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7 MAP 2025

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MAP 2025

LUTHERAN HOME AT KANE, ET AL.,
Appellants,
v.
DEPARTMENT OF HUMAN SERVICES,
Respondent.

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS

On appeal from the Order of the Commonwealth Court at No. 303 CD 2023 dated June 4, 2024, affirming the decision of the Department of Human Services, Bureau of Hearings and Appeals at Nos. 090-08-0113, 090-08-0130, 090-08-0134, 090-08-0157, 090-08-0158, 090-08-0159, 090-08-0164, 090-08-0170, 090-08-0174, 090-08-0176, 090-08-0186, 090-08-0187, 090-08-0188, 090-08-0192, 090-08-0193, 090-08-0200 and 090-08-0213 dated March 1, 2023.

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INTEREST OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill that purpose. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), The Buckeye Institute states that no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

Pennsylvania courts have afforded *Chevron*-type deference when faced with an ambiguous statute and *Auer*-type deference when an agency is interpreting its ambiguous regulations. However, *Chevron* and *Auer* deference are inconsistent with Pennsylvania's constitutional structure and statutory rulemaking schemes. The Court should abandon both.

In 2024, the U.S. Supreme Court abandoned *Chevron* deference altogether. Similarly, states like Ohio, Wisconsin, Michigan, Delaware, Florida, and at least 13 other states have either legislatively or judicially rejected *Chevron* deference. These states favor independent judicial review of statutes rather than agency interpretations.

Further, in 2019, the U.S. Supreme Court narrowed *Auer* deference. *See Kisor v. Wilkie*, 588 U.S. 558 (2019). Even the author of *Auer v. Robbins*, 519 U.S. 452 (1997), came to doubt its validity. The constitutional and statutory concerns raised by *Chevron* deference are also raised by *Auer* deference. *Auer* deference permits agencies to create vague regulations and later interpret them in ways that benefit the agency. While the U.S. Supreme Court limited *Auer* deference in *Kisor*, it did not eliminate it. *Kisor* does not resolve the fundamental problems with *Auer* deference.

This Court should abandon deference to administrative agencies and reassert judicial authority in interpreting laws and regulations.

ARGUMENT

I. Introduction

"To declare what the law is, or has been, is a *judicial power* . . . ." *Respublica v. McClean*, 4 Yeates 399, 406 (Pa. 1807) (opinion of Yeates, J.). "[A]nd one of the fundamental principles of all our governments"—especially Pennsylvania's—is that the three branches of government "shall be separated." *Id. See also* Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-1790*, 59 Pa. Hist.: J. Mid-Atlantic Stud. 122, 123 (1992) (noting that the 1790 Pennsylvania Constitution "embodied the republican principles of 1776," including an independent judiciary). However, when courts defer to executive agencies' interpretations of statutes or regulations, which carry the force of law, the court cedes the judicial power to another branch.

In the past, Pennsylvania courts have presumed that agency legislative rules are reasonable and "accorded a particularly high measure of deference . . . ." *N.W. Youth Services, Inc. v. Com., Dept. of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013) (citation omitted). The level of deference a court grants to an administrative agency in Pennsylvania depends on how the court categorizes the agency's interpretation. *Dep't of Env't Prot. v. Clearfield Cnty.*, 283 A.3d 1275, 1283 (Pa. Comm. 2022).

> There are three categories of an agency's interpretation: (1) an agency's interpretation of its regulation interpreting an ambiguous statute, *i.e.*, *Chevron* deference; (2) an agency's interpretation of its own regulation, *i.e.*, *Auer* deference; and (3) an agency's interpretation of its non-

> legislative interpretive rules (guidance documents), *i.e.*, *Skidmore* deference.

Id. at 1284 n.16.

This Court developed its deference doctrines based on the U.S. Supreme Court's precedents. *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 292 A.3d 921, 927–28 (Pa. 2023). While the U.S. Supreme Court revised its deference doctrines—due to constitutional and statutory concerns—this Court has yet to follow suit. *See id.* at 928 (noting that various Justices have expressed the view that Pennsylvania courts "should, if not must, depart from federal" deference doctrines in certain circumstances). Of particular importance to this case, *Chevron* and *Auer* deference are inconsistent with the Commonwealth's constitutional structure and its statutory rulemaking schemes.

