No. CV 19-700

In the Arkansas Court of Appeals

AMERICAN HONDA MOTOR CO., INC., *Appellant*
v.
LARRY WALTHER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, *Appellee*.

Appeal from the Circuit Court of Pulaski County,
Hon. Chris Piazza, Circuit Judge

Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of the Appellant

---

Jessica Lee Thompson
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Jessica.Thompson@NCLA.legal

Brett D. Watson
BRETT D. WATSON, ATTORNEY AT LAW, PLLC
P.O. Box 707
Searcy, Arkansas 72145-0707
Telephone: (501) 281-2468
Facsimile: (501) 421-1756
watson@bdwpllc.com

Counsel for Amicus Curiae
New Civil Liberties Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS

Amicus Curiae the New Civil Liberties Alliance is a nonprofit, nonpartisan organization devoted to defending civil liberties. As a public-interest law firm, NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to be subject only to penalties that are both Constitutional and have been promulgated by Congress. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because administrative agencies have trampled them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the Administrative State. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States and the State of Arkansas is the focus of NCLA's concern.

This case is particularly important to NCLA. It believes this case is an opportunity for this Court to fulfill its fundamental duty "to say what the law is" and denounce deference to agency interpretations of statutes. In doing so, NCLA be-

lieves the Court would honor their duty as judges, protect the due process of law for all litigants, and bolster the confidence of the people in the courts.

SUMMARY OF ARGUMENT

The Arkansas Constitution and Code of Judicial Conduct require judges to exercise independent judgment and to refrain from bias when interpreting the law. These are foundational constitutional requirements for an independent judiciary. Additionally, the Due Process Clauses of the Arkansas Constitution and the Fourteenth Amendment to the U.S. Constitution forbid judges from showing bias for or against a litigant when resolving disputes. These statements of judicial duty are so axiomatic that they are seldom mentioned or relied upon in legal argument—because even to suggest that a court might depart from its duty of independent judgment or display bias toward a litigant would be disturbing.

Yet deference to agency statutory interpretations flouts these bedrock constitutional principles. Unfortunately, repeated citations and incantations of any legal precedent run the danger of producing uncritical and unthinking acceptance. The constitutional problems with the court-created deference doctrine discussed in this brief remain as acute as ever.

American Honda asks this Court to decide whether the circuit court erred in giving "great deference" to the Department of Finance and Administration in a Post-2009 Arkansas Tax Procedure case. This *amicus curiae* brief focuses on this first point on appeal and presents the constitutional arguments for answering in the affirmative. *Amicus curiae* takes no position on the other points on appeal.

ARGUMENT*

Granting "great deference" to agency statutory interpretations violates both the state and federal constitutions for two reasons. First, agency deference requires judges to abandon their duty of independent judgment in violation of Article 4 of the Arkansas Constitution. Second, agency deference violates the Due Process Clauses of the Arkansas Constitution and the Fourteenth Amendment of the U.S. Constitution by commanding judicial bias toward a litigant.

I. AGENCY DEFERENCE VIOLATES ARTICLE IV BY REQUIRING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

Agency deference compels judges to abandon their duty of independent judgment. Under the Arkansas Constitution, the judiciary is a separate and independent branch of the state government, and no member of the political branches shall exercise its powers. The Arkansas Supreme Court has observed that Article IV, Sections 1 and 2 of "the Arkansas Constitution assur[e] the separation of powers among the three branches of government by providing that each branch is a separate department and that no person in one department shall exercise a power

---

* No party's counsel authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief or otherwise collaborated in the preparation or submission of the brief. No person or entity other than *amicus curiae*, its members, or its counsel made monetary contributions to the brief or collaborated in its preparation. ASCR 4-6(c).

belonging to either of the other departments." *Griffen v. Arkansas Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 51, 130 S.W.3d 524, 532 (2003). And "[a] judge shall uphold and promote the *independence*, integrity, and impartiality of the judiciary[.]" Ark. Code Jud. Conduct Canon 1 (emphasis added). Read together, "[t]he public policy in our canons and the Arkansas Constitution is radiantly clear. Judicial independence is the hallmark of our system of government[.]" *Griffen*, 355 Ark. at 51, 130 S.W.3d at 532.

