No. 121A23 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ALVIN MITCHELL, Petitioner-Appellant, v. THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS, Respondent-Appellee.	From Forsyth County

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BRIEF OF *AMICI CURIAE*
NORTH CAROLINA FARM BUREAU FEDERATION, INC. &
NORTH CAROLINA CHAMBER LEGAL INSTITUTE

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INTEREST OF AMICI

Amicus Curiae North Carolina Farm Bureau Federation Inc.,[1] is the State's largest general farm organization, representing approximately 35,000 farm families in every county of North Carolina.

[1] No person or entity, other than *Amici*, their members and their counsel, either directly or indirectly wrote this brief or contributed money for its preparation. *Amici's* counsel express gratitude to Zannah Tyndall, a third-year law student at Campbell University School of Law who is a Farm Bureau member and summer legal associate, for her outstanding research and contributions to this brief.

The organization's volunteer-farmer members raise livestock and poultry and produce myriad crops throughout North Carolina, such as tobacco, sweet potatoes, melons, cotton, soybeans, corn, and wheat. Farm Bureau's members are the backbone of the State's $111.1 billion agricultural sector.[2]

Amicus Curiae North Carolina Chamber Legal Institute ("NCCLI") is a North Carolina nonprofit corporation organized to promote and improve North Carolina's business and economic development climate. One way NCCLI accomplishes this goal is by defending established legal principles and the legality of long-standing business practices against unwarranted intrusion.

Amici became interested in this case after this Court granted Appellant's Petition for Discretionary Review on the issue of agency deference. *Amici*'s members are heavily regulated by numerous state agencies, including, for example, the Department of Agriculture & Consumer Services, the Department of Environmental Quality, and the Department of Revenue. While in many instances *Amici*'s members work

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[2] Dr. Mike Walden, *Agriculture and Agribusiness: North Carolina's Number One Industry*, North Carolina State University at https://cals.ncsu.edu/agricultural-and-resource-economics/wp-content/uploads/sites/46/2017/07/AgricultureAgribusinessReport-2023-digital.pdf (last visited May 22, 2024).

well with these and other agencies, there is always a risk that an agency will interpret a statute or a rule in a way that imposes unlawful regulatory burdens on their members. In the event that an *Amici* member challenges an agency action in court, the application of agency deference unfairly tilts the scales of justice in favor of the agency.

In this brief, *Amici* survey this Court's agency deference cases in detail, emphasizing the judicial branch's fundamental role as *the* interpreter of statutes and regulations in our constitutional framework. As illustrated below, the State's agency deference case law was derived from federal cases that are now being called into question. Regrettably, our appellate courts adopted these concepts without engaging in significant legal analysis. Further, our courts have often conflated the distinct approaches to agency deference and applied them inconsistently, thus creating a confused jurisprudence.

Accordingly, *Amici* urge this Court to make clear that North Carolina's courts must not defer to agencies when interpreting statutes and regulations because our courts ultimately decide the meaning of our laws. Doing so will restore the balance of power between our three

branches of state government, clear up our confusing deference case law, and foster the administration of good and fair government.

ISSUE PRESENTED

> Under North Carolina law, when, if ever, should a court defer to an agency's interpretation of the rules and regulations that the agency has promulgated?

ARGUMENT

I. DEFERRING TO AGENCY INTERPRETATIONS UPSETS THE DELICATE BALANCE THAT SUPPORTS THE SEPARATION OF POWERS BETWEEN THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES OF STATE GOVERNMENT.

Since issuing *Baynard v. Singleton*, 1 N.C. 5, 1 Mart. 48 (1787), this Court has repeatedly asserted its constitutional duty to interpret the law. *See also McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) ("The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution.") (citations omitted); *Houston v. Bogle*, 32 N.C. (10 Ired.) 496, 504 (1849) ("The right to *decide* what the law is and what it was is vested in the Supreme Court."). Thus, when a court defers to an agency's interpretation of a statute or regulation, it *yields* its inherent constitutional authority to an executive agency's opinion. *See defer*,

Black's Law Dictionary (11th ed. 2019). By abdicating its responsibility to declare the meaning of a law, a deferring court willingly erodes its power and enables a regulatory agency to exceed any restraints the General Assembly may have imposed upon it. *See Myers v. Yamato Kogyo Company, Ltd.*, 597 S.W.3d 613, 617 (Ark. 2020) ("By giving deference to agencies' interpretations of statues, the court effectively transfers the job of interpreting the law from the judiciary to the executive. This we cannot do."). In other words, agency deference is anathema to our constitutional structure. Accordingly, it should have no place in our jurisprudence.

