Doctrine” (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837), the Court of Appeals, had determined that it was required to defer to the Board's “reasonable interpretation” of an ambiguous statute, and held that the statute precluded an independent contractor from fulfilling the role of full-time manager.

The Court took this case to address what deference if any, a court should give to an administrative agency's interpretation of a statute. The Court noted that Ohio case law had been inconsistent regarding deference standards. Some cases adopted the “mandatory deference” standard, holding that courts owe conclusive deference to an agency's interpretation of a statute that it must enforce so long as the interpretation is reasonable. Others state that courts will conclusively defer to an agency's reasonable interpretation when the statute is ambiguous. Yet another line of cases held that courts might rely on the expertise of a state agency.

Recognizing the need to articulate a consistent standard, the Court first reviewed the Ohio Constitution's foundational principle of separation of powers. The Court reiterated that the ultimate authority to render definitive interpretations of the law “has long been understood as

resting exclusively in the judicial power.”<sup>3</sup> Accordingly, mandatory deference to agency interpretation would not be consistent with this principle. The Court then reviewed Ohio's statutory scheme, finding that the General Assembly did not intend to delegate interpretive authority to administrative agencies. Instead, “Ohio's statutory scheme supports the view that any judicial deference to administrative agencies is *permissive rather than mandatory* and may occur *only when a statutory term is ambiguous*.”<sup>4</sup> (Emphasis added.)

The Court then articulated the deference standard for Ohio: A Court may consider an administrative agency's construction of a legal text in exercising its duty to independently interpret the law.<sup>5</sup> An administrative interpretation should play no role when the text is unambiguous. The Court further instructs how courts are to weigh administrative interpretations of ambiguous statutes:

Now assume that a court does find ambiguity and determines to consider an administrative interpretation along with other tools of interpretation. The weight, if any, the court assigns to the administrative interpretation should depend on the persuasive power of the agency's interpretation and not on the mere fact that it is being offered by an administrative agency. A court may find agency input informative; or the court may find the agency position unconvincing. What a court may not do is outsource the interpretive project to a coordinate branch of government.<sup>6</sup>

Applying this standard, the Court concluded nothing in the statutory language precluded an independent contractor from serving as a full-time manager of an engineering firm.

The Ohio Supreme Court became the latest state high court to reconsider the U.S. Supreme Court's “*Chevron* deference” doctrine.<sup>7</sup> *TWISM* appears to reassert the judiciary's role in interpreting the law and, in so doing, appears to level the playing field in litigation between private parties and state agencies.

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<sup>1</sup> Slip Opinion No. 2022-Ohio-4677; Justice Pat DeWine authored the opinion with Justices Sharon L. Kennedy, Patrick F. Fischer, and Michael P. Donnelly concurring. Chief Justice Maureen O'Connor and Justices Melody Stewart and Jennifer Brunner concurred in judgment only.

<sup>2</sup> *Id.* at ¶13.

<sup>3</sup> *Id.* at ¶133.

<sup>4</sup> *Id.* at ¶140.

<sup>5</sup> *Id.* at ¶ 44.

<sup>6</sup> *Id.* at ¶47.

<sup>7</sup> High courts in Wisconsin, Utah, Arkansas, Delaware, Kansas, Michigan, and Mississippi have similarly revamped their deference doctrines lately, returning to *de novo* review.