II. There has been a growing trend away from *Chevron* deference. This Court should join this movement.

Currently, eighteen states afford agencies no deference when interpreting statutes, a significant increase from just seven states in 2015. Walker, Christopher J. & Neena Menon, Chevron's *51 Imperfect Solutions*, 5 Wis. L. Rev. 1585, 1610–13 (2024). And, the U.S. Supreme Court has overruled *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and eliminated federal deference to administrative

agencies. Pennsylvania should reject these now discredited deference schemes and reaffirm that courts, not agencies, interpret the law.

A. The U.S. Supreme Court has explicitly abandoned *Chevron* deference.

In June 2024, the U.S. Supreme Court issued its opinion in *Loper Bright* and rejected the use of *Chevron* deference. 603 U.S. at 412. The Court asserted that *Chevron* deference was incompatible with the Administrative Procedure Act. *Id.* After all, "courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 413.

While the Court relied on statutory interpretation in *Loper Bright*, Justices Thomas and Gorsuch also pointed out the constitutional separation of powers issues associated with *Chevron* deference. *Id.* at 413–14 (Thomas, J. concurring) (citation omitted); *id.* at 423–424 (Gorsuch, J., concurring). "To provide 'practical and real protections for individual liberty,' the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government," *id.* at 414 (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015)), and overly generous deference blurs, if not erases, those lines. Justice Thomas further argued that *Chevron* deference "curb[ed] the judicial power afforded to courts," while "expand[ing] agencies' executive power beyond constitutional limits." *Id.* (Thomas, J., concurring). *Chevron* encompassed the

problem attributed to the administrative state—it serves itself but is beholden to none. *Loper Bright* represents a significant step toward restoring balance in the federal government as it reassures that it is the courts' job to "say what the law is." *Id.* at 385 (quoting *Marbury v. Madison*, 1 U.S. 137, 177 (1803)).

Like Justices Thomas' and Gorsuch's arguments, states have abandoned their *Chevron* deference schemes on constitutional grounds.

B. Several states abandoned *Chevron* deference before *Loper Bright*.

One of the "happy incidents" of the United States' constitutional system is the ability of states to serve as "laborator[ies]" having the "right to experiment" by charting new paths. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). Under the U.S. Constitution, states retain an "extensive portion of active sovereignty." The Federalist No. 45, at 308 (James Madison) (Easton Press ed., 1979). Pennsylvania's sister states have returned to the courts their authority to interpret the law. *See TWISM Enterprises, L.L.C. v. State Bd. of Registration for Prof'l Engineers & Surveyors*, 223 N.E.3d 371, 382–83 (Ohio 2022) ("Roughly half the states in the Union review agency interpretations of the law de novo." (citation omitted)); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* 71–73 (2020), bit.ly/3qQU3eK (noting that 12 states have deference equivalent to that of the federal courts while approximately 32

have expressly rejected *Chevron*, give a lesser form of deference, or have expressed skepticism toward deference doctrines recently). While the *Loper Bright* decision is a watershed decision in the rejection of federal *Chevron* deference, other states' rejection of *Chevron* deference is equally—if not more—persuasive. But it is not just that the other states have been and continue to reject *Chevron* deference, but more importantly, they have given thoughtful, reasoned analysis explaining why they have abandoned *Chevron* deference. This Court should consider the practices of its sister states. *See Yanakos v. UPMC*, 218 A.3d 1214, 1220 (Pa. 2019) (recognizing the similarities between Pennsylvania's Constitution and jurisprudence and those of other states).

1. Ohio

Ohio is among the latest states to reject *Chevron* deference. In *TWISM*, the Ohio Supreme Court examined the level of deference, if any, that a court should grant to an administrative agency's interpretation of a statute." 223 N.E.3d at 374. The court made it clear—"the judicial branch is *never* required to defer to an agency's interpretation of the law." *Id.* (emphasis in original).

