In the
Supreme Court of Ohio

TWISM ENTERPRISES, LLC, d/b/a VALUCADD SOLUTIONS, Appellant, v. **STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND SURVEYORS,** Appellee.	Case No. 2021-1440 On appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case Nos. C-200411 & C-210125

OPENING BRIEF OF APPELLANT TWISM ENTERPRISES, LLC

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INTRODUCTION

The parties here dispute the meaning of R.C. § 4733.16(D) and related regulations. But the "central question" before the Court is: "Who decides?" *Nat'l Fed'n of Indep. Business v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring); *see also State ex rel. Khumprakob v. Mahoning Cty. Bd. of Elections*, 153 Ohio St.3d 581, ¶ 29 (2018) (Fischer, J., concurring in judgment only) ("The primary question here is *who decides* that a measure initiated by electors exceeds a municipality's legislative power."). The answer is found in the Ohio Constitution, adopted by the people for their protection against arbitrary rule.

This Constitution vests the power to decide questions of law exclusively in the judiciary. OHIO CONST. art. IV, § 1; *Norwood v. Horney*, 110 Ohio St.3d 353, at ¶ 117 (2006). And because it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), it must be *the Judicial Branch—alone*—who decides this case. *See State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*, 166 Ohio St.3d 64, ¶ 21 (2021) ("*[O]nly* the judiciary has ultimate authority to interpret the law.") (emphasis added) (citing, inter alia, *Marbury*, 5 U.S. at 177).

But instead of deciding for itself what § 4733.16(D) means, the court of appeals below granted outcome-determinative deference to the State Board of Registration for Engineers and Surveyors—an Executive Branch agency and *one of the parties* in the case. And the court granted deference even though the Board's interpretation requires adding a term into the text of the statute that was not adopted by the Legislative Branch.

The text of § 4733.16(D)—together with the Board's own official regulations—forecloses the Board's interpretation. Under the statute, TWISM Enterprises applied for a Certificate of Authorization and had to designate "one or more full-time . . . managers" as "responsible for and in responsible charge of [its] professional engineering . . . activities and decisions." R.C. § 4733.16(D). The Board defines "responsible charge" as "being in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities of the business enterprise." Ohio Adm. Code § 4733-39-02(A). And it defines "full[-]time" as "working substantially all the engineering . . . hours for" a firm. *Id*. § 4733-39-02(B). Here, it is undisputed that TWISM designated James Cooper, an independent contractor, as its manager; that Mr. Cooper was in control of, accountable for, and in supervision of TWISM's engineering activities; and that he worked *all* the engineering hours for TWISM. Therefore, TWISM and Mr. Cooper met the law's requirements.

But the Board denied TWISM's application. The Board claimed that § 4733.16(D) requires a "full-time manager" to be a "*W-2 employee*"—even though (1) § 4733.16(D) includes no such requirement; (2) the word "employee" is found nowhere in § 4733.16(D) or the Board's own regulations; and (3) as shown above, those officially adopted regulations contradict its current "interpretation." Because the facts are undisputed, the magistrate and trial-court judge below properly applied *de novo* review and held that TWISM's interpretation was the best reading of the law. But the court of appeals ruled for the Board because, it said, it "must" defer to the Board's interpretation. (App. 11a.)

As this case thus demonstrates, judicial deference to the executive's legal interpretation violates the Ohio Constitution's Separation of Powers—the "first, and defining, principle of a free constitutional government." *State v. Bodyke*, 126 Ohio St.3d 266, ¶ 39 (2010) (citations omitted). Deference here allowed the Executive Branch to encroach upon *both* the Judicial Branch (by definitively declaring what the law means) *and* the Legislative Branch (by adding terms to a statute). Deference, further, compelled the court of appeals to both "abdicate [its] function and responsibility . . . to say what the law is" and "abandon [its] role as an independent check on the executive branch." *In re 6011 Greenwich Windpark, L.L.C.*, 157 Ohio St.3d 235, ¶ 74 (2019) (Kennedy, J., dissenting) (cleaned up).

This case also shows that deference violates the closely related principle of due process of law—the guarantee of *an independent judgment* about the law *by a court*. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) (noting that, for centuries, "due process" has "consistently referred to the guarantee of legal *judgment* in a case by an authorized *court* in accordance with settled law") (emphasis added); *see also* Ohio Jud. Cond. Rule 2.3(A) (A "judge shall perform the duties of judicial office . . . without bias or prejudice.").

Accordingly, this Court should reverse the court of appeals and confirm that only the government's Judicial Branch is vested with the power and obligation to say what the law is and, further, that while courts may consider executive-branch interpretations—as they consider arguments from all parties to a case—courts must not defer to agency

interpretations. Finally, because the plain and unambiguous terms of § 4733.16(D) do not require engineering firms to designate W-2 *employees* as their engineering managers, the Court should hold that TWISM's application met the requirements of § 4733.16(D).

STATEMENT OF FACTS

The facts are not in dispute. (App. 3a.) TWISM, a small start-up firm founded by Shawn Alexander, applied to the Board for a Certificate of Authorization. (*Id*.) State law required TWISM to "designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering . . . activities and decisions, and those designated persons shall be registered in this state." R.C. § 4733.16(D). The Board defines "responsible charge" as "being in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities of the business enterprise." Ohio Adm. Code § 4733-39-02(A). And the Board defines "full[-]time" as "working more than thirty hours per week *or* working substantially all the engineering . . . hours for a . . . limited liability company . . . that holds a certificate of authorization." *Id*. § 4733-39-02(B) (emphasis added).

TWISM designated independent-contractor James Cooper, an Ohio-registered engineer, as its manager. (App. 15a.) Mr. Cooper testified that he led TWISM's engineering activities and performed *all* its engineering hours. (Supp. 10–11, 15 [Tr. 19:19–20:23, 24:16–24].) Further, as part of TWISM's application, Mr. Cooper executed a "Firm Affidavit of Responsibility" on the Board's own form, which required him to affirm that he was "in

responsible charge for and in charge of" TWISM's "professional engineering . . . activities and decisions." (Supp. 24.) The Board's form-Affidavit also asked Mr. Cooper to say if he was "listed on multiple [Certificates of Authorization]" or had other engineering employment and, if so, to identify other firms he worked for and to describe "how [he] w[ould] manage" engineering activities for multiple firms. (*Id*.) Mr. Cooper explained that he performed engineering work for TWISM and two other firms, that he worked mainly on "one-off" assignments, and that "there should be no conflict of interest or excessive time commitments for any of the services [he] perform[s]." (*Id*. 25.)

The Board did not dispute these facts. Instead, it claimed that § 4733.16(D) precludes a firm from designating an independent contractor to serve as the firm's manager. (Supp. 7–8 [Tr. 16:21–17:1].) Even though neither the statute nor the related regulations even mention "employee," and even though the Board's regulatory definitions provide otherwise, the Board asserted that a manager had to be a "W-2" employee of a firm rather than a "1099" independent contractor. (*Id*.) Solely on that ground, the Board denied TWISM's application. (*Id*.; App. 4a ¶5, 15a, 32a.)

