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

REPLY BRIEF OF APPELLANT TWISM ENTERPRISES, LLC

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INTRODUCTION

More than three years ago, the Board denied TWISM's application for a certificate of authorization under R.C. § 4733.16(D) solely because TWISM had not designated a "full-time employee" as its engineering manager. But neither § 4733.16(D) nor the Board's own regulations even mention the word "employee." Accordingly, at every step of this litigation—including in response to TWISM's Memorandum in Support of Jurisdiction here—the Board demanded deference for its extra-textual interpretation. Now, while the Board claims that this is not a deference case (Opp. Br. 1), it still asks for deference to its supposedly long-standing legal interpretation. *See* Opp. Br. 21–23.

But it remains the Judicial Branch's duty—not the Executive Branch's—to say what the law is. Therefore, courts *may consider* an agency's interpretation (long-standing or otherwise); but because courts alone are obligated to determine the best reading of the law, they *must not defer*. Here, in any event, the Board presented no evidence that it ever adopted a reading of § 4733.16(D) or the accompanying regulations that precludes an engineering firm from designating an independent contractor as its manager.

Instead—and contrary to the Board's stated reliance on § 4733.16(D)'s plain language—the Board now relies on language of a nearby statute and a series of policy arguments. Neither claim can be supported. First, the Board points to R.C. § 4733.161, which includes the term "independent contract," and argues that § 4733.16(D)'s lack of such a term shows that it precludes the use of independent contractors. But R.C. § 4733.161 also

says "direct employment," another term absent from § 4733.16(D). Under the Board's argument, § 4733.16(D) must also preclude the use of direct employees. Such a strained reading is unreasonable. Instead, as TWISM has argued throughout, § 4733.16(D) allows engineering firms to use either direct employees or independent contractors as their engineering managers.

The Board's policy-based arguments fare no better. While the Board suggests what "responsible for" and "in responsible charge" *should* mean, the Board cannot identify a single source defining either phrase—or any other part of § 4733.16(D) or its regulations—in a way that would prohibit firms from using independent contractors as engineering managers.

In short, neither the plain language of § 4733.16(D) nor the Board's extra-textual arguments support its contention that TWISM was required to hire a direct, full-time employee as its engineering manager. The Board can succeed only if the Court defers. But under the Ohio Constitution's separation of powers and the allied protections of due process of law, the Court alone must determine the best reading of the law. TWISM Br. 8–31. The Court must, therefore, reject the Board's attempt to both invoke and avoid deference.

After all, the issue before the Court is how the judiciary is to consider and resolve disputes about the law's meaning. The court of appeals' opinion below shows the need for this Court to clarify its deference jurisprudence. The court of appeals failed to consider—much less exhaust—the tools of statutory interpretation and found ambiguity

only because of the parties' competing interpretations. App. 10a–11a, 12a, ¶¶ 28–29, 35. The court's entire analysis was as follows: "Because there are different, reasonable readings of 'full-time manager,' we find that the term is ambiguous. As such, this court must defer to the Board's interpretation." App. 11a, ¶ 29.

Finally, leaving the deference question for another day will allow administrative agencies to continue to demand deference, and lower courts will continue to struggle under this Court's contradictory deference jurisprudence. Therefore, the Court should reverse the court of appeals; hold 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, courts must not defer to agency interpretations; and, finally, conclude that § 4733.16(D) does not require engineering firms to designate direct, full-time *employees* as their engineering managers.

ARGUMENT

I. THIS CASE IS ALL ABOUT ADMINISTRATIVE DEFERENCE

A. The Board's demand for deference should be rejected

The Board mistakenly suggests that the parties and amici agree on the resolution of the deference question. Opp. Br. 22. The Board begins on common ground—quoting R.C. § 1.49(F) for the proposition that courts "may consider . . . the administrative construction of the statute"—but it does not limit itself to that point. The Board (contradicting its earlier position) now says that courts "*need* not defer" to administrative interpretation. Opp.