The Ohio Supreme Court found it "difficult" to "reconcile" *Chevron*-style deference with the Ohio Constitution's separation of powers due to the abdication of the judicial duty to "say what the law is" to the executive branch. *Id.* at 380 (citation omitted). The court reasoned that "[e]ach branch of government 'can exercise such

power, and such only, as falls within the scope of the express delegation,'" *id.* at 379 (quoting *Scovill v. Cleveland*, 1 Ohio St. 126, 134 (1853)), and "[s]eparating 'the several powers of enacting, construing, and executing laws' aids 'the just exercise of the powers' and 'prevent[s] abuse,'" *id.* at 380 (quoting *Chesnut v. Shane's Lessee*, 16 Ohio 599, 620 (1847) (Read, J., dissenting)). The court recognized that while "the other branches of government must follow and apply the law—a task that entails some level of interpretation"—"the ultimate authority to render definitive interpretations of the law has long been understood as resting exclusively in the judicial power." *Id.* (citations omitted). Given the significant similarities between the separation of powers provisions in the Ohio and Pennsylvania Constitutions,[1] this Court should consider the Ohio Supreme Court's rationale.

Further, *Chevron* raises due process and judicial independence concerns because it "turns over to one party" in the case, that is, the executive branch and

[1] *Compare* Ohio Const. art. II, § 1 ("The legislative power of the state shall be vested in a General Assembly."); Ohio Const. art. III, § 5 ("The supreme executive power of this state shall be vested in the governor."); and Ohio Const. art. IV, § 1 ("The judicial power of the state is vested in a supreme court" and lower courts), *with* Pa. Const. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."); Pa. Const. art. IV, § 2 ("The supreme executive power shall be vested in the Governor . . . ."); Pa. Const. art. V, § 1 ("The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court . . . such other courts as may be provided by law . . . .").

The Ohio Constitution was heavily influenced by the Pennsylvania 1682 Frame of Government and the later Pennsylvania Constitution, with several provisions being directly adopted. *See State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, 177 Ohio St.3d 174, 176; Patrick R. DeWine, *Ohio Constitutional Interpretation*, 86 Ohio State L.J. at 14 (forthcoming 2025).

agency being sued, "the authority to say what the law means." *Id.* at 380; *see also* The Federalist No. 10 (James Madison) (Easton Press ed., 1979) ("No man is allowed to be a judge in his own cause."); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1211 (2016) ("One of the costs of deference . . . is that it systematizes biased judgment in violation of the Fifth Amendment's guarantee of due process.").

Ohio did not merely reject *Chevron*; it established the framework for a judicial review system in a post-*Chevron* world. First, courts should utilize traditional tools of statutory interpretation to ascertain the meaning of a statute. At this point, if the text is unambiguous, the inquiry ends. *TWISM*, 223 N.E.3d at 382. Where ambiguity remains, "a court may consider an administrative agency's construction," assigning it weight solely based "on the persuasive power" of the interpretation and "not on the mere fact that it is being offered by the administrative agency." *Id*. In other words, in Ohio, *Skidmore* reigns supreme in a post-*Chevron* world. *Id.* (analogizing Ohio's future of deference to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) Under *Skidmore*, and now in Ohio, an agency's rulings, interpretations and opinions

> while *not controlling upon the courts by reason of their authority*, do constitute a body of experience and informed judgement to which courts and litigants *may* properly resort for guidance. The *weight of such judgment* in a particular case will *depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency*

> *with earlier and later pronouncements, and all those factors which give it power to persuade*, if lacking power to control."

Skidmore, 323 U.S. at 140 (emphasis added).

2. Wisconsin

The Wisconsin Supreme Court recently determined that its practice of deferring to administrative agencies on questions of law violates the separation of powers. *See Tetra Tech EC, Inc. v. Wisc. Dep't. of Rev.*, 914 N.W.2d 21 (Wis. 2018); *Myers v. Wisconsin Dep't. of Nat. Resources*, 922 N.W.2d 47 (Wis. 2019) ("We have ended our practice of deferring to administrative agencies' conclusions of law."). Wisconsin's deference was not an exact replica of *Chevron* deference. Courts gave agency interpretations "great weight" deference—adopting agency interpretations so long as they were *reasonable*—or "due weight" deference—a "tie goes to the agency" approach when there are multiple equally reasonable interpretations. *Tetra Tech EC, Inc.*, 914 N.W.2d at 31–32. According to the Wisconsin Supreme Court, both types of deference were "unacceptably problematic" and "unsound in principle" because they do "not respect the separation of powers" and "give[] insufficient consideration to the parties' due process interest in a neutral and independent judiciary . . . ." *Id.* at 48, 54.