TWISM filed an administrative appeal, which was heard by a Board-appointed hearing officer at the Board's office. (App. 25a.) The hearing officer did not consider whether § 4733.16(D) was ambiguous but nonetheless agreed with the Board that he "must" defer to its interpretation. (*Id*. 33a.) He then offered his opinion that it was reasonable for the Board to require a person "to devote all of his/her professional time" to a

firm "as a full-time employee." (*Id*.) He therefore recommended that the Board's denial be affirmed. (*Id*. 34a.) The Board adopted the hearing officer's Report and Recommendation and entered a final order. (*Id*. 25a–27a.)

TWISM appealed to the common pleas court and argued that the Board's final order was "not supported by reliable, probative, and substantial evidence and [wa]s not in accordance with law." R.C. § 119.12(D). Because the facts were undisputed and the sole question was one of legal interpretation, the magistrate applied *de novo* review. (App. 20a.) She rejected the Board's argument that § 4733.16(D) required a manger to be a W-2 employee: The Board "ha[d] not pointed to any statute or rule whereby either the General Assembly or the Board has even arguably imposed such a requirement." (*Id*. 22a.) Further, the "undisputed evidence before the Board" showed that Mr. Cooper "fully met" the "full[-]time" "requirement" of Ohio Adm. Code § 4733-39-02(B). (*Id*. 21a.) The magistrate therefore recommended reversal and vacatur of the Board's decision. (*Id*. 22a.)

Upon the Board's objections, the trial court reviewed the legal questions *de novo* and concluded that the Board's purported requirement—that a manager must devote all of his professional time to a company as a W-2 employee—is "not mandated by the plain text of" § 4733.16(D). (App. 15a, 16a.) The court noted that § 4733.16(D) "does not put forth any requirements regarding what kind of employment, *i.e.*, 'W-2' or '1099'" is mandated, nor does it "state that a designated manager must devote all his or her time" to a single firm. (*Id*. 16a–17a.) The court also looked at the Board's form-Affidavit, which, as

noted above, expressly contemplates engineers' working for multiple firms. (*Id*. 17a.) According to the trial court, this "mandatory, state-issued form demonstrates that, contrary to the Board's interpretation, a designated manager does *not* have to 'devote[] all his/her time to the company as an employee.'" (*Id*.) Finally, the trial court stated, the Board's interpretation "creates new, substantive requirements that are not found in" § 4733.16(D). (*Id*.) The court approved the magistrate's decision, reversed and vacated the Board's denial, and ordered the Board to issue TWISM a Certificate of Authorization. (*Id*.)

On appeal, the First District panel observed that no material facts were in dispute and, therefore, its review was limited to the legal question whether R.C. § 4733.16(D) and Ohio Adm. Code § 4733-39-02(B) allow an independent contractor to serve as a "full-time manager." (App. 6a.) The Board argued that its "reasonable" interpretation was necessarily entitled to deference. (*Id*. 6a–7a.) The court disagreed because, it explained, deference is appropriate only if a statute or rule is ambiguous. (*Id*. 7a.) The court later found ambiguity—but without applying all the traditional tools of statutory construction—only because, it said, both parties' interpretations were reasonable. (*Id*. 10a–11a.) As a result, and without further analysis, the court held it "must defer to the Board's interpretation" and upheld the Board's decision. (*Id*. 11a.)

This Court granted jurisdiction on Propositions of Law 1 and 2. *See 02/15/2022 Case Announcements*, 2022-Ohio-397.

ARGUMENT

I. Proposition of Law No. 1: *Under the Ohio Constitution's separation of powers and related guarantees of due process, it is exclusively the judiciary's province and duty to say what the law is; and, therefore, Ohio courts may consider but must not defer to executive agencies' legal interpretations.*

A. Ohio's Constitution divides powers to protect the people's liberty and security

1. The people of Ohio delegated some of their sovereign power to the government and divided it among three branches

Americans were the first to recognize and adopt as foundational the principle that "[a]ll political power is inherent in the people." OHIO CONST. art. I, § 2. *See Cincinnati, Wilmington & Zanesville R.R. Co. v. Clinton Cty. Comm'rs*, 1 Ohio St. 77, 85 (1852) (same); *Marbury*, 5 U.S. at 176 (That "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

The people delegated some of their political power to the government and distributed it among three—and only three—branches. *See Hale v. State*, 55 Ohio St. 210, 214 (1896) (explaining that the people "distribut[ed] [governmental power] to appropriate departments"); *see State v. Guilbert*, 56 Ohio St. 575, 626–27 (1897) (The state's "powers are embraced within the three familiar divisions of legislative, judicial, and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions."); *The Federalist No. 47*, at 324 (Cooke Ed. 1961) (Madison) (identifying the "legislative, executive, and judiciary" powers as "all" of government's powers).

The people of Ohio thus vested the state's law-making power in the General Assembly (OHIO CONST. art. II, § 1), the executive power in the Governor (*id*. art. III, § 5), and the judicial power in the courts (*id*. art. IV, § 1). *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462 (1999).

Ohio's doctrine of separation of powers "implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson*, 92 Ohio St.3d 584, 586 (2001) (citation omitted). The Ohio Constitution applies the separation-of-powers principle "in defining the nature and scope of powers designated to the three branches of the government." *Cleveland Bar Ass'n v. Picklo*, 96 Ohio St.3d 195, ¶ 4 (2002) (cleaned up). "It is inherent in our theory of government that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved." *State v. Hochhausler*, 76 Ohio St.3d 455, 466 (1996) (cleaned up).

Importantly, the government's powers were not arranged simply to settle interbranch squabbles. Rather, the Constitution's structure and the specific delegation of certain powers to each branch serve mainly to protect the liberty and security of the people—those who adopted the Constitution and for whose benefit government agents must act. *See Norwood*, 110 Ohio St.3d 353, ¶ 114 (The separation of powers "was a deliberate design to secure liberty.") (citing, inter alia, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,

635 (1952) (Jackson, J., concurring)); *see also Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (The "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed.").

Liberty depends on separated powers because the concentration of power leads to arbitrary government, subject to whim rather than law. Therefore, for example, the "General Assembly cannot require the courts 'to treat as valid laws those which are unconstitutional. If this could be permitted, the whole power of the government would at once become absorbed and taken into itself by the Legislature.'" *Bodyke*, 126 Ohio St.3d 266, ¶ 52 (quoting *Bartlett v. State*, 73 Ohio St. 54, 58 (1905)). Similarly, "there is no liberty, if the judiciary power be not separated from the legislative and executive." MONTESQUIEU, SPIRIT OF THE LAWS, Book XI.5. Indeed, it "would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying causes of individuals." *Id.*; *see also The Federalist No. 47*, at 326 (Madison) (discussing Montesquieu and the dangers of uniting powers of separate branches); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government."). In short, "'[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'"

State ex rel. Bryant v. Akron Metro. Park Dist. For Summit Cty., 120 Ohio St. 464, 473 (1929) (quoting *The Federalist No. 47* (Madison)). And, therefore, "*any* encroachment by one upon the other is a step in the direction of arbitrary power." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135 (2000) (emphasis added) (cleaned up).