Despite these stated principles, agency deference commands Arkansas judges to abandon their independence by giving controlling weight to an agency's opinion of what a statute means—not because of the persuasiveness of the agency's argument, but rather based solely on the brute fact that this administrative entity has addressed the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("'The judicial power … requires a court to exercise its independent judgment in interpreting and expounding upon the laws.' […] [Agency] deference precludes judges from exercising that judgment[.]") (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility is not tolerated in any other context—nor should it be accepted by a truly independent judiciary. The Code of Judicial Conduct's and the Arkansas Constitution's mandate of judicial independence cannot be easily displaced. Yet agency deference allows a non-judicial entity to usurp the judiciary's power of interpretation and commands judges to "defer" to the legal pronouncements of a supposed "expert" body external to the judiciary.

In the end, agency deference is nothing more than a command that courts abandon their duty of independent judgment and assign controlling weight to a non-judicial entity's interpretation of a statute. It is no different in principle from an instruction that courts must assign weight and defer to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or the *New York Times* editorial page. In each of these absurd scenarios, the courts similarly would be following another entity's interpretation of a statute so long as it is not "clearly wrong"—even if the court's own judgment would lead it to conclude that the statute means something else.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). An agency is entitled to have its views heard and considered by the court, just as any other litigant or *amicus*, and a court may and should consider the "unique insights" an agency may bring on account of its expertise and experience. *Id.* "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

But here, the circuit court concluded it "must give great deference to an administrative agency's interpretation of a statute affecting the agency and should not

overturn the agency's interpretation unless it is clearly wrong." Add. 322 (citing, *inter alia, Pledger v. Boyd*, 304 Ark. 91, 93, 799 S.W.2d 807, 808 (1990)). The circuit court, however, omitted a vital constraint on agencies' statutory interpretations, namely, that they are "not conclusive." *Pledger*, 304 Ark. at 93, 799 S.W.2d at 808.

Recognizing an argument's persuasive weight does not compromise a court's duty of independent judgment. But "great deference" requires far more than respectful consideration of an agency's views; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to the views preferred by the agency. The judicial duty of independent judgment allows (indeed, requires) courts to consider an agency's views and to adopt them *when persuasive*, but it forbids a regime in which courts "defer" or give automatic and controlling weight to a non-judicial entity's interpretation of statutory language—particularly when that interpretation does not accord with the court's sense of the best interpretation.

II. AGENCY DEFERENCE VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO SHOW BIAS IN FAVOR OF AGENCIES

A related and more serious problem with agency deference is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual

litigant before the court violates due process. The U.S. Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009). And the Arkansas Code of Judicial Conduct mandates that a judge "shall perform the duties of judicial office impartially[.]" Ark. Code Jud. Conduct Canon 2. Nonetheless, under agency-deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled to remove the judicial blindfold and tip the scales in favor of the government's position. This practice must stop.

Agency deference institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed question of statutory interpretation arises. Rather than exercise their own judgment about what the law is, granting "great deference" instructs judges to defer to the judgment of one of the litigants before them unless it is clearly wrong. A judge who openly admitted that he or she accepts a government-litigant's interpretation of a statute by default—and that he or she automatically rejects any competing interpretations that might be offered by the non-government litigant unless the government is clearly wrong—might be impeached and removed from the bench for exhibiting such bias and abusing judicial power. Yet this is perilously close to what judges do whenever they apply "great deference" in cases where an agency appears as a litigant. The government litigant wins simply by showing that its preferred interpretation of the statute is not "clearly wrong"—while the opposing litigant gets no such latitude

from the court and must show that the government's view is not merely wrong, but clearly so.