Wisconsin established a new approach like that adopted by Ohio. In a demonstration of how the tripartite system of government can work together on this issue, the Wisconsin Legislature passed 2017 Wis. Act 369. Section 35 of the Act

enshrined into law that "[n]o agency may seek deference in any proceeding based on the agency's interpretation of any law," and section 80 amended a current statutory provision to read "[u]pon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." 2017 Wis. Act 369 §§ 35, 80 (codified at Wis. Stat. §§ 227.10(2g) and 257.57(11)). Wisconsin courts now review questions of law de novo, while giving agency interpretations "due weight" based on their persuasive value and not deferential right. *Tetra Tech EC, Inc.*, 914 N.W.2d at 53.

3. Michigan

Similarly, Michigan has rejected *Chevron* deference despite its constitution specifically recognizing administrative agencies. *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 265 (Mich. 2008). Recognizing that agencies have "quasi-judicial" powers to conduct contested cases and fact-finding proceedings, the Michigan Supreme Court distinguished this "limited" power from the judiciary's inherent authority to say what the law is. *Id.* The Michigan Supreme Court concluded that by giving deference to agencies on questions of law, courts "threaten the separation of powers . . . by allowing the agency to usurp the judiciary's constitutional authority to construe the law . . . ." *Id.* at 267. The Michigan Supreme Court also recognized that deferring to executive agencies on questions of law produces the anomalous result that courts place *more weight* on a different branch's

interpretation of the law than a lower court's interpretation in its own branch. *Id.* at 270.

The Michigan Supreme Court explicitly declined to "import the federal [*Chevron*] regime into Michigan's jurisprudence." *Id.* at 272. This decision stems from the realization that *Chevron* has proven "very difficult to apply," and the "unyielding deference . . . required by *Chevron* conflicts with . . . the separation of powers . . . by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government." *Id.* at 271–72.

Like its midwestern counterparts, Michigan's Supreme Court clarified judicial review post-*Chevron*. Michigan courts now review statutory interpretations de novo. *Id.* at 266–67. While the courts give "respectful consideration" to agency interpretations of statutes, these interpretations are "not binding on the courts . . . ." *Id.* at 267 (citation omitted). Instead, courts "take[ ] note" of agency constructions of "doubtful or obscure laws," using them as an "aid for discerning the Legislature's intent" as "expressed in the language of the state . . . ." *Id.*

4. Additional state rejections of *Chevron*

Ohio, Wisconsin, and Michigan are not alone. *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of cert.) ("[N]otable voices have also spoken. Several state courts have refused to import a broad understanding of *Chevron* in their own administrative law jurisprudence."). High courts in states

like Arkansas, Colorado, Delaware, Kansas, Mississippi, and Utah have made similar decisions to abandon *Chevron*. *See, e.g., Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 617 (Ark. 2020); *Nieto v. Clark's Market, Inc.*, 488 P.3d 1140, 1149 (Co. 2021); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999); *Kansas Dep't. of Rev. v. Powell*, 232 P.3d 856, 859 (Kan. 2010); *King v. Mississippi Military Dep't*., 245 So.3d 404, 407–408 (Miss. 2018); *Ellis-Hall Consultants v. Pub. Serv. Comm.*, 379 P.3d 1270, 1273–75 n. 4 (Utah 2016).

In other instances, state legislatures have stepped in to reject deference. For example, in 2018, the Arizona Legislature and Governor amended the state's statutes to limit agency deference on questions of law. Arizona now mandates that "[i]n a proceeding brought by or against the 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. § 12-910(F). Tennessee passed a similar law in 2022. *See* Tenn. Code § 4-5-326 (2022).

Florida voters did not wait for the courts or legislature to abandon deference. In 2018, Florida voters passed Amendment 6, which amended the Florida Constitution to state, "[i]n 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." Fl. Const. art. 5, § 21.

While an increasing number of states have moved away from *Chevron* or deference altogether, it is noteworthy that "no states [ ] have gotten appreciably more deferential in the past 20 years." Ortner, *supra*, at 3 n. 3, 68.