Br. 21 (emphasis added). But TWISM and Amici contend that courts *must* not defer: Because the Judicial Branch *alone* has the power and duty "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), deference violates the Ohio Constitution's separation of powers. *See, e.g.*, TWISM Op. Br. 8–31; Attorney General's Amicus Br. 5–21.

What's more, the Board still demands deference. *See* Opp. Br. 22 (citing *State ex rel. Linnabary v. Husted*, 138 Ohio St. 3d 535, ¶ 23 (2014) ("reasonable" agency interpretation is "entitled" to deference); *Swallow v. Indus. Comm'n of Ohio*, 36 Ohio St. 3d 55, 57 (1988) (courts must give "due deference" to interpretation of experienced agency tasked with administering the law); *UBS Fin. Servs., Inc. v. Levin*, 119 Ohio St. 3d 286, ¶ 34 (2008) ("long standing administration practice should not be set aside unless judicial construction makes it imperative to do so.") (cleaned up); *State ex rel. Auto. Mach. Co. v. Brown*, 121 Ohio St. 73, 75–76 (1929) (similar statement concerning long-standing administrative interpretation); *Indus. Comm'n of Ohio v. Brown*, 92 Ohio St. 309, 311 (1915) (same)).

The Court should reject the Board's request for deference. First, the age or reasonableness of an agency's interpretation has no bearing on a court's independent duty to determine the *best reading* of the law. *Cf. Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (Deference is improper because it "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.") (citation omitted).

Further, as Professor Bamzai exhaustively documented, administrative practices and constructions may be relevant when "they were contemporaneous to enactment or customary . . . ." Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 943 (2017). Thus, under traditional canons of statutory interpretation, courts "respect" contemporary practices and constructions (*id*. at 941–47) and may use them "'to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause.'" *Id*. at 963 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 407 (Leonard W. Levy ed., Da Capo Press 1970) (1833)). This Court engaged in just this sort of analysis in *In re Friedman's Estate*, 154 Ohio St. 1 (1950). There, *after* applying traditional canons of construction, the Court observed that its "holding seems to have represented the unquestioned administrative construction and practice as related to [the statute at issue] for a long period of years." *Id*. at 10–11 (citation omitted).

The *Friedman* case is notable because it was cited by *In re Packard's Estate*, 174 Ohio St. 349 (1963), which was in turn cited by *UBS Financial Services*, for the proposition that "long standing administration practice should not be set aside unless judicial construction makes it imperative to do so." *UBS Fin. Servs.*, 119 Ohio St. 3d 286, ¶ 34 (cleaned up). As noted, *Friedman* does not support *UBS*'s seemingly definitive deference rule. Nor, in fact, does this Court's analysis in *Indus. Comm'n of Ohio v. Brown*, despite its statement that a long-standing administrative interpretation is "to be reckoned with most seriously, and is not to be disregarded and set aside unless judicial construction makes it imperative

so to do." 92 Ohio St. at 311. Rather, all of these cases support Professor Bamzai and Justice Story's rule that courts respect contemporaneous practices and interpretations and may use them to assist the courts' independent obligation to say what the law is. *See UBS Fin. Servs.*, 119 Ohio St. 3d 286, ¶ 34 (noting that Tax Commissioner presented evidence of, and BTA accordingly found, Commissioner's decades-long administrative practice); *Packard's Estate*, 174 Ohio St. at 356 (noting parties' concession of Tax Commissioner's practice); *Friedman's Estate*, 154 Ohio St. at 10–11 (*confirming* its interpretation based on long-standing administrative construction and practice); *Auto. Mach.*, 121 Ohio St. at 75 (noting executive interpretation of law "since its enactment").[1] In *Industrial Comm'n of Ohio v. Brown*, finally, the Court looked to long-continued administrative interpretation because the industrial-commission laws were relatively new—"a virgin field"—in which contemporaneous and continued interpretation are most relevant *to assist* the courts. 92 Ohio St. at 311.