2. The people of Ohio gave each branch the means to check the others

Of course, mere "parchment barriers" between the branches cannot prevent encroachment and, therefore, are not a sufficient guarantor of liberty, *The Federalist No. 48*, at 333 (Madison), as "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go," MONTESQUIEU, SPIRIT OF THE LAWS, Book XI.4. "To prevent this abuse, it is necessary from the very nature of things that power should be a check to power." *Id*. Therefore, an "important function of th[e American] system [of checks and balances] is to prevent one government entity from acting unilaterally without some form of check placed on it by other parts of the government." *State ex rel. O'Diam v. Greene Cty. Bd. of Comm'rs*, 161 Ohio St.3d 242, ¶ 17 (2020) (citing *Youngstown Sheet & Tube*, 343 U.S. at 593 (Frankfurter, J., concurring); *The Federalist No. 51*, at 351–52 (Madison)); *see also The Federalist No. 51*, at 349 (Madison) (The "constant aim was to divide and arrange the several [branches] in such a manner as that each may be a check on the other.").

As this Court thus recognized soon after Ohio's original constitution was adopted, "the people can never be secure under any form of government, where there is no check

among the several departments." *Rutherford v. M'Faddon* (Ohio 1807), POLLACK, OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823 (1952) 75. *See Sheward*, 86 Ohio St.3d at 463.

To ensure checks and balances, "the Constitution permits each branch to have some influence over the other branches in the development of the law." *Bodyke* 126 Ohio St.3d 266, ¶ 48. Accordingly, the people gave the Executive Branch some portion of the legislative and judicial powers. *See, e.g.*, OHIO CONST. art. II, § 8 & art. III, § 8 (authorizing Governor to convene special session of the General Assembly); art. II, § 16 (delegating Governor legislative powers to sign bills into law and veto); art. III, § 11 (giving Governor power, "after conviction, to grant reprieves, commutations, and pardons"); art. IV, § 13 (authorizing Governor to fill judicial office that becomes vacant). Similarly, the Legislative Branch was delegated powers that serve to check the Executive and Judicial Branches. *See, e.g., id.*, art. II, § 16 (authorizing General Assembly, by three-fifths' vote of each house, to enact a bill into law over Governor's veto); art. IV, § 17 (providing for removal of judges by General Assembly). *Cf. also The Federalist No. 47*, at 326–31 (Madison) (describing similar provisions in various state constitutions).

Finally, the judiciary was entrusted by the people of Ohio with "both the power and the solemn duty" "to ensure that the boundaries between branches remain intact." *Bodyke*, 126 Ohio St.3d 266, ¶ 46 (citation omitted). As a result, the "legislative and executive branches have to abide by constitutional limits as interpreted by courts." *O'Diam*, 161 Ohio St.3d 242, ¶ 18. The "power and duty of the judiciary to determine the

constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers." *Norwood*, 110 Ohio St.3d 353, ¶ 116 (cleaned up); *cf. also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) ("Policing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court.") (cleaned up).

3. The judicial power vests courts with the independent power to decide questions of law, resolve disputes, and issue binding judgments

The judicial power is "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020). "'It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment.'" *Thompson*, 92 Ohio St.3d at 586 (quoting *Fairview v. Giffee*, 73 Ohio St. 183, 190 (1905)); *Guilbert*, 56 Ohio St. at 627 ("'[T]o adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.'") (quoting COOLEY, CONST. LIM. 109 (6th ed. 1890)); *see Guilbert* at 628 (describing judicial powers—*e.g.*, applying evidence rules to ascertain disputed facts, interpreting and applying statute of limitations, and deciding questions of fact and law—that were *unconstitutionally* granted to county recorder).

The debates preceding the 1851 Constitution were premised on this understanding of judicial power. *See, e.g.*, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51 (Smith 1851) 124 (remarks of Mr. Hitchcock) ("the representatives of the people, from whom the judicial power emanates, decree that the judicial department shall decide all questions of law and settle all disputes and controversies."); *id.* at 267 (remarks of Mr. Reemelin) ("The General Assembly should pass laws; the court should adjudicate upon them."); *id.* at 270 (remarks of Mr. Nash) ("It is left for the courts to say whether [] acts are valid or not. The courts have *always* claimed and exercised this power.") (emphasis added); *id.* at 633 (remarks of Mr. Kennon) ("What is the duty of a judge? He is sworn to decide the law as it is.").

In short, "[t]he power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department. The construction of the laws and Constitution is for the courts." *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169 (1916).

A judge's power and duty to independently interpret the law is not excused when she faces an ambiguous statute. To the contrary, it remains the judiciary's obligation—not the executive's or the legislature's—to say what the law is. As this Court stated, it is "elementary that the authority of *courts* [is invoked] to interpret a duly enacted statute . . . when there is some apparent ambiguity in its terms." *Watson v. Tax Comm'n*, 135 Ohio St. 377, 380 (1939) (emphasis added) (citation omitted); *see also Dana Corp. v. Testa, Tax*

Comm'r, 152 Ohio St. 3d 602, ¶ 23 (2018) ("Given the ambiguity, *we* must interpret the statute.") (emphasis added) (no deference applied).

4. With its independent judicial power, the Judicial Branch was vested with the solemn obligation to police the other branches

The judiciary checks the other branches chiefly through its power to issue definitive interpretations of the Constitution and other law. As this Court put it, the "power of constitutional adjudication [is] secured exclusively in the judiciary, essential to its integrity and independence, serving, fundamentally and intrinsically, as a check upon the other branches." *Sheward*, 86 Ohio St.3d at 467; *see id.* at 464 ("'If legislative acts are to all intents obligatory on the court—the constitution is a subordinate instrument—liable to be annulled, altered and amended by legislative supremacy. Their acts would not only be equal, but superior to that charter, which has the sanction of "We the people do ordain and establish."'") (quoting *Rutherford* (Ohio 1807) (Tod, J., concurring)).[1] Judicial review, therefore, ensures that the law—the Constitution—is superior to all three branches. *See id*. at 469 ("The judicial power to declare legislative enactments unconstitutional is not a superior power, neither one of veto nor of greater wisdom. It is rather a power burdened with a duty—a duty to determine in particular cases whether the Legislature has reached and passed the extreme boundary of legislative power.") (cleaned up); *The Federalist No. 78*, at 525 (Hamilton) ("Nor does this conclusion by any means suppose a superiority of

[1] Judge Tod was impeached (though acquitted) for daring to apply the doctrine of judicial review. *See Sheward*, 86 Ohio St.3d at 464.

the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."). The people, after all, entrusted the judiciary with the exclusive "province and duty . . . to say what the law is." *Marbury*, 5 U.S. at 177.

5. The powers delegated by the people to the three branches cannot be further delegated

The Ohio Constitution provides that "all powers, not herein delegated, remain with the people." *Id*. art. I, § 20. Through this provision, the people expressly confirmed what is otherwise implicit through the separation of vested powers—that our Constitution, like the federal Constitution, "is best seen as a kind of agency instrument" between the people (the principals) and government officials (the people's agents). Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 854 (2019) (citing GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017)). As this Court explained long ago, the people have an "undoubted right to delegate just as much, or just as little" of their powers through the Constitution, which is an "instrument" or "letter of attorney" by which, "alone," each branch is "authorized to act at all." *Cincinnati, Wilmington & Zanesville R.R.*, 1 Ohio St. at 85. More recently, the Court confirmed the relationship between the principals and their government agents: "'[W]hat the sovereign people *do* by their *constitution,* their subordinate, the legislature, may not *undo* by *statute,*

else the agent in government is more powerful than his principal.'" *Village of Lucas v. Lucas Loc. Sch. Dist.*, 2 Ohio St.3d 13, 14 (1982) (citation omitted); *see generally* Calabresi & Lawson, *supra*, 94 NOTRE DAME L. REV. at 854–55 (explaining that delegated discretionary powers cannot be further delegated without specific authorization in the Constitution, an agency instrument); THOMAS JEFFERSON, WRITINGS 253 (Library of Am. 1984) ("Our antient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise.").