III. The Court should abandon *Auer* deference rather than toy with it as *Kisor v. Wilkie* did.

Under *Auer* deference, courts "defer[ed] to an agency's interpretation of its own regulation . . . unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (quoting *Auer*, 519 U.S. at 461). Similarly, this Court has

> [f]ollow[ed] a two-step analysis when reviewing an agency's interpretation of its governing regulations: (1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and (2) whether the regulation is consistent with the statute under which it was promulgated.

Tire Jockey Serv., Inc. v. Com., Dep't of Envtl. Prot., 915 A.2d 1165, 1186 (Pa. 2007). In many respects, this Court and the Commonwealth Court have developed the Pennsylvania *Auer* doctrine in a manner like that of the U.S. Supreme Court. *See Lutheran Home at Kane v. Dep't of Human Servs.*, 318 A.3d 164, 180 (Pa. Commw. 2024) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (noting that "[d]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered

judgment on the matter in question")); *see also id.* ("Pennsylvania courts only apply *Auer* deference to agencies' reasonable interpretations of ambiguous regulations."). That deference has created significant problems. The U.S. Supreme Court's limiting of the doctrine in *Kisor* did not resolve those problems.

A. *Auer* deference raises similar constitutional issues as *Chevron* deference.

"In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Chevron U.S.A. Inc.*, 467 U.S. 837). Like *Chevron* deference, *Auer* deference is "constitutionally suspect," *Garco Const., Inc. v. Speer*, 583 U.S. 1193 (2018) (Thomas, J., with whom Gorsuch, J., joins, dissenting from the denial of cert.) (citing *Mortg. Bankers Ass'n*, 575 U.S. at 112–133).

Auer deference creates separation of powers issues by assigning the primary role of interpreting ambiguous regulations to agencies rather than the judiciary. This transfer of power "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts. And it results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'" *Id.* (Thomas, J., dissenting from the denial of cert.) (quoting at *Mortg. Bankers Ass'n*, 575 U.S. at 124, 126). "Umpires in games at Wrigley Field do not

defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here." *Kisor*, 588 U.S. at 632 (Kavanaugh, J., concurring in the judgment). *See also* Major League Baseball, *Ground Rules*, CUBS, https://www.mlb.com/cubs/ballpark/ground-rules (last visited Feb. 27, 2025).

Even Justice Scalia—the author of *Auer*—"came to doubt its correctness." *Garco Const., Inc.*, 583 U.S. at 1193 (Thomas, J., dissenting from the denial of cert.) (citing at *Mortg. Bankers Ass'n*, 575 U.S. at 111–112 (Scalia, J., concurring in judgment); *Decker*, 568 U.S. at 616–621 (Scalia, J., concurring in part and dissenting in part); *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring)). With humility, Justice Scalia acknowledged that the Court's "cases have not put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). While questioning his earlier support for *Auer* deference, Justice Scalia recognized that "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk America, Inc.*, 564 U.S. at 68 (Scalia, J., concurring).

Justice Scalia was right to rethink his opinion in *Auer* and his prior approval of deference. This Court, too, should question the constitutional implications of *Auer* deference and reject it entirely.

B. *Auer* deference undermines the Commonwealth's notice and comment provisions.

In addition to constitutional concerns, Justice Scalia recognized a second problem with *Auer* deference: "[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.* at 69 (Scalia, J., concurring). Likewise, the potential risks that agencies pose to the democratic process and individual liberty were not lost on the General Assembly.

Like the federal administrative law framework before the Administrative Procedure Act, Pennsylvania's administrative scheme is comprised of multiple statutes: the Commonwealth Documents Law (CDL), the Commonwealth Attorneys Act (CAA), and the Regulatory Review Act (RRA) (collectively "the Acts"). *Lutheran Home at Kane*, 318 A.3d at 178. These three laws "comprise the core of Pennsylvania's scheme for notice-and-comment rulemaking by administrative agencies and legal and regulatory review by the Attorney General and the Independent Regulatory Review Commission." *Id.* (citation omitted).