Here, however, no such practices or constructions are at issue. Indeed, the Board presented *no evidence* that it has *ever* interpreted § 4733.16(D) as requiring a full-time

[1] The *Automobile Machine Co. v. Brown* decision was a mandamus case, which presents yet another distinction. As Prof. Bamzai explains, the "mandamus standard afford[s] great leeway to executive discretion in interpreting legal text," and therefore, the "application of the [deferential] mandamus standard [i]s a consequence *solely* of the form of relief requested, not the consequence of the interpretive theory used." 126 YALE L.J. at 958. In other words, mandamus claims require a high burden to compel an executive agent to act, but the "deference" given to executive action there is distinct from deference to an agency's legal interpretation in the mine-run of cases.

"employee" status for a manager. (*See* App. 32a [Report & Recommendation ("I believe this is a case of first impression.").] Accordingly, even under the Board's reading of these "deference" cases, its failure to present any evidence of its supposedly consistent and long-standing interpretation dooms its demand for deference. *Cf. Int'l Paper Co. v. Testa*, 150 Ohio St. 3d 348, ¶ 17 (2016) (rejecting agency's "invocation of the doctrine of longstanding administrative practice" because there was "no established administrative practice that would have binding effect" when "the administrative practice is entirely recent and relatively limited").

Finally, even if the Board had presented such evidence, it would merely assist the *Court's* interpretation of a law. It remains, as always, solely within the judiciary's province and duty to say what the law is. The Court should reject the Board's request for wholesale deference.

B. The Court must clarify Ohio's deference jurisprudence

The various formulations of deference described above do not exhaust this Court's inconsistent jurisprudence in this area:

- **Applying *de novo* review to questions of law.** *See, e.g., Ceccarelli v. Levin*, 127 Ohio St. 3d 231, ¶ 8 (2010).
- **Applying deference only after finding ambiguity.** *See, e.g., 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).
- **Applying deference without first finding ambiguity.** *See, e.g., State ex rel. Lucas Cnty. 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).[2]

- **Applying *de novo* review of legal questions *and* affording "due deference" to administrative interpretation.** *See, e.g.*, *Bernard v. Unemp. Comp. Rev. Comm'n*, 136 Ohio St. 3d 264, ¶¶ 9, 12 (2013).

- **Deferring to "long-standing" practice or interpretation, unless judicial construction makes it "imperative" to disregard.** *UBS Fin. Servs.*, 119 Ohio St. 3d 286, ¶ 34; *Auto. Mach.*, 121 Ohio St. at 75–76.

- **Holding "an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable."** *State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St. 3d 320, ¶ 10 (2003) (citation omitted); *see id*. at ¶ 15 ("Because the commission's reading of R.C. 4123.651 is reasonable, it is our *duty* to affirm the judgment of the court of appeals upholding the commission's order.") (emphasis added) (affirming denial of workers' compensation claim).

Accordingly, by declining to address deference here, the Court would merely delay resolution of an urgently needed doctrinal question, leave lower courts without direction, and, in the meantime, allow administrative agencies to place their thumbs on the scales of justice. The Court should hold that while courts may consider administrative practices and interpretations, they must not defer.

As explained next, the Board relies on extra-textual arguments to support its interpretation of § 4733.16(D), demonstrating that it cannot succeed here unless the Court abdicates its independent judgment and defers to the Board's interpretation.

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[2] The Board below argued that deference to its interpretation was required only because (it asserted) its interpretation was reasonable. (App. 6a–7a.)

II. THE TEXT OF § 4733.16(D) ALLOWS A FIRM TO HIRE EITHER AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR AS ITS ENGINEERING MANAGER

Because the language of § 4733.16(D) does not require an engineering firm to directly employ an engineering manager, the Board **(A)** offers an inapt comparison to another engineering statute that ultimately supports *TWISM's* interpretation; and **(B)** relies on an ethics opinion and position statements—but no relevant definitions—from an engineering organization to raise several irrelevant policy arguments.