Therefore, under traditional agency principles, the people's delegation of some of their sovereign power to their agents in three branches precludes their agents from exceeding or further delegating or re-assigning their powers, unless the people have so provided in the Constitution. Accordingly, this Court has held that the General Assembly, "like the other departments of government, exercises only delegated authority" and therefore "cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body." *Cincinnati, Wilmington & Zanesville R.R.*, 1 Ohio St. at 86, 87. And "any act passed by [the General Assembly], not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited." *Id*. at 86; *see also City of Toledo v. State*, 154 Ohio St.3d 41, ¶ 26 (2018) (The "people of this state conferred on the General Assembly the legislative power. This lawmaking prerogative cannot be delegated to or encroached upon by the other branches of government.") (citations omitted); *Khumprakob*, 153 Ohio St.3d 581, ¶ 33 (Fischer, J.,

concurring in judgment only) (noting that "legislative power is *reserved* to the people but *delegated* to the General Assembly and municipalities").

Similarly, this Court recognized that a court is "an instrumentality and an incident to sovereignty and is the repository of its judicial power. It is the agency of the state by means of which justice is administered, and is that entity in the government to which the public administration of justice is delegated and committed." *State ex rel. Cherrington v. Hutsinpiller*, 112 Ohio St. 468, 471 (1925). Accordingly, in "the absence of express constitutional provision therefor, the General Assembly of Ohio cannot assign to the judicial branch of the government any duties other than those that are properly judicial, to be performed in a judicial manner." *Thompson v. Redington*, 92 Ohio St. 101 (1915), paragraph two of the syllabus. *See also South Euclid v. Jemison*, 28 Ohio St.3d 157 (1986) (invalidating law purporting to give Registrar of Motor Vehicles judicial power to review and reverse judgments of municipal courts concerning suspensions of driver's licenses).

Most importantly here, "the power of constitutional adjudication was secured exclusively in the judiciary, essential to its integrity and independence, serving, fundamentally and intrinsically, as a check upon the other branches." *Sheward*, 86 Ohio St.3d at 467.

To fulfill its "solemn duty" to "ensure that the boundaries between branches remain intact," *Bodyke*, 126 Ohio St.3d 266, ¶ 46 (citations omitted), the judiciary "must" therefore *both* (1) "'jealously guard the judicial power against encroachment from the other two branches of government,'" *Norwood*, 110 Ohio St.3d 353, ¶ 117 (citation

omitted), *and also* (2) refrain from ceding judicial power to the other branches, *see The Federalist No. 51*, p. 349 (Madison) ("The great security against a gradual concentration of the several powers in the same department, consist in giving those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.").

In sum, the people of Ohio established a government, to which they delegated certain powers among three distinct branches of government; each exercises specific and enumerated powers; and the people did *not* delegate to their government agents the authority to *re*-delegate or *re*-assign their powers.

6. The power of the Executive Branch to administer the laws does not include the judicial power

Of course, "the power to ascertain and decide is not necessarily a judicial power." *Guilbert*, 56 Ohio St. at 627; *see also State ex rel. Atty. Gen. v. Harmon*, 31 Ohio St. 250, 259 (1877) ("Judgment and discretion are required to be exercised by all the departments."). But the subjects of this judgment and discretion differ depending on the *nature* of the respective power. *See, e.g.*, *Guilbert*, 56 Ohio St. at 627 ("Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination."); *cf. Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.").

Accordingly, members of the Legislative Branch exercise judgment and discretion when they consider and adopt laws. Likewise, agents of the Executive Branch use judgment and discretion when executing the laws enacted by the Legislative Branch (with the Governor's approval or over his veto). *See* OHIO CONST. art. III, § 6 (obligating the Governor to "see that the laws are faithfully executed").

But only *judges*—agents in the Judicial Branch—have the ultimate authority to decide cases and controversies concerning the meaning of the law and the rights and interests of private parties. *See Guilbert*, 56 Ohio St. at 627 ("[I]t is clear that 'to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.'") (quoting COOLEY, CONST. LIM. 109). Accordingly, in *Guilbert*, for example, this Court struck down an act that "attempt[ed] to confer judicial power" upon a county recorder, as violative of the judicial-vesting clause. *Id*., paragraph three of the syllabus.

7. The Board's legal determinations are subject to plenary judicial review

The principles above show that the Board's initial review of TWISM's application was a proper exercise of *executive* power, as the General Assembly may have administrative officials determine whether certain facts exist or certain qualifications are met—without, of course, "delegating to such officers legislative or judicial power within the meaning of the Constitution." *Fassig v. State*, 95 Ohio St. 232 (1917), paragraph two of the syllabus, overruled in part on other grounds, *Griffin v. Hydra-Matic Div., Gen. Motors Corp.*,

39 Ohio St.3d 79 (1988). *See Fassig*, paragraph two of the syllabus ("[I]n providing for the enforcement of its enactments, [the legislature] may clothe administrative officers with power to ascertain whether certain specified facts exist, and thereupon to act in a prescribed manner, without delegating to such officers legislative or judicial power within the meaning of the Constitution."); *Belden v. Union Central Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph three of the syllabus (same).[2]

Here, the Board was tasked to determine whether TWISM's application met the requirements set forth in § 4733.16(D) and related regulations, "and thereupon to act *in a prescribed manner*." *Fassig*, 95 Ohio St. 232, paragraph two of the syllabus (emphasis added). If the Board found that TWISM's application met the requirements, it was

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[2] This Court explained the distinction between executive power and judicial power in *Musser v. Adair*:

> A county auditor cannot be empowered to hear and determine an issue between A. and B. as to title to land, or to a horse, or as to whether A should recover of B. a certain sum of money. These are judicial questions, and can only be determined in a proper proceeding by a court. But as to whether a certain tract of land or a horse is owned by A., and should be taxed as his property, or that B. owes A. a certain sum of money which should be returned by A. as a 'credit,' are different questions; and, however much inquiry and consideration may be involved in their determination, he determines no question of title as between adversary parties that is binding on them. Therefore a county auditor, under the sections above referred to, in making additions to the returns of a person of his property for taxation, does not act as a judge. He acts simply as an agent of the state in the valuation and assessment of the property of its citizens for the purpose of taxation. He is simply a ministerial officer, and none other. His proceedings under these sections make a prima facie case for the collection of the tax based on the additions.

55 Ohio St. 466, 473 (1896). If a definitive resolution is needed, then *judicial* review follows.

required to approve the application and issue the Certificate of Authorization. *See* R.C. § 4733.16(E) (The Board "shall issue a certificate of authorization to each . . . limited liability company. . . that satisfies the requirements of this chapter."). If not, the Board was required to decline the application. *Id.*; *cf. Fassig*, 143 Ohio St. at 348 ("If [the Superintendent of Insurance] finds the company has sufficient assets as required by the act he *shall* give his approval, otherwise he *shall* reject the plan.") (emphasis added).