II. THE STATE'S DEFERENCE JURISPRUDENCE IS SUPPORTED BY PERFUNCTORY LEGAL ANALYSIS AND OFTEN HAPHAZARDLY APPLIED.

There are two instances in which courts may defer to an agency's interpretation of a law. The first arises when a regulatory agency interprets a statute. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781–82, (1984) (deferring to permissible agency interpretations of "silent or ambiguous" statutes). The second involves an agency's interpretation of a regulation it has adopted. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct.

905, 911 (1997) (holding an agency's interpretation of a regulation is controlling unless plainly erroneous or inconsistent with the regulation).

Generally speaking, North Carolina's appellate courts have acknowledged the distinction between statutory and regulatory deference. This Court has consistently refused to defer to agency interpretations of unclear statutes, instead only considering an agency's views. *See, e.g.*, *State ex rel. Utilities Comm'n v. The Public Staff of N.C. Utilities Comm'n*, 309 N.C. 195, 213, 306 S.E.2d 435, 445 (1983). ("It is the Court and not the agency that is the final interpreter of legislation"); *Watson Industries v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952) ("It is only in cases of doubt or ambiguity that the courts may allow themselves to be guided or influenced by an executive construction of a statute"). Notably, this Court has never adopted *Chevron*, though the Court of Appeals appears to frequently rely upon the doctrine. *See, e.g.*, *Total Renal Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 666, 776 S.E.2d 322 (2015); *Carpenter v. N.C. Dep't of Hum. Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), *disc. rev. improvidently allowed*, 333 N.C. 533, 427 S.E.2d 874 (1993). In contrast, when interpreting a rule or policy adopted by a regulatory agency, this

Court gives the agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Morrell v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994).

A careful look at the State's deference jurisprudence reveals the perfunctory adoption of agency deference concepts that have been haphazardly applied. Fortunately, this Court may remedy these shortcomings by reiterating that our courts are solely responsible for ascertaining the meaning of statutes and regulations.

A. The State's deference case law is derived from federal cases that are being called into question.

The concept of federal courts deferring to another branch of government's interpretation of ambiguous laws dates back to at least the 1800s. In *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827), the Supreme Court of the United States stated that when deriving the meaning "of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id.* More than a century later, in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944), the Supreme Court articulated a similar idea.

In *Skidmore*, the Supreme Court considered whether several packing plant employees were entitled to overtime pay under the federal Fair Labor Standards Act ("FLSA") for time they spent "waiting" to perform their duties as fire fighters. In concluding the FLSA did not "preclude[ ] waiting time from also being working time" for purposes of overtime pay, the Supreme Court wrote:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, *while not controlling upon the courts by reason of their authority*, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and *all those factors which give it power to persuade, if lacking power to control.*

Id. at 140, 65 S. Ct. at 164 (emphasis added).

Thus, *Edwards' Lessee* and *Skidmore* stand for the unremarkable proposition that courts should consider agency interpretations as merely persuasive authority, as they do when reviewing non-binding opinions issued by other federal and state courts.

One year after issuing *Skidmore*, the Supreme Court articulated a different standard to help federal courts when ascertaining the meaning

of ambiguous "administrative regulation[s]." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215 (1945). While noting that the text of a constitutional provision or a statute may be relevant in some respects, the Supreme Court stated, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id. at* 414, 65 S. Ct. at 1217. Thus, the Court observed, its "only tools," to employ in these situations "are the plain words of the regulation and any relevant interpretations of the [regulator]." *Id.* The Supreme Court subsequently affirmed *Seminole Rock*'s approach to deference in *Auer,* 519 U.S. at 461, 117 S. Ct. at 911.