A. The Board's construction-by-comparison argument supports TWISM

According to the Board, because R.C. § 4733.161—another engineering statute—explicitly authorizes an "employer-independent contractor" relationship, and because § 4733.16(D) does not include this explicit authorization, § 4733.16(D) must then *require* an employer-employee relationship. Opp. Br. 2, 16–17. The Board, however, omits critical language from § 4733.161, which says that engineering services may be provided and performed "by a firm holding a certificate of authorization . . . through *either direct employment* or *independent contract* with the person contracting with the owner and offering the services." *Id*. 4733.161(A)(1) (emphasis added).

As the Board argues, if the General Assembly had wanted to require an employer-employee relationship for firms and their engineering managers in § 4733.16(D), it could have said so explicitly. Opp. Br. 16–17. But § 4733.16(D) says nothing about an employer-employee relationship. TWISM thus properly designated an independent contractor as its engineering manager.

B. The Board fails to identify any definitions of statutory terms to support its interpretation of § 4733.16(D)

The Board goes to great lengths to argue what § 4733.16(D) *should* mean. But none of the authorities it cites—including its own regulations—say anything about the supposedly requisite employment structure of engineering firms.

First, the Board contends that the terms "responsible for" and "in responsible charge" have long-standing meanings in the engineering field (Opp. Br. 9–10, 13), but the Board points to no such meanings that *require* an employer-employee relationship between a firm and its engineering manager. Thus, while "responsible charge" may be understood by professional-engineering organizations as the direct control and personal supervision of engineering work, (Opp. Br. 10), this understanding applies to the manager's control and supervision over engineering work, *not* to the firm's control of the manager. *See* § 4733.16(D) (requiring engineering firm to designate a *manager* "as being responsible for and in responsible charge of *the professional engineering . . . activities and decisions*.") (emphasis added). In other words, the Board's control-and-supervision "definition"—like the term "responsible charge" itself—says nothing about the relationship between the firm and its engineering manager. The Board's reliance on R.C. § 1.42 ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly") (*see* Opp. Br. 10–11) is misplaced since the Board fails to show that either "responsible for" or "in responsible charge" has acquired a meaning that requires an engineering manager to be an *employee*. Thus, although it's

true, as the Board notes, that the General Assembly may "import" a known term into a statute (Opp. Br. 10), the Board does not identify any employment relationship that was (supposedly) "imported" into § 4733.16(D).

Indeed, while asserting a universal and "unbroken" use of "responsible charge" to mean "direct control" (Opp. Br. 10–11) the Board itself codified a less-stringent (under its theory) definition of "responsible charge" as "being in control of, accountable for and in *either* direct *or indirect* supervision of the engineering . . . activities" of the firm. Ohio Adm. Code 4733-39-02(A) (emphasis added). Nowhere does the Board use the word "employee" to limit who may be designated as an engineering manager, nor does the Board define any terms to require that an engineer manager be a direct, full-time employee.

The Board also cites to an ethics opinion—not a definition—from the National Society of Professional Engineers. Opp. Br. 11. According to this opinion, an engineer *should* not merely recommend (or not) approval of engineering plans after the fact; rather, the "better course" for an engineer would be to sign drawings over which he had authority and control. *Id*. (citing Nat'l Soc. Prof. Eng'rs, Bd. of Ethical Review No. 19-11 (Jan. 30, 2020)). But whatever the "better" course may be, nothing in this opinion requires an engineering manager to be an employee.

And, in any event, the undisputed evidence shows that TWISM fully satisfies this "supervision and control" ethics opinion. Mr. Cooper testified that when working with Mr. Alexander, they (or Mr. Cooper alone) assessed job sites, after which estimates were

prepared for contractors; Mr. Alexander then produced drawings based on Mr. Cooper's field reports, and Mr. Cooper reviewed the drawings to ensure compliance with Ohio law. (Supp. 12–14 [Tr. 21:1–23:1].) In short, Mr. Cooper was involved throughout the process and did not merely recommend approval of work with which he had no prior involvement. He thus scrupulously complied with Ohio Adm. Code 4733-35-07(A), which states that an engineer "shall not sign and/or seal professional work unless that work was prepared under his/her supervision and direction." But the Board never adopted a regulation to require a manager to be an "employee" under § 4733.16(D).