But the Board is limited to *executive* power. Therefore, while the General Assembly "may confer discretion in the *administration* of the law," it "*may not* delegate the exercise of its discretion *as to what the law shall be*," for the latter is a power reserved to the Legislative Branch. *Fassig*, 143 Ohio St. at 347 (emphasis added). Nor may an executive agency say *what the law is*, for that power is reserved to the Judicial Branch.[3] Accordingly, although the Board must decide, in the first instance, what a law requires of applicants, the Board's legal interpretations are always subject to *plenary* judicial review—because, when

[3] That the Board held a hearing for TWISM to contest the initial denial does not alter the *nature* of the Board's *executive* power. As Prof. Baude explains, the *manner* in which government agents carry out their obligations is not the criterion to determine what power (legislative, executive, or judicial) is being exercised. Rather, the criterion is the nature of the task at issue. Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. at 1520, 1521–22. For example, the disbursement of public benefits is a responsibility of the executive branch, but that branch may use adjudicatory-like procedures to determine the amount of benefits to be disbursed. *Id.* at 1577. However, when the government seeks to deprive a private right (as opposed to disburse a public benefit) or when it seeks to bind private parties or resolve questions of law, it must ultimately proceed through the judicial branch. *Id*. at 1522, 1536, 1541.

a dispute arises concerning the requirements or validity of the law, it is the *judiciary's* "province and duty . . . to say what the law is." *Marbury*, 5 U.S. at 177.

Therefore, when a legal dispute arises and judicial review is required, the Board presents its arguments to a court—as does the regulated party—but the *court* must make the final, binding decision, without deferring to either party. *See, e.g.*, *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 144 Ohio St.3d 239, ¶¶ 10, 11 (2015) (A "board of elections has discretion to determine whether a proposed ballot measure satisfies statutory prerequisites to be a ballot measure," but boards of elections "do *not* have authority to sit as arbiters of the legality or constitutionality of a ballot measure's substantive terms," because otherwise, a board would be authorized "to adjudicate a constitutional question and require this court to affirm its decision even if the court disagreed with the board's conclusion . . . ."); *see also State ex rel. Espen v. Wood Cty. Bd. of Elections*, 154 Ohio St.3d 1, ¶ 15 (2017) (striking down, as violative of the separation of powers, law that granted election boards authority to engage in substantive legal review of proposed ballot petitions); *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528, 535–36, 538 (1856) (discussing ministerial duty of Governor to ascertain whether company met prerequisites of banking requirements, and observing that Governor—appropriately—did "not assume the exercise of a discretion in regard to the question in this case, which would [have] ma[d]e his determination final and conclusive. . . . [O]n the contrary, he concede[d] the authority of the judiciary over the question.").

Thus, when a proceeding "involves a controversy over rights of person or property—that is to say, a matter of judicial cognizance—a court of competent jurisdiction is not deprived of that jurisdiction by the fact of some administrative agency having first made some determination of it." *Stanton v. Tax Comm'n*, 114 Ohio St. 658, 680 (1926). And, in "such event it is not only competent for the Legislature to provide a judicial review, but *it is its imperative duty to do so*." *Id*. (emphasis added).

All branches, in other words, may make legal determinations by interpreting the law, but only the *courts* have the ultimate and final power to construe statutes and the Constitution.

B. Judicial deference to Executive Branch agencies violates the Separation of Powers

1. Deference allows the Executive Branch to encroach on the other branches and to exercise judicial and legislative powers

Deference runs afoul of all the principles set forth above. *First*, because deference requires courts to treat executive-branch legal interpretations as dispositive, the *Executive* Branch and not the Judicial Branch determines "what the law is." *Marbury*, 5 U.S. at 177. Thus, when judges face (supposedly) ambiguous statutes, deference requires them to adopt the agency's interpretation so long as it's "reasonable." As a result, deference "precludes judges from exercising [their independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (citation

omitted). This Court has applied deference even when interpreting an unambiguous statute. *See, e.g.*, *State ex rel. Lucas Cty. Republican Party Executive Comm. v. Brunner*, 125 Ohio St.3d 427, ¶ 23 (2010) (stating, without discussing ambiguity, "at a minimum, the secretary's interpretation of the pertinent [statutes] is a reasonable one and is thus entitled to judicial deference") (citation omitted). Whatever the circumstances, by deferring to agency interpretation, a court cedes judicial power to the Executive Branch.

Second, as this case highlights, deference allows the Executive Branch to encroach upon the Legislative Branch. The Board's contention, that § 4733.16(D) required TWISM to hire a *W-2 employee* as its engineering manager, is based on the insertion of the term "employee" into the text of the statute. But as this Court has held, "neither administrative agencies nor this court 'may legislate to add a requirement to a statute enacted by the General Assembly.'" *State ex rel. Moorehead v. Indus. Comm'n*, 112 Ohio St.3d 27, ¶ 15 (2006) (quoting *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 27–28 (1970)). Nonetheless, the court of appeals held that the Board's interpretation was "reasonable" (App. 11a), even though an extra-textual interpretation cannot be reasonable, much less can it be the "best reading" of the law.

This Court's analysis in *Moorehead* is instructive. There, the Court considered whether an injured worker suffered a "loss of use" to decide whether benefits were payable. The court of appeals deferred to the commission's interpretation that a "loss of use" doesn't occur when an injured worker "survives an industrial injury in an unconscious

state for only a brief period and never actually experiences the disabling effects of the injury." *Id*., ¶ 6. But the statute in question neither specified a required length of time of survival after a "loss-of-use" injury, nor required an injured worker to be consciously aware of his injury, before benefits may be awarded. *Id*. at ¶¶ 14, 16. This Court reversed the Commission's interpretation and the lower court's deference thereto, because neither administrative agencies nor courts may add terms to a statute. *Id*. at ¶ 15

Here, the court of appeals (1) ceded judicial power to the Executive Branch by adopting the Board's interpretation; and (2) allowed the Board to rewrite the law and exercise legislative power by accepting the Board's insertion of a term into § 4733.16(D).

2. Deference requires the judiciary to abdicate its duty as an independent branch of government

By affording the Executive Branch dispositive influence over legal interpretation, courts both "abdicate [their] function and responsibility . . . to say what the law is" and "abandon [their] role as an independent check on the executive branch." *In re 6011 Greenwich Windpark*, 157 Ohio St.3d 235, ¶ 74 (Kennedy, J., dissenting) (cleaned up); *see also In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St.3d 651, ¶ 71 (2020) (DeWine, J., concurring in judgment only) (Deference "forces the judiciary to abandon the exercise of its independent judgment in favor of an agency's construction.") (citations omitted).

The Judicial Branch's "solemn duty" to "ensure that the boundaries between branches remain intact," *Bodyke*, 126 Ohio St.3d 266, ¶ 46 (citations omitted, necessarily

precludes courts from ceding judicial power to the other branches. The "administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417 (1981), paragraph one of the syllabus. Indeed, the "orderly administration of justice, under the Constitution and laws of this state, absolutely requires that *each* court in our judicial system should in turn exercise its *independent judgment* in each particular case." S*tate ex rel. Cleveland Tel. Co. v. Court of Common Pleas of Cuyahoga Cty.*, 98 Ohio St. 164, 170 (1918) (emphasis added).