The chief procedural safeguard, Section 1201 of the CDL, requires each administrative agency to provide "public notice of its intention to promulgate, amend or repeal any administrative regulation" and "request for written comments by any interested person concerning the proposed administrative regulation or change

therein." 45 P.S. § 1201. "The process by which regulations are promulgated provides an important safeguard against the unwise or improper exercise of discretionary administrative power and includes . . . consideration of such comments, and hearings as appropriate." *Marcellus Shale Coal. v. Dept. of Envtl. Protec.*, 193 A.3d 447, 476 (Pa. Commw. 2018) (quoting *Commonwealth v. Colonial Nissan, Inc.*, 691 A.2d 1005, 1009 (Pa. Commw. 1997)), *rev'd on other grounds*, 292 A.3d 921 (Pa. 2023). Notice and comment rulemaking empowers citizens—particularly those most affected by regulations—to express their opinions. It gives them a role in the rulemaking process.

Through these procedures, the General Assembly aimed to hold agency heads accountable to the General Assembly and the public. The General Assembly also sought to foster predictability and stability in the administrative arena and to establish a baseline against which future agency action would be measured. *Auer*-type deference effectively exempts agencies from the CDL's notice and comment requirements. This undermines the General Assembly's objectives and leaves agencies free to promulgate ambiguous regulations and later interpret them, all while knowing that their interpretation will never be subject to true judicial review. Or as Justice Scalia put it, "the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that

will enable 'clarification' with retroactive effect." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part).

Vagueness frees agencies "to control the extent of [their] notice-and-comment-free domain." *Mortg. Bankers Ass'n*, 575 U.S. at 111 (Scalia, J., concurring in the judgment). It allows them to "expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.* (Scalia, J., concurring in the judgment) All this "frustrat[es] the notice and predictability purposes of rulemaking." *N.W. Youth Services, Inc.*, 66 A.3d at 312 (quoting *Christopher*, 567 U.S. at 158).

Rather than securing consent from the governed, *Auer* deference relieves an agency of the burdens associated with the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on the regulated community. Because of *Auer*, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process . . . or to the regulated public." *Id. See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524–25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and

definite so that affected parties will have adequate notice concerning the agency's understanding of the law").

Ultimately, fairness suffers in the absence of transparency, while greater public access and participation in the rulemaking process fosters trust in agencies and the government. Transparency likewise ensures that all parties have a fair opportunity to advocate. Conversely, agency actions that proceed without notice and comment put the regulated community at risk. Agency interpretations that require individuals to take specific actions or refrain from doing so become de facto—if not de jure—law, regardless of how those interpretations are formulated. Consequently, the regulated community must either comply with the interpretation or risk facing enforcement actions predicated on alleged noncompliance. "After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law." *Mortg. Bankers Ass'n*, 575 U.S. at 110 (Scalia, J., concurring in the judgment).

The Bureau of Hearings and Appeals' interpretation here is but one example of how state agencies disregard the Acts when they interpret their own regulations. This Court's reliance on *Auer* allows agencies to continuously move the goalpost with the force of law. This is precisely the type of abuse the General Assembly sought to prevent with the Acts. Until this Court insists that the executive branch

abide by the Acts, state agencies will continue their unconstitutional usurpation of power.

C. *Kisor* did not resolve the *Auer* deference incongruencies.

The Commonwealth Court noted below, "Pennsylvania courts only apply *Auer* deference to agencies' reasonable interpretations of *ambiguous* regulations." *Lutheran Home at Kane*, 318 A.3d at 180 (citations omitted). Under the Pennsylvania formulation, "[a]n ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested." *Id.* (citations omitted). In *Kisor*, the U.S. Supreme Court rejected this formulation of ambiguity. While *Kisor* seemingly limited *Auer* deference, it did not resolve the core problems with applying deference. As Justice Kegan noted when writing for the Court, the *Kisor* deference doctrine remained "potent in its place, but cabined in its scope." *Kisor*, 588 U.S. at 563–64.

In applying *Kisor*, first, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 574 (citation omitted). "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 575 (citing *Chevron U.S.A. Inc.*, 467 U.S. at 843, n. 9 (adopting the same approach for ambiguous statutes)).