But the Supreme Court is now questioning the wisdom of agency deference. Recently, the Court narrowed *Auer*'s reach after considerable criticism. *See Kisor v. Wilkie*, 588 U.S. 558, 574, 139 S. Ct. 2400, 2415 (2019) (stating "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous"). And the Court is currently considering *Chevron*'s future in *Loper Bright et al. v. Raimondo*, No. 22-451 (U.S.) and *Relentless et al. v. Dep't of Commerce et al.*, No. 22-1219 (U.S.) (both argued Jan. 17, 2024).

Meanwhile, nine state supreme courts have recently rejected the use of agency deference. *See Myers*, 597 S.W.3d at 617 (2020) (rejecting agency deference); *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140 (Colo. 2021) (rejecting *Auer* deference); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 293 P.3d 723 (2013) (rejecting deference); *In re Complaint of Rovas Against SBC Michigan,* 482 Mich. 90, 754 N.W.2d 259 (2008) (rejecting *Chevron* deference); *Mississippi Methodist Hosp. & Rehab. Ctr., Inc. v. Mississippi Div. of Medicaid*, 319 So. 3d 1049 (Miss. 2021) (rejecting *Auer* deference, eliminating all deference); *King v. Mississippi Mil. Dep't*, 245 So. 3d 404 (Miss. 2018) (rejecting *Chevron* deference); *In re Application of Alamo Solar I, L.L.C.,* No. 2023-Ohio-3778 (2023) (rejecting *Auer* deference); *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Pro. Engineers & Surveyors*, 2022-Ohio-4677, 172 Ohio St. 3d 225, 223 N.E.3d 371 (2022) (rejecting *Chevron* deference); *Murray v. Utah Lab. Comm'n*, 2013 UT 38, 308 P.3d 461 (2013) (rejecting deference); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI App 75, 382 Wis. 2d 496, 914 N.W.2d 21 (2018) (rejecting *Chevron* deference). This case presents an opportunity for this Court to once again rule that our courts do not yield interpretative authority to regulators.

i. This Court has consistently treated agency interpretations of statutes as merely persuasive authority.

It appears that one of this Court's earliest references to the concept of deferring to agency statutory interpretations involved a 1912 dispute regarding the validity of an election to establish a local school district in Wake County and impose a property tax to fund the new district. *Gill v. Bd. of Comm'rs of Wake County*, 160 N.C. 176, 76 S.E. 203 (1912). A then-existing statute authorized Wake County to hold the election, provided that the Wake County Board of Commissioners and the county's Board of Education approved a "petition of one-fourth of the freeholders with the proposed special school district" and gave sufficient public notice of the election. *Id.* at 179, 76 S.E. at 204. The plaintiffs argued that the petition had not been signed by the requisite number of freeholders in the district because women and non-residents were excluded from the total count of freeholders. The *Gill* Court, in a divided opinion, rejected plaintiffs' claims. In partial support of its decision, this Court stated: "Numerous authorities agree practically that contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate

and valuable aids in ascertaining the meaning of a statute." *Gill*, 160 N.C. *at* 188, 76 S.E. at 208 (1912) (citations omitted). Noting that "the record discloses the 'educational department and the Attorney General, its legal adviser,'" had interpreted the statute to exclude women and non-residents, the *Gill* Court adopted that interpretation "as being not only a safe guide, but as agreeing with our notion of what the Legislature meant" when enacting the statute. *Id. at* 190, 76 S.E. at 209.

Subsequently, this Court cited *Gill* in several cases interpreting various portions of the Revenue Act. For example, in *Watson,* this Court ruled in favor of a taxpayer who sought to recover the amount of excise taxes it paid to rebroadcast radio programs. 235 N.C. at 211, 69 S.E.2d at 511. Although this Court observed that the Secretary of Revenue's interpretation of the Revenue Code may be "one of the most significant aids" in ascertaining the meaning of the excise tax statute, *see id.*, it refused to rely on the Secretary's interpretation because the taxpayer was not subject to the excise tax under the plain language of the statute, *id.* at 209, 69 S.E.2d at 510. In reaching its decision, this Court emphasized that "[u]nder no circumstances, will the courts follow an administrative interpretation in direct conflict with the clear intent and

purpose of the act under consideration." *Watson*, 235 N.C. at 211, 69 S.E.2d at 511. *See also e.g.*, *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 310, 59 S.E.2d 819, 822 (1950) ("The construction given a taxing statute by the Commissioner of Revenue will be given consideration by the Court, though not controlling."); *Cannon v. Maxwell*, 205 N.C. 420, 422, 171 S.E. 624, 625 (1933) ("While not controlling, [an agency's contemporaneous] construction is always entitled to due consideration."). Importantly, in *Gill* and its later decisions, this Court has never declared that our courts must defer to an agency's interpretation of an unclear statute.