This was not always so in Arkansas. Appellee argues that over 70 years of judicial precedent supports deference, citing *Walnut Grove Dist. No. 6 v. County Bd. of Educ.,* 204 Ark. 354, 162 S.W.2d 64 (1942). But the "great deference" afforded to the agency in the opinion below has strayed from its modest beginnings. Besides, "[a] wrong cannot be sanctioned by age and acquiescence, and transformed into a virtue. Indifference and lack of vigilance have lost some of the dearest rights to the people, but they can always be regained by energy and persistence." *Terrell v. Middleton*, 187 S.W. 367, 373 (Tex. Civ. App. 1916), *writ denied*, 108 Tex. 14, 191 S.W. 1138 (1917); *see also Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 494–95, 86 A.2d 201, 231 (1952) ("…we are not impressed by the plaintiffs' argument that the practice is to the contrary, for if that is the practice, it should be terminated, not perpetuated.").

When the *Walnut Grove* court encountered a question of statutory interpretation, it observed that while the "administrative interpretation of the legislation is not, of course, conclusive[,]" it is also "not to be disregarded." *Id.* at 66. The *Walnut Grove* court concluded that this is especially true when the agency's construction "has been observed or acted upon for a long period of time[,]" citing to a treatise collecting cases. *Id.* (citing § 219 of Crawford's Interpretation of Laws); *but see Baldwin v. United States*, 589 U.S. __, 2020 WL 871675, 2020 U.S. LEXIS 1359, 140 S. Ct. 690, 692–93 (2020) (Thomas, J., dissenting from denial of certiorari) ("In the past, I have left open the possibility that 'there is some unique histori-

cal justification for deferring to federal agencies.' […] It now appears to me that there is no such special justification and that [agency deference] is inconsistent with accepted principles of statutory interpretation from the first century of the Republic.") (quoting *Michigan v. EPA*, 135 S. Ct. at 2712).

Among the cases included in the treatise summary was an Arkansas case, *Moore v. Tillman*, 170 Ark. 895, 282 S.W. 9 (1926). In *Moore*, the Arkansas Supreme Court was tasked with interpreting a federal statute. *Moore* presents a cogent example of the use of agency interpretation as one of the tools in the Court's statutory construction toolbox. For example, the *Moore* Court first observed "[t]his is the interpretation put upon the word 'alienated' by the Land Department of the United States, and by the Supreme Court of the United States, and is practically the consensus of modern opinion in state jurisdictions where the above provisions of the statute have been under consideration." *Id.* at 899, 282 S.W. at 11. Moreover,

> While the interpretation of the above provisions of the Revised Statutes of the United States by the Land Department is not controlling on the courts, it is at least highly persuasive, and, where it is in harmony with the decision of the United States Supreme Court in the construction of these statutes, it occurs to us that such interpretation should and must govern.

*Id.*at 899–900, 282 S.W.at 11 So while the *Moore* and *Walnut Grove* opinions considered agency interpretations persuasive—particularly when the interpretations were consistent with longstanding usage or United States Supreme Court precedent—those Courts were careful to note that such agency interpretations were "not controlling" or conclusive, unlike how the circuit court decision below treated them.

Supreme courts in other states have rejected showing "great deference" to an administrative agency's interpretations of statutes in favor of judicial independence and separation of powers. Mississippi courts once reviewed agency interpretations of a rule or statute as "a matter of law that is reviewed *de novo*, but with great deference to the agency's interpretation." *Miss. Methodist Hosp. & Rehab Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606 ¶ 15 (Miss. 2009), *abrogated by King v. Mississippi Military Dep't*, 245 So.3d 404 (Miss. 2018). Like the *Walnut Grove* rationale for agency deference, the court had explained that the "duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Id.* But in 2018, the Mississippi Supreme Court rejected this rationale and "abandon[ed] the old standard of giving deference to agency interpretations of statutes." *King*, 245 So.3d at 408 ("[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