Here, the Board itself unwittingly highlighted the doctrinal error that results from judicial deference, when it complained that the common pleas court had "substituted its [the court's] *judgment* for that of the Board's." Apr. 23, 2021 Op. Br. at 1 (emphasis added). But issuing *independent judgments* to say "what the law is" is precisely what *courts*—not Executive Branch agencies—are empowered and obligated to do. The "judicial power resides exclusively in the judicial branch." *Norwood*, ¶ 117 (citations omitted).

To be sure, when disputes arise, both agencies and the private parties they regulate "may espouse arguments regarding the meaning of a statute," but "in the end, it is the courts that have the authority and the duty to 'say what the law is.'" *In re Determination of Existence of Significantly Excessive Earnings*, 162 Ohio St.3d 651, ¶ 105 (Kennedy, J., concurring in judgment only in part and dissenting in part) (quoting *Marbury*, 5 U.S. at 177). The "separation-of-powers doctrine prohibits the executive branch of government from

overriding a court's judgment about what the law requires in a particular case—even if the court errs in its judgment and even if the error was fairly obvious." *State v. Henderson*, 161 Ohio St.3d 285, ¶ 42 (2020). "Under our system of government, no officer is placed above the restraining authority of the law." *Whiteman*, 5 Ohio St. at 534.

In sum, when a court defers to agencies' legal interpretations—even when the law is genuinely ambiguous—it fails its "solemn duty" to the people who vested the judiciary with the power to say what the law is. By so deferring, a court improperly delegates what should be its exclusive power to another branch—something the Ohio Constitution precludes.

C. Judicial deference to Executive Branch agencies violates the Due Process of Law

1. Due Process as Separation of Powers

A *court's* duty of *independent* judgment, *especially* when an administrative agency is a party to a case, raises another closely related principle—due process of law. It "has aptly been said that the Due Process Clause is an 'instantiation of separation of powers' and that '[d]ue process and Article III in this sense are fused at the hip.'" Baude, 133 HARV. L. REV. at 1541. (quoting Chapman & McConnell, 121 YALE L.J. at 1672; and Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 8 (2012)).

A basic prerequisite of due process is a "'fair trial in a fair tribunal.'" *State v. Clinkscale*, 122 Ohio St.3d 351, ¶ 15 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Due process requires a "neutral and detached judge." *Ward v. Village of*

Monroeville, 409 U.S. 57, 62 (1972). And, therefore, in "a criminal case, the judge cannot defer to the prosecutor's interpretation of the law. In a civil case between a corporation and an individual, the judge cannot defer to the corporation's interpretation of the law. Nor can a judge defer to the interpretation put forward by an employer in an employment dispute." Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1209 (2016); *see also Creech v. P.A. & W.R. Co.*, 11 Ohio Dec. Reprint 764, 766 (Ohio C.P. 1893) ("No just conception can be formed of the exercise of judicial powers that does not imply a hearing and the right to defend before adjudication, *upon equal terms* with the party instituting the proceeding. 'Due course of law' means nothing short of this.") (emphasis added).

Accordingly, when a court defers to an agency, it necessarily but improperly defers to *one of the parties* in a case and thereby abdicates its duty to make an *independent* judgment—and thus denies the other party its right to a basic requirement of due process, a neutral and detached judge. *See* Hamburger, 84 GEO. WASH. L. REV. at 1209 (An Article III judge "must exercise his own judgment in a case, including his own judgment about what the law is, and he therefore cannot defer to the judgment of an administrative agency without abandoning his office as a judge."); Ohio Jud. Cond. Rule 2.3(A) ("A judge shall perform the duties of judicial office . . . without bias or prejudice.").

This court's description of judicial duty nearly 200 years ago confirms the point:

> As a court of justice we *must* administer the laws without respect to circumstances or persons. We must perform our functions, and have no authority to do or to forbear the performance of any duty, to suit our discretion or convenience. When the path of duty is open to our view, we *must* proceed.

> We are equally without authority to surrender to another any portion of the sovereign power confided to our keeping, as to refuse or deny justice from caprice, or personal feeling.

State v. Coulter, Wright 421, 425 (Ohio 1833).

2. Convenience and pragmatism do not trump the right to independent judgment by a court of law

As this Court's opinion in *Coulter* points out, any ostensible "practical" benefits of deference do not allow courts to abdicate their constitutional obligation. Indeed, "'that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (citations omitted); *see also Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."). The "convenience" of *initial* administrative review does not relieve the judiciary of its independent duty to ultimately decide questions of law.

And even slight encroachments among the three branches must be resisted, because, for example, "if it is true that 'the legislature *can* pass unconstitutional acts—that they are the sole judges of their constitutionality—and if unconstitutional, that there is no

remedy; then . . . the whole train of evils against which our constitution meant to provide, may be *gradually* let in upon us.'" *Sheward*, 86 Ohio St.3d at 463 (emphasis added) (quoting *Rutherford* (Ohio 1807)); *see also Youngstown Sheet & Tube*, 343 U.S. at 594 (Frankfurter, J., concurring) (The "accretion of dangerous power does not come in a day." Rather, it "come[s], however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."). And the government's powers were divided precisely to *prevent* the "gradual concentration of the several powers in the same department." *The Federalist No. 51*, at 349 (Madison).

D. Ohio's ad hoc deference jurisprudence demonstrates the difficulty in abdicating the judicial power to other branches

1. This Court has not adopted a "deference doctrine"

Perhaps because of the doctrinal and practical difficulties outlined above, the Court has inconsistently applied deference to the statutory and regulatory interpretations of administrative agencies.[4] Thus, the Court has often applied *de novo* review to questions of law. *Ceccarelli v. Levin*, 127 Ohio St.3d 231, ¶ 8 (2010). At times, it has done so without discussing ambiguity. *See, e.g.*, *Brunner*, 125 Ohio St.3d 427, ¶ 23 (stating, without

[4] While this Court has described as "well-settled" a practice of giving deference to administrative interpretations, it did so by relying on (1) an earlier decision in which this Court deferred to the interpretation of *federal* law by a *federal* agency and (2) an appellate court decision. *See State ex rel. McLean v. Indus. Comm'n of Ohio*, 25 Ohio St.3d 90, 92 (1986) (citing *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972); *Miami Conservancy Dist. v. Bucher*, 87 Ohio App. 390 (1949)).

discussing ambiguity, "at a minimum, the secretary's interpretation of the pertinent [statutes] is a reasonable one and is thus entitled to judicial deference.") (citation omitted).

But not always. *See Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, ¶ 29 (2014) (A court "owes no duty of deference to an administrative interpretation *unless* it finds the [law] ambiguous.") (emphasis added). *See In re Determination of Existence of Significantly Excessive Earnings*, 162 Ohio St.3d 651, ¶ 78 (DeWine, J., concurring) ("This court's precedent is far from consistent when it comes to the requirement that a statute be found ambiguous before consideration may be given to an agency's construction.").

This Court has even announced *de novo* review of legal questions *while also* affording "due deference" to administrative interpretations. *Bernard v. Unemp. Comp. Rev. Comm'n*, 136 Ohio St.3d 264, ¶¶ 9, 12 (2013).

Most recently, the Court held that "only the judiciary has ultimate authority to interpret the law." *Ferrara*, 166 Ohio St.3d 64, ¶ 21. Accordingly, agency interpretation can be considered—if at all—*only* after the court finds the statute ambiguous. *Id.* at ¶ 21. But even then, the Court continued, courts may *not* defer to the agency's view—they may only "consider" it. *Id.*; *see also Watson*, 135 Ohio St. at 380 (describing, as "elementary," that "the authority of *courts* [is invoked] to interpret a duly enacted statute . . . when there is some apparent ambiguity in its terms.") (emphasis added) (citation omitted); R.C. § 1.49(F) (court "may" consider agency construction). *Ferrara* is consistent with the

Constitution's separation of powers and the Judicial Vesting Clause. As this Court explained a century ago, "[i]t is the *duty of the court* to declare the law as it exists," which includes the "power to interpret statutory language which is obscure and ambiguous." *Winzeler v. Knox*, 109 Ohio St. 503, 513 (1924) (emphasis added).

2. The Constitution and the laws it authorizes preclude deference in this case

Whatever the merits of judicial deference generally, it has no place here. The Constitution expressly granted jurisdiction to Ohio courts to review actions of administrative agencies, "as may be provided [or conferred] by law." *See* OHIO CONST. art. IV, §§ 2(B)(2)(d), 3(B)(2), 4(B).[5] After the Board issued its final order denying TWISM's application, TWISM appealed to the court of common pleas, as provided by R.C. § 119.12. According to this law, "any party adversely affected by any order of an agency issued pursuant to an adjudication . . . denying the issuance . . . of a license or registration of a licensee . . . may appeal from the order of the agency to the court of common pleas . . .." R.C. § 119.12(A). The grounds for such an appeal are "that the agency's order is not

[5] While the General Assembly is authorized to establish the courts' jurisdiction, it has no authorization to invade the courts' exercise of their powers. *Cf. Hale*, 55 Ohio St. at 213 ("The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent."). A "power which the legislature does not give, it cannot take away." *Id*. at 215.

supported by reliable, probative, and substantial evidence and is *not in accordance with law*." R.C. § 119.12(D) (emphasis added). As all of the courts below acknowledged, the facts here are not in dispute, and the only question for review is whether the Board's denial of TWISM's application is "not in accordance with law." *Id*.

The resolution of pure legal questions is reserved exclusively to the judiciary. Therefore, the magistrate and trial court judge of court of common pleas both correctly applied a *de novo* review of the Board's decision, and the court of appeals erred by deferring to the Board's interpretation. *Cf. In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 270 (Mich. 2008) ("Given that statutory construction is the domain of the judiciary, it is hard to imagine why a *different branch's* interpretation would be entitled to more weight than a lower *court's* interpretation.") (emphasis added.)

Finally, none of the supposed justifications for deference exist in this case. No technical engineering expertise is at issue; this case presents only a pure question of law—an issue for which courts are "at no disadvantage in answering." *Free Enter. Fund*, 561 U.S. at 491. Additionally, the Board's official "interpretation" of § 4733.16(D)—its regulations codified in Ohio's Administrative Code—supports *TWISM's* argument. In these circumstances, deference shouldn't even be considered—much less reflexively applied. *See OfficeMax, Inc. v. United States*, 428 F.3d 583, 598 (6th Cir. 2005) ("*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted.").

II. Proposition of Law No. 2: *R.C. § 4733.16(D) does not preclude an engineering firm from designating an independent contractor as its professional-engineering manager.*

Applying the principles set forth above, this Court has the power and the duty to determine whether § 4733.16(D) allows engineering firms to employ independent contractors as their engineering managers. Because the Board is a party to this case, the Court must, of course, *consider* its arguments—just as it must consider TWISM's. But because it is the judiciary's exclusive "province and duty . . . to say what the law is," the Court *may not defer* to the Board's interpretation. *Marbury*, 5 U.S. at 177; *see Ferrara*, 166 Ohio St.3d 64, ¶ 21 (courts "consider" but do not defer to agency).

A. The plain, unambiguous language of R.C. § 4733.16(D) does not require an engineering firm to designate, as its engineering manager, a W-2 employee

To determine what the law is, "courts must take the law as they find it." *Weaver v. State*, 120 Ohio St. 44, 46 (1929). Therefore, legal interpretation starts with the text. *State v. Jordan*, 89 Ohio St.3d 488, 492 (2000). The "cardinal rule" is to "first look to the language of the statute itself," which reveals the "legislative intention." *Id*. Interpretation involves "consider[ing] the statutory language in context" and "construing words and phrases in accordance with rules of grammar and common usage." *State ex rel. Prade v. Ninth Dist. Ct. of Appeals*, 151 Ohio St.3d 252, ¶ 14 (2017) (per curiam) (quoting *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, ¶ 25 (2009)). "Terms that are undefined in a statute are accorded their common, everyday meaning." *Satterfield v. Ameritech Mobile Commc'ns*,

155 Ohio St.3d 463 ¶ 18 (2018) (citing R.C. § 1.42); *Schario v. State*, 105 Ohio St. 535 (1922), syllabus (same).

Section 4733.16(D) requires engineering firms like TWISM to "designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering . . . activities and decisions, and those designated persons shall be registered in this state." The Board defines "responsible charge" as "being in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities of the business enterprise." Ohio Adm. Code § 4733-39-02(A). And the Board defines "full[-]time" as working "substantially all" of a firm's engineering hours. *Id*. § 4733-39-02(B). It is undisputed that TWISM's designee James Cooper (1) was registered in Ohio; (2) was "in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities" of TWISM; and (3) worked all TWISM's engineering hours.

Accordingly, the (legal) question for the Court is: May Mr. Cooper, a 1099 independent contractor, serve as TWISM's "full-time . . . manager[,]" or does § 4733.16(D) require a W-2 employee?

Most noticeably, the word "employee" does not appear in either § 4733.16(D) or the Board's regulations. In "interpreting statutes it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Moorehead*, 112 Ohio St.3d 27, ¶ 15 (cleaned up); *see Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, ¶ 12

(2004) (same). Therefore, "no intent may be imputed to the Legislature in the enactment of a law, other than such as is supported by the language of the law itself," and "courts may not speculate, apart from the words, as to the probable intent of the Legislature." *Wachendorf v. Shaver*, 149 Ohio St. 231, 236 (1948). The Board's attempt to insert the word "employee" must be rejected. *See State v. Hairston*, 101 Ohio St.3d 308, ¶ 22 (2004) (foreclosing appellee's argument because it would have required "'read[ing] into the statute language that does not exist.'") (quoting *Middleburg Hts. v. Ohio Bd. of Bldg. Standards*, 65 Ohio St.3d 510, 514 (1992)).

Further, read in context, the words that *do appear* in the text—partners, managers, members, officers, and directors—do not require, full-time W-2 employment. To the contrary, these undefined terms—taken in "their common, everyday meaning," *Satterfield*, 155 Ohio St.3d 463, ¶ 18—mean ownership or leadership positions.[6] To be sure, an

[6] *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (PARTNER: "1. Someone who shares or takes part with another, esp. in a venture with shared benefits and shared risks; an associate or colleague . . .. 2. One of two or more persons who jointly own and carry on a business for profit"); (MANAGER: "1. Someone who administers or supervises the affairs of a business, office, or other organization"); *id*., (OFFICER: "In corporate law, the term refers esp. to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer."); *id*., (DIRECTOR "1. Someone who manages, guides, or orders; a chief administrator. 2. A person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers."); *cf. also id*. (COMPANY: "limited liability company" – "A statutorily authorized business entity that is characterized by limited liability for and management by its ***members*** and ***managers*** . . .") (emphasis added).

individual serving in one of these capacities *could also be* an employee. But the everyday meaning of each of those terms is one of management—not W-2 employment.

Relatedly, nothing in § 4733.16(D) precludes engineering firms from using independent contractors to serve as "full-time partners, managers, members, officers, or directors." Government itself outsources management responsibilities.[7] There is no reason private companies cannot do so, too—certainly no reason identified in the text of § 4733.16(D).

Finally, the Board's argument that the term "full-time" in § 4733.16(D) means "full-time, W-2 employee" cannot be accepted. Aside from the fact that the word "employee" does not appear in the text, the term "full-time" modifies "partners, managers, members, officers, and directors," positions that, as explained above, involve management and not (without more) employment. Further, "full-time" simply means that a firm's "manager" (or partner, etc.) performs all the firm's engineering hours. This meaning is not only consistent with the Board's official regulation (Ohio Adm. Code § 4733-39-02(B)), but it makes sense in the context of Ohio Revised Code Ch. 4733, which does not micromanage how engineering firms are to be run. To construe the law otherwise would require the

[7] *See Cincinnati v. Testa*, 143 Ohio St.3d 371, ¶ 34 (2015) (The Board of Tax Appeals "acted reasonably and lawfully by determining that Cincinnati did not forfeit its exemption under R.C. 5709.08(A) when it hired a private management company to manage its [public] golf courses."); *Sys. Automation Corp. v. Ohio Dep't of Admin. Servs.*, 2004-Ohio-5544, ¶ 2 (10th App. Dist.) (describing Department of Administrative Services' outsourcing day-to-day management of project to independent contractor).

Court to make an extra-textual assumption that engineering firms *must be* open for business 30+ hours a week. Such an interpretation finds no support in the actual text of the law and, further, it would threaten the existence of small, start-up companies like TWISM that have just as much right to engage in engineering as do large, established firms.

In sum, nothing in § 4733.16(D) requires engineering companies to hire (W-2) *employees* as their engineering managers. The Board's argument to the contrary is not based on the text of the statute. And "when the language employed is clear, unambiguous, and free from doubt, it is the duty of the court to determine the meaning of that which the Legislature did enact, and not what it may have intended to enact." *Christ Diehl Brewing Co. v. Schultz*, 96 Ohio St. 27, 27–28 (1917). The Court should rule that § 4733.16(D) does not mandate a W-2 employee to serve as engineering manager.

B. The mere possibility of different interpretations does not create ambiguity

Below, the Board did not argue that § 4733.16(D) was ambiguous. But in its Response here, the Board defends the court of appeals' interpretation of the "ambiguous" law. *See* Memo. In Resp. 11. But ambiguity doesn't exist because a party asserts it. Nor does the mere possibility of multiple readings establish ambiguity. *State v. Porterfield*, 106 Ohio St.3d 5, ¶ 11 (2005). Rather, when ambiguity is claimed, courts must "objectively and thoroughly examine *the writing* to attempt to ascertain its meaning." *Id*. (emphasis added) (citation omitted). Here, the Board points to nothing in *the text* of § 4733.16(D) to show that it is "subject to more than one *reasonable* interpretation." *Clark v. Scarpelli*, 91

Ohio St.3d 271, 274 (2001) (emphasis added) (citation omitted). Instead, ambiguity must be manufactured by inserting the term "employee" into § 4733.16(D) and the regulations. Thus, even though "a court must first look to the language of the statute itself," *Jordan*, 89 Ohio St.3d at 492 (citation omitted), the Board asks the Court to look at language *beyond* the statute. The Board's argument fails since the "'question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.'" *Hairston*, 101 Ohio St.3d 308, ¶ 12 (citation omitted); *see also Christ Diehl Brewing Co.*, 96 Ohio St. at 27–28 ("[I]t is the duty of the court to determine the meaning of that which the Legislature did enact, and not what it may have intended to enact.") (citation omitted). "Whatever the reasons of the Legislature in passing the act may have been, ours is a government of laws, and courts must take the law as they find it; and, if a change is to be made, the same must be made by the Legislature and not by the courts"—nor by the Executive Branch. *Weaver*, 120 Ohio St. at 46. "'To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative.'" *Id*. (quoting *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804)).

Therefore, the Court must resist the temptation to treat mere assertions as evidence of ambiguity, else "allegations of ambiguity become self-fulfilling." *Porterfield*, 106 Ohio St.3d 5, ¶ 11. As explained above, the plain and unambiguous terms of § 4733.16(D) do not require engineering firms to designate W-2 employees as their professional engineers.

C. Even if the Court finds ambiguity in § 4733.16(D), it should reach the same conclusion, after employing the traditional tools of statutory construction

Assuming only for purposes of this argument that the law is ambiguous,[8] the Court must "consider a host of factors" to discover the "intent of the legislature." *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 185 (2002). This intent "is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained." *Cochrel v. Robinson*, 113 Ohio St. 526 (1925), paragraph four of the syllabus. *See* R.C. § 1.49 (identifying factors a court "may" consider to determine the legislative intent of an ambiguous statute, including consequences of a particular construction and the administrative construction of the statute).

Here, the Board's officially promulgated regulations and form-Affidavit confirm the plain-text reading of the statute. The Board defines "full[-]time" as "working more than thirty hours per week or working substantially all the engineering . . . hours for" an engineering firm, Ohio Adm. Code § 4733-39-02(B), and it defines "responsible charge" as "being in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities of the business enterprise" *id*. § 4733-39-02(A). Further, as the

[8] But, as explained above, ambiguity—even if it exists here—still requires *the Court* to determine the law's meaning without deferring to the Board's interpretation.

trial court noted (App. 17a), the Board's "Firm Affidavit of Responsibility" expressly contemplates that engineering managers may do work for more than one firm. Thus, the undisputed facts, the Board's official regulatory definitions, and the Board's official actions all confirm—contrary to its current contention—that § 4733.16(D) does not mandate a W-2 employee to serve as engineering manager.

That conclusion is buttressed by the factual context at issue here—a small, start-up company that does not operate around the clock. Indeed, the Board's counsel below acknowledged that because TWISM was a start-up, it "[didn't] have 30 hours a week of engineering work," and, further conceded, that if an engineer is "doing all [a firm's] engineering work for them [an engineering firm], . . . then [it] meet[s] the ['full[-]time'] requirement" in Ohio Adm. Code § 4733-39-02(B). (Supp. 28 [Sept. 29, 2020 Tr. 15:10–17].) The supposed problem, the Board's counsel argued, was that Mr. Cooper worked those hours "for" himself—not *as an employee* of TWISM. (*Id*. 28–29 [Sept. 29, 2020 Tr. 15:17–16:1].) In short, the Board acknowledges that TWISM and Mr. Cooper meet all the statutory and regulatory requirements but fail only the Board's extra-textual "employee" requirement.

* * *

CONCLUSION

The Court should reverse. The Court should confirm that the Judicial Branch has the exclusive power and duty to say what the law is and, therefore, that judicial deference to agency interpretations is invalid. The Court should also hold that § 4733.16(D) allows engineering firms to employ independent contractors as their engineering managers and remand the case for any further proceedings consistent with this Court's opinion.

* * *

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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