This Court continued to view agency interpretations of statutes and regulations as merely persuasive authority into the 1980s. For example, in one case, this Court upheld the Marine Fisheries Commission's denial of a dredge and fill permit, emphasizing that "[f]inal interpretation of statutory terms is . . . a judicial function," but agency interpretations "are entitled to due consideration by the courts." *In re Broad and Gales Creek Cmty. Ass'n*, 300 N.C. 267, 274, 266 S.E.2d 645, 651 (1980). Upon due consideration, this Court concluded the Commission's interpretation of the dredge and fill permit statute "to be entirely proper and in accordance

with the intent and goals of the legislature." *Gales Creek*, 300 N.C. *at* 275, 266 S.E.2d at 651.

A year later, this Court rejected the North Carolina Credit Union Commission's interpretation of the term "common bond" in N.C.G.S. § 54-109.26 to allow the State Employee's Credit Union to expand the scope of its membership to include local and federal government employees. *In re N.C. Savings and Loan League*, 302 N.C. 458, 460, 276 S.E.2d 404, 406 (1981). This Court began its analysis by stating the long-standing and familiar de novo review standard: "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency . . . ." *Id.* at 465, 276 S.E.2d at 410. Applying *Skidmore*, the Court then concluded the Commission's interpretation of the term "common bond" was "unpersuasive." *Id.* at 465-66, 276 S.E.2d at 410.

Following *Savings & Loan*, this Court has frequently applied *Skidmore*'s non-binding approach to analyzing agency interpretations. *See e.g.*, *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 371 N.C. 697, 700-01, 821 S.E.2d 376, 379 (2018); *High Rock Lake Partners, L.L.C. v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735

S.E.2d 300, 303 (2012); *Lee v. Gore*, 365 N.C. 227, 229-30, 717 S.E.2d 356, 359-60 (2011); *Wells v. Consolidated Judicial Retirement System of N.C.*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001); *Britt v. N.C. Sheriff's Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E. 2d 75, 78 (1998); *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981). In doing so, it has consistently stated that our appellate courts have the final say as to the meaning of statutes and regulations. *See, e.g.*, *High Rock Lake Partners,* 366 N.C. at 319, 735 at 303 ("The responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform."); *Lee,* 354 N.C. at 319, 553 S.E.2d at 881 ("[I]t is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes.") (citation omitted).

ii. However, the Court of Appeals has adopted a conflicting approach relating to agency interpretations of statutes.

Notwithstanding this Court's frequent statements that courts should not defer to agency interpretations of statutes, the Court of Appeals invoked the *Chevron* doctrine in *Carpenter* 107 N.C. App. at 278,

419 S.E.2d at 582. There, the Court of Appeals considered a state agency's interpretation of a federal regulation. *Carpenter*, 107 N.C. App. at 280, 419 S.E.2d at 584. With scant analysis, the *Carpenter* Court adopted the *Chevron* reasonableness test, describing the doctrine as "well settled." *Id. at* 279, 419 S.E.2d at 584 (citations omitted). Since then, the Court of Appeals has relied upon *Chevron*-like deference on numerous occasions, even though this Court has never actually applied *Chevron*. *See, e.g.*, *Fund Holder Reps., LLC v. N.C. Dep't of State Treasurer*, 275 N.C. App. 470, 474–75, 854 S.E.2d 64, 67 (2020), *aff'd*, 381 N.C. 324, 872 S.E.2d 924 (2022); *AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs.*, 240 N.C. App. 92, 102, 771 S.E.2d 537, 543 (2015); *Total Renal Care*, 242 N.C. App. at 673, 776 S.E.2d at 327; *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006).

iii. While our courts give an agency's interpretation of its own regulations "controlling weight," this approach is falling out of favor.