The Board tries to make much of the fact that engineering may be performed only through natural persons and that "direct control" requires personal supervision. Opp. Br. 5–6, 10. This is a tautology: Of course engineering and supervision must be *personally* carried out. But Ohio allows natural persons to provide these services through a corporate form. *See* R.C. § 4733.16(A) ("A firm, partnership, association, limited liability company, or corporation may provide professional engineering . . . services in this state as long as the services are provided only through natural persons registered to provide those services in the state . . .."). And, accordingly, both § 4733.16 and the Board's regulations expressly authorize and contemplate that entities themselves—like TWISM—may obtain certificates of authorization. *See id.*; Ohio Adm. Code 4733-39-02(B) (defining "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*.") (emphasis added).[3]

The Board claims that, because an independent contractor would not be responsible for "following an employer's every command about how the work is done" (which, to be clear, is not what the statute says), somehow the firm couldn't impose its standards on the engineering work. Opp. Br. 12. But, as this Court has explained, "every contract for work"—including contracts with independent contractors—"reserves to the employer a certain degree of control to enable him to ensure that the contract is performed according to specifications." *State ex rel. Nese v. State Teachers Retirement Bd. of Ohio*, 136 Ohio St. 3d 103, ¶ 34 (2013) (citation omitted).[4] And, in any event, the Board also emphasizes that

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[3] The Board further asserts either that TWISM is ineligible for a certificate of authorization (because it hasn't designated a full-time employee as manager) or that it doesn't need a certificate (because Mr. Cooper, not TWISM, is doing the engineering work). Opp. Br. 20. This argument cannot be squared with R.C. § 4733.16(A), which allows individuals—even non-engineers—to form entities, obtain certificates of authorization, and provide engineering services.

[4] The Board claims that a firm's (supposed) inability to ensure that its employees follow company policy is "exactly what happened" in *Sharqawi v. Kirby Co.*, No. 20-cv-271, 2021 WL 4756095 (N.D. Ohio Sept. 7, 2021). *See* Opp. Br. 12. But *Sharqawi* didn't identify any negative effects of an independent-contractor relationship. Rather, the court denied a motion to dismiss a claim alleging that the employer breached an agreement by treating Mr. Sharqawi as an employee while the contract stated that he was to be an independent contractor. The other cases cited here by the Board (Opp. Br. 12) similarly say nothing about the policy implications of an independent-contractor relationship. *See Desimone v. Allstate Ins. Co.*, Nos. C 96-03606 CW & C 99-02074 CW, 2000 WL 1811385 (N.D. Cal. Nov. 7, 2000) (addressing employment dispute under California law); *Howard v. Life Care Centers of Am., Inc.*, No. E2004-00212-COA-R3-CV, 2004 WL 1870067 (Tenn. App. Aug. 20, 2004) (holding that because defendant decided against renewing plaintiff's contract, plaintiff was not entitled to protection of Tennessee's whistleblower statute even though a question of

"engineers may not rubber-stamp the work of non-engineers." Opp. Br. 6.[5] The Board thus complains that an independent contractor has both insufficient control and too much discretion. *See id.* 16 (making similar claims about liability issues). The truth of the matter is that a professional engineer—whether a direct employee or an independent contractor—has legal and ethical obligations to ensure that engineering plans meet certain standards. *See, e.g.*, R.C. § 4733.11 (license qualifications); Ohio Adm. Code Ch. 4733-09 (qualifications); *id*. Ch. 4733-25 (Code of Ethics). But under the Board's argument, an employer's "direct control" could trump the legal and ethical obligations of its (fully employed) engineering manager.