Next, if genuine ambiguity remains, "the agency's reading must still be 'reasonable.'" *Id.* (citation omitted). "Under *Auer*, as under *Chevron*, the agency's

reading must fall 'within the bounds of reasonable interpretation.'" *Id.* at 576 (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

Finally, even if reasonable, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 576 (citation omitted). The *Kisor* Court identified three "especially important markers for identifying when *Auer* deference is and is not appropriate." *Id.* 576–77.

- [T]he regulatory interpretation must be one actually made by the agency. . . . [I]t must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *Id.* at 577.

- Next, the agency's interpretation must in some way implicate its substantive expertise. . . . [T]he basis for deference ebbs when "the subject matter of the dispute is distant from the agency's ordinary" duties or "falls within the scope of another agency's authority." *Id.* at 577–78 (cleaned up) (citation omitted).

- Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. That means, . . . that a court should decline to defer to a merely "convenient litigating position" or "post hoc rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. *Id.* at 579 (citations omitted).

Justice Kagan's attempt to "cabin" *Auer* is admirable. If nothing else, *Kisor* taught that "[g]one are the days of 'reflexive' deference." Kevin O. Leske, *A New Split in the Rock: Reflexive Deference Under* Stinson *or Cabined Deference Under* Kisor*?*, 74 Admin. L. Rev. 761, 772 (2022). One commentator went further, arguing

that *Kisor's* impact "is to preserve the *Auer* doctrine in name only, a zombie-like creature that inhabits a place in which it is not entirely dead but is almost completely devoid of all that once made it alive." Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 Admin. L. Rev. 553, 568–69 (2021) (citation omitted). Regardless of the hyperbole, *Kisor* only toyed with the problem of deference rather than addressing it head-on. As Justice Gorsuch's *Kisor* concurrence explained, the Court should have gone further.

D. This Court should bypass *Kisor's* half-step and eliminate *Auer*-type deference.

"Where did *Auer* come from? Not from the Constitution, some ancient common law tradition, or even a modern statute." *Kisor*, 588 U.S. at 593 (Gorsuch, J., concurring in the judgment). Justice Gorsuch recognized what the majority did not want to tackle: *Auer* was poorly reasoned and should be abandoned. Instead, "the Court created an entirely new deference standard, one that is festooned with so many qualifications, restrictions, and limitations that it looks like a Christmas tree with something to make everyone happy." Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 Geo. J.L. & Pub. Pol'y 105, 121 (2020). Such deference simply is unnecessary.

> [E]very day, in courts throughout this country, judges manage with [ ] traditional tools to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution. Yet when it comes to interpreting [ ] regulations, *Auer* displaces this process and requires

> judges instead to treat the agency's interpretation as controlling even when it is "not . . . the best one."

Kisor, 588 U.S. at 600 (Gorsuch, J., concurring in the judgment). Gorsuch further pointed out that "several Members of this Court, along with a great many lower court judges and members of the legal academy, have questioned *Auer's* validity." *Id*. at 601–602 (Gorsuch, J., concurring in the judgment).

Of course, *Kisor's* dilution of *Auer* occurred before the Supreme Court's 180-degree turn on *Chevron* in *Loper Bright*. In *Loper Bright*, the Court emphasized the judicial responsibility to interpret the law and only give the agency the respect it deserves based on its "power to persuade." *Loper Bright Enterprises*, 603 U.S. at 402. The Court further explained that "[t]he Framers also envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* at 385. Regulations are laws, and the courts are no less released from their duty to interpret regulatory laws than they are from their duty to interpret statutory laws just because an agency has asserted its own interpretation. Indeed,

> [t]he better presumption is therefore that the legislature expects courts to do their ordinary job of interpreting [regulatory laws], with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the [regulation].

Id. at 403.

Kisor was an interim step leading to the Supreme Court's rejection of deference. *Kisor's* longevity is suspect. *See, e.g., United States v. Boler*, 115 F.4th 316, 322 (4th Cir. 2024) ("The Supreme Court's recent ruling in [*Loper Bright*] calls into question the viability of *Auer* deference.) This Court should bypass that interim step and reject *Auer* deference.

CONCLUSION

For the above reasons, this Court should abandon both *Auer* and *Chevron* deference to administrative agencies' interpretations and reverse the Commonwealth Court's decision.

Respectfully submitted,

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