Shifting to agency regulatory interpretations, *Morrell* instructed our courts to give "substantial deference" to agencies when they are interpreting rules or policies that the agency has adopted. *Morrell,* 338

N.C. at 237, 449 S.E.2d at179-80. At issue in *Morrell* was whether a North Carolina Department of Health and Human Services' ("DHHS") policy regarding the eligibility requirements that triggered financial support for families with dependent children violated federal regulations. Citing solely United States Supreme Court cases, including *Seminole Rock*, *Morrell* declared the "well established" rule that "the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Morrell*, 338 N.C. *at* 238, 449 S.E.2d at 180 (citations omitted). This Court then stated it would "defer to [DHHS's] interpretation of the regulations as plausible and consistent with their language, and hold that an alternative reading is not compelled by the regulations' plain language or by other indications of the Secretary's intent at the time of the regulations' promulgation." *Id.* (citation omitted and cleaned up).

Interestingly, the Court of Appeals had taken the same position several years before in *Pamlico Marine Co., Inc., v. N.C. Dep't of Nat. Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986). The legal question in *Pamlico Marine* revolved around the Coastal Resources Commission's interpretation of its regulations that provide exemptions

from minor permits required under the Coastal Area Management Act. *Pamlico Marine*, 80 N.C. App. at 203-04, 341 S.E.2d at 108. In its analysis, the Court of Appeals cited *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969), for the proposition that "when construing an administrative regulation, 'a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Pamlico Marine*, 80 N.C. App. at 206, 341 S.E.2d at 112 (citing *Thorpe* 393 U.S. 268 at 276, 89 S.Ct. at 523 (1969)). The panel also cited *State v. Best*, a criminal matter that simply articulated this Courts non-binding approach to addressing agency statutory interpretations. *Pamlico Marine* 80 N.C. App. at 206, 341 S.E.2d at 112 (citing *State v. Best*, 292 N.C. 294, 308, 233 S.E.2d 544, 553 (1977) ("Where an issue of statutory construction arises, the construction adopted by those charged with the execution and administration of the law is relevant and may be considered.") (citation omitted)).

Recently, the United States Supreme Court carped at the flawed approach that *Morrell* and *Pamlico Marine* adopted. In *Kisor v. Wilkie*, the Supreme Court stated that its "most classic formulation of the test—whether an agency's construction is 'plainly erroneous or inconsistent with the regulation,' . . . . may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Kisor*, 588 U.S. at 574, 139 S. Ct. at 2414 (citing *Seminole Rock*, 325 U.S. at 414, 65 S.Ct. at 1215). *Kisor* also criticized *Thorpe* for granting "*Auer* deference without careful attention to the nature and context of the interpretation." *Kisor,* 588 U.S. at 574, 139 S. Ct. at 2414. While *Kisor* may have cribbed the plainly erroneous analysis somewhat by requiring that an agency regulation be "genuinely ambiguous," *id.* at 574, 139 S. Ct. at 2415, it failed to do what this Court should now: end the practice of deferring to an agency's interpretation of its own regulations.

B. Inconsistent approaches to agency deference have created a cluttered and confused jurisprudence.

Inconsistent application of this Court's deference decisions has cluttered our jurisprudence and created confusion for courts and litigants alike. This Court should take the opportunity to clean up this jurisprudential mess.

As noted above, the Court of Appeals has applied *Chevron*-like deference in myriad cases while overlooking this Court's long-standing position that agencies will not be given deference when they interpret statutes. *Compare Carpenter*, 107 N.C. App. at 279, 419 S.E.2d at 584 ("It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute.") *with Utilities Comm'n,* 309 N.C. at 211, 306 S.E.2d at 444 ("Nevertheless, it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes."). Therefore, this Court should restate its consistent position against deferring to statutory interpretations by agencies.

In the regulatory deference context, *Morrell* and *Pamlico Marine* gave agencies substantial deference when interpreting their own regulations. As with *Carpenter*, neither *Morrell* nor *Pamlico Marine* provided much analytical support for allowing extensive agency deference. Moreover, in *Pamlico Marine*, the Court of Appeals conflated the highly deferential *Auer*-type deference standard with the non-binding approach to statutory interpretation that this Court has always

employed. *Supra* at 18. Unfortunately, our courts have continued to repeat this error.