Resuming its "better policy" rationale, the Board contends that "responsible for" must mean "liable for" and then raises hypothetical circumstances in which an injured party seeks recovery for the negligent acts of a non-employee manager. Opp. Br. 13–16. The Board's argument is severely flawed.[6] First, it is entirely question-begging: That an

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material fact existed concerning his employment status); *Ogunde v. Prison Health Servs., Inc.*, 645 S.E.2d 520 (Va. 2007) (breach-of-contract claim under Virginia law).

[5] In the engineering profession, this prohibited practice is called "plan-stamping." Mr. Cooper's testimony confirms that he does not engage in plan-stamping, as he explained that he changed Mr. Alexander's drawings—which were based on Mr. Cooper's field reports—to ensure that they complied with Ohio law. (Supp. 13–14 [Tr. 22:5 – 23:1].)

[6] The Board's cases do not address the purported liability issues the Board raises here. *See Witherspoon v. Sides Constr. Co.*, 362 N.W.2d 35 (Neb. 1985) (affirming in part and reversing in part order dismissing all claims as time barred); *Sime v. Tvenge Associates Architects & Planners, P.C.*, 488 N.W.2d 606 (N.D. 1992) (affirming order dismissing claims against architects, engineers, and builder as time barred). The Board claims that this Court's opinion in *State ex rel. Yost v. Burns* makes "almost exactly" the point that when

engineering manager be "responsible for" (or liable for) a firm's engineering work leaves open the question of to whom the manger is responsible. And the Board's policy-based argument fails to consider how injured parties can recover in these circumstances. For example, an engineering firm like TWISM could maintain malpractice insurance to cover the negligence of its independent contractors.[7] Similarly, an injured client could recover directly from the firm, which could then seek indemnification from its independent contractor.[8] A client could also hold a firm liable for, *e.g.*, its negligent hiring of an independent contractor.[9] Firms and independent contractors could execute contracts setting forth

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"an independent contractor is the supervisor, the supervised engineering work is no longer the *firm's* engineering work." Opp. Br. 16 (citing *Burns*, --- Ohio St. 3d ---, 2022-Ohio-1326 ¶¶ 2, 3, 13). That's not at all what this Court said in *Burns*. Rather, the Court held that the charter school's *CEO* was not liable for the *treasurer's* embezzlement "because he [the CEO] did not receive or collect the public money that was misappropriated" and because the treasurer worked for the school's board. *Id*. ¶¶ 1, 13. *Burns* did not address the employer's liability.

[7] TWISM's operating agreement (§ 67) provides that TWISM "may acquire [liability] insurance on behalf of any Member, employee, *agent or other person* engaged in the business interest of the Company" for "liability asserted against them . . . while acting in good faith on behalf of the Company." (Vol. 1 – Record, p. 115 of 313 [pdf]) (emphasis added). Because the Board failed to raise this "liable for" argument until the last minute, TWISM did not have the opportunity to submit evidence of its malpractice insurance.

[8] *See, e.g.*, *CSX Transp., Inc. v. Columbus Downtown Dev. Corp.*, 307 F. Supp. 3d 719, 728 (S.D. Ohio 2018) (explaining, under Ohio law, an implied right to indemnification is recognized for certain relationships, including independent contractor and employer).

[9] *See Albain v. Flower Hosp.*, 50 Ohio St. 3d 251 (1990), overruled on other grounds, *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St. 3d 435 (1994).

the liabilities of the parties.[10] And, finally, Ohio recognizes exceptions to the general rule relieving employers of liability for the acts of independent contractors, including estoppel and ratification.[11] But, regardless, none of these policy issues alters the language of § 4733.16(D), which does not require that the firm be "responsible for" the engineering work—it requires that the firm's designated manager be "responsible for" the work. Finally, even if "responsible for" could be read as "liable for," nothing—certainly nothing in R.C. Ch. 4733—allows an independent contractor to escape liability for his own negligent work.

Ultimately, the question before the Court is not, What the best policy for making (the Board's hypothetical) plaintiffs whole,[12] but rather, What is the best meaning of the terms used in the statute. The Board acknowledges that "a firm might structure its affairs by hiring employees to do the engineering work, and then hire an independent contractor to supervise those employees." Opp. Br. 16. The Board claims, however, that such an arrangement would deviate from § 4733.16(D)'s "responsible for" requirement. But whether the arrangement deviates from the statute's requirements is precisely the

[10] The *Ogunde* case cited by the Board involved a contract through which the supervisor was liable for the work of independent contractors he supervises even though the supervisor was himself an independent contractor. 645 S.E.2d at 524.

[11] *See, e.g.*, *Clark*, 68 Ohio St. 3d at 444.

[12] The Board cites to several cases involving accidents that may—or may not—create grounds for tort actions, but none that address the statutory language at issue here. *See* Opp. Br. 14–15.

question before the Court. TWISM contends that its arrangement—supervision of TWISM's engineering work by an independent contractor—does *not* violate § 4733.16(D). The Board's circular, policy-based argument is irrelevant and without merit.

III. THE BOARD ERRED BY DENYING TWISM'S APPLICATION

Because the statute supports TWISM's argument, the Court should reverse the court of appeals and require the Board to issue a certificate of authorization to TWISM. The Board, again, tries to change the subject.

The Board asserts that its decision to deny TWISM's application is supported by evidence that TWISM "sidestepped the law" in 2018. Opp. Br. 18–19. Not so. While TWISM was unaware of the certificate-of-authorization requirement, once informed it acted immediately to correct the mistake. But the Board's denial was based *solely* on TWISM's designation of an independent contractor as its engineering manager. (Supp. 7–8 [Tr. 16:21–17:1] (Board's counsel confirming sole reason for denial); App. 32a (Hearing Officer Report and Recommendation 5 ("The sole dispute in the matter is whether, given the undisputed facts, Mr. Cooper is a full-time manager . . . as required by R.C. 4733.16(D) and defined in Ohio Adm. Code 4733-39-02(B) . . . .")). Further, the evidence shows that all of TWISM's engineering work was supervised and approved by Mr. Cooper, an Ohio-registered professional engineer. *See* TWISM Op. Br. 4–5. And there is no evidence that any of TWISM's work caused harm. TWISM's innocent mistake in 2018 did not form the

basis of the Board's denial of TWISM's application, and it has no bearing on the issues before the Court.

The Board also defends its denial by arguing that law firms cannot be owned by paralegals. This is a non sequitur. Ohio law expressly precludes non-lawyers from having ownership interests in law firms. *See* Ohio R. Prof. Conduct 5.4(d). No such bar applies to engineering firms. Indeed, as noted above, Ohio expressly allows non-engineers to form engineering firms. R.C. § 4733.16(A).

Further, this Court's decision in *Disciplinary Counsel v. Spicer*, 160 Ohio St. 3d 466 (2020)—relied on by the Board (*see* Opp. Br. 19)—confirms the Board's error. In *Spicer*, this Court enjoined and fined a paralegal for deceiving the client that a lawyer would supervise the work and for completing legal work without a lawyer's supervision. *Spicer* at ¶¶ 3–4, 13. Here, there is no contention that TWISM improperly engaged in professional engineering by completing engineering work without the supervision of a professional engineer. Therefore, the paralegal analogy fails completely. Non-engineers are permitted to own engineering firms, and it is undisputed that Mr. Cooper didn't just supervise TWISM's professional engineering work—he performed all of it.

* * *

CONCLUSION

The Court should reject the Board's last-minute plea to avoid the deference question. On the merits, this Court should reverse the court of appeals; hold that only Ohio's Judicial Branch is vested with the power and obligation to say what the law is and, further, that while Ohio courts may consider executive-branch interpretations—as they consider arguments from all parties to a case—courts must not defer to agency interpretations; and conclude that § 4733.16(D) does not require engineering firms to designate direct, full-time (W-2) *employees* as their engineering managers. The Court should remand with an order to issue a certificate of authorization to TWISM and to grant TWISM all other relief that the Court finds just and proper.

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Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF SERVICE

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