Wisconsin also once showed "great weight deference" to agency statutory interpretations. That practice was originally premised on the same reasoning supporting deference in *Walnut Grove.* But Wisconsin has now reversed course as well. *See Tetra Tech*, 914 N.W.2d at 33–34 (tracing the roots of its deference doctrine to "language of persuasion" and an "acknowledge[ment] that a change in an ancient practice could have unacceptably disruptive consequences."). Where Wisconsin courts "once treated an agency's interpretation of a statute as evidence of its

meaning [],” the “reach of the deference principle” first expanded to “something the courts could do in interpreting and applying a statute, but were not required to do.” *Id.* at 36, 37. Later, a 1995 decision from the Wisconsin Supreme Court “made the deference doctrine a systematic requirement upon satisfaction of its pre-conditions” and “[i]t accomplished this feat by promoting deference from a canon of construction to a standard of review.” *Id.* The *Tetra Tech* court explained this was an important step in the evolution of the deference doctrine:

> Enshrining this [deference] doctrine as a standard of review bakes deference into the structure of our analysis as a controlling principle. By the time we reach the questions of law we are supposed to review, that structure leaves us with no choice but to defer if the preconditions are met.

Id. at 38.

While Wisconsin courts recognized that this deference doctrine “allowed the executive branch of government to authoritatively decide questions of law in specific cases brought to our courts for resolution,” the court never “determine[d] whether this was consistent with the allocation of governmental power amongst the three branches.” *Id.* at 40. After concluding that its “deference doctrine cedes to administrative agencies some of our exclusive judicial power[,]” it “necessarily follow[ed] that when [an] agency comes to [the court] as a party in a case, it—not the court—controls some part of the litigation.” *Id.* at 49. “When a court defers to the governmental party, simply because it is the government, the opposing party is unlikely to be mollified with assurances that the court bears him no personal animus as it does so.” *Id.*

The *Tetra Tech* court recognized Wisconsin's deference doctrine "deprive[d] the non-governmental party of an independent and impartial tribunal," while granting the "rule of decision" to an "administrative agency [that] has an obvious interest in the outcome of a case to which it is a party." *Id.* at 50. The court thus concluded that "deference threatens the most elemental aspect of a fair trial"—a fair and impartial decisionmaker. *Id.* By rejecting the deference doctrine, the court "merely [] join[ed] with the ancients in recognizing that no one can be impartial in his own case." *Id.*

Justice Thomas recently underscored the rejection of this rationale, concluding that agency deference "differs from historical practice in at least four ways." *Baldwin*, 140 S. Ct. at 694.

> First, it requires deference regardless of whether the interpretation began around the time of the statute's enactment (and thus might reflect the statute's original meaning). Second, it requires deference regardless of whether an agency has changed its position. Third, it requires deference regardless of whether the agency's interpretation has the sanction of long practice. And fourth, it applies in actions in which courts historically have interpreted statutes independently.

Id.

In short, no rationale can support a practice that weights the scales in favor of a *government* litigant—the most powerful of parties—and that commands systematic bias in favor of the government's preferred interpretations of statutes. Whenever "great deference" is applied in a case in which the government is a party, the courts deny due process to the non-governmental litigant by showing favoritism to the government's interpretation of the law.

III. THE COURT SHOULD CALL OUT THESE CONSTITUTIONAL PROBLEMS WITH AGENCY DEFERENCE NOTWITHSTANDING THE REQUIREMENTS OF *STARE DECISIS*

Arkansas case law has never considered or addressed these constitutional objections to agency deference.[1] So, it is not true that this Court has rejected these constitutional arguments by deferring to agencies for over 70 years. *See* Appellee Brief at 10. Judicial precedents do not resolve issues or arguments that they never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("Cases cannot be read as foreclosing an argument that they never dealt with.").[2]

---

[1] *Amicus curiae* is unaware of any cases addressing these precise constitutional objections. Although an appellant challenged the Arkansas Workers' Compensation Act for its failure "to ensure judicial independence and violat[ing] his substantive and procedural due-process