In *N.C. Acupuncture Licensing Bd.*, this Court interpreted whether the practice of dry needling fell within the scope of the Physical Therapy Act. This Court began its analysis noting it "gives great weight to an agency's interpretation of a statute it is charged with administering; however, an agency's interpretation is not binding." 371 N.C. at 700, 821 S.E.2d at 379. It then concluded, "Although not dispositive, the Physical Therapy Board's construction of the statutory term "physical therapy" so as to encompass dry needling is persuasive authority for this Court." *Id.* at 702, 821 S.E.2d at 381. The Court could have ended its analysis there, but it continued on, concluding, based on *Morrell*, that the Physical Therapy Board's interpretation of the Physical Therapy Act must be given "controlling weight" because a rule it had approved was "consistent with both the statute and the language of the rule." *Id.* at 371 N.C. 697, 704, 821 S.E.2d 376, 382 (2018) (citing *Morrell*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994)).

A few years earlier, the Court of Appeals improperly combined the different approaches to agency deference in a case involving the

Environmental Management Commission's ("EMC") imposition of two civil penalties against a chicken processor for discharging waste water into a creek. *House of Raeford Farms, Inc. v. N.C. Dep't of Envir. & Nat. Res.*, 242 N.C. App. 294, 774 S.E.2d 911 (2015). On cross appeal, the Department of Environment and Natural Resources ("DENR") asserted the superior court had erred below when it failed to defer to the EMC's decision to impose the penalties on the processor. Citing *Pamlico Marine*, the Court of Appeals observed, "an administrative agency's interpretation of its own regulations is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation." *House of Raeford*, 242 N.C. App. at 310, 774 S.E.2d at 922 (citation omitted). But then the Court of Appeals cited *Savings & Loan*'s statement that while agency interpretations of statutes are "accorded some deference by appellate courts, those interpretations are not binding." *Id.* The Court of Appeals ultimately rejected DENR's deference argument because the superior court had properly ruled that the EMC erred when it imposed the penalties on the chicken processor. Although the Court of Appeals reached the correct conclusion, its analysis mistakenly combines this Court's non-binding approach to statutory

deference with the "plainly erroneous and inconsistent" test set out in *Morrell* and *Pamlico Marine*.

Finally, the Court of Appeals decision in *Cnty. of Durham v. N.C. Dep't of Envir. & Nat. Res.*, 131 N.C. App. 395, 507 S.E.2d 310 (1998) illustrates the confusing case law that has resulted from imprecise applications of the agency deference concept altogether. In *Durham*, the Court reviewed DENR's denial of Durham County's declaratory ruling request, which sought to determine whether the citing of Land Clearing and Inert Debris landfills were subject to statutory notice and hearing provisions. *Id.* at 396, 507 S.E.2d at 311. At the outset of its opinion, the *Durham* Court recited an internally inconsistent statement of the de novo review standard. *Id.* (citing *Brooks*, 303 N.C. at 580-81, 281 S.E.2d at 29). Under that familiar standard, "an appellate court may freely substitute its judgment for that of the agency." *Brooks*, 303 N.C. at 580–81, 281 S.E.2d at 29. However, the *Durham* Court then stated, "even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation." *Cnty. of Durham*, 131 N.C. App. at 397, 507 S.E.2d at 311. As support, the Court cited *Newsome v. N.C. State Bd. of Elec.*, 105 N.C. App. 499, 507, 415

S.E.2d 201, 205 (1992) (citation omitted). But *Newsome* did not go so far in combining de novo review with agency deference. It merely stated that agency interpretations of statutes "should be accorded considerable weight." *Newsome*, 105 N.C. App. at 507, 415 S.E.2d at 205. The *Durham* Court next added to its already confusing analysis citing *Carpenter* and *Chevron* before stating, "we review this case de novo but accord considerable weight to NCDENR's interpretation of the statute at issue." *Cnty. of Durham,* 131 N.C. App. at 397, 507 S.E.2d at 311-12. The Court then resolved the case by parsing the text of a DENR regulation. *Id.* at 398, 507 S.E.2d at 312. Thus, to the extent deference should have been applied at all, *Morrell* was the appropriate standard to use. Moreover, a fair reading of *Durham* suggests there was no need for the Court to defer to DENR's interpretation in the first place.

Eliminating the *Morrell* and *Pamlico Marine* approach to regulatory deference would make clear that agency interpretations of their own regulations are not binding, but merely persuasive authority. It would, as the Supreme Court suggested in *Kisor*, avoid situations in which courts apply the test "without careful attention to the nature and context of the interpretation" advanced by an agency. *Kisor,* 588 U.S. at

574, 139 S. Ct. at 2414 (critiquing *Thorpe* on which *Pamlico Marine* relied). Further, ending deference to an agency's regulatory interpretations would remove the very real likelihood of courts continuing to confuse the distinct approaches to agency deference.

III. ELIMINATING AGENCY DEFERENCE WILL PROMOTE GOOD AND FAIR GOVERNMENT.

While the question presented in this case is narrowly focused on the type of regulatory deference addressed in *Morrell* and *Pamlico Marine*, this Court should take this opportunity to reassert its role as the final arbiter of statutory and regulatory interpretations. Several reasons support this result.

First, rejecting the use of agency deference to interpret statutes and regulations will restore a proper relationship between the branches of state government. By definition, when courts defer to agency interpretations, they abdicate their constitutional power to say what the law is. *Supra* at 4-5. Courts, not agency bureaucrats, decide questions of law. *E.g.*, *McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016).

However, by incorporating agency deference concepts into our jurisprudence, this Court, *see Morrell* 338 N.C. at 238, 449 S.E.2d at 180

(adopting the "plainly erroneous and inconsistent" test for agency interpretations of their own regulations), and the Court of Appeals, *see Carpenter*, 107 N.C. App. at 279, 419 S.E.2d at 584 (adopting *Chevron* deference without support from this Court), made unforced errors that unnecessarily enhanced the power of the executive branch. This Court is best suited to reset the balance of power that is fundamental to our State's constitutional superstructure. *See* N.C. Const. art. I, § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.").

Second, ending the use of agency deference will level the regulatory playing field in favor of the citizens and businesses of our State. Granting agencies deference in the interpretation of statutes and regulations puts those who find themselves opposed to an agency in litigation at a distinct disadvantage. Deference tilts the scales of justice to the government and distorts the adversarial process that is a hallmark of our judicial system. Members of the regulated public that challenge agency actions face significant obstacles to victory, especially the expense and time associated with litigation. Coupling those hurdles with the legal advantage that agency deference provides, makes it a wonder that

private citizens and businesses ever proceed to litigate against agencies in the first place. In other words, agency deference works as an invisible hand to discourage members of the regulated community from protecting themselves against unlawful agency actions. Thus, deferring to agency interpretations has a chilling effect that stifles free enterprise and erodes the ability of the regulated community to fully assert their rights.

Finally, ending agency deference will foster better government. Armed with agency deference, state agencies have little incentive to narrowly interpret statutes or carefully craft reasonable regulations. The existence of deference enables agencies to take liberties with their statutory boundaries and maximize the reach of their already extensive power. Without the safety blanket of agency deference, agencies will hopefully propose and adopt reasonable regulations based on the constraints the General Assembly imposes upon them and be prepared to articulate and defend their interpretations of statutes and regulations on equal footing with those upon whom they impose their authority.

This case presents this Court with an opportunity to definitively reassert its constitutional authority to rule on the meaning of statutes and regulations. Agency interpretations have persuasive authority,

nothing more. Returning to these fundamental principles, *see* N.C. Const. art. I, § 35, will encourage state agencies to make better decisions on behalf of the people and businesses they serve and foster an environment of good and fair government.

CONCLUSION

For the reasons stated above, this Court should once again declare that our courts, not regulatory agencies, have the final say about the meaning of statutes and regulations.

Respectfully submitted, this the 29th day of May 2024.

Electronically submitted
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *AMICI CURIAE* BRIEF has been filed by electronic means with the Clerk of Court, Supreme Court of North Carolina pursuant to Rule 26(a) of the North Carolina Rules of Appellate Procedure, and that a copy of the brief has been served on the parties by sending it to the correct and current email addresses for their respective counsels, as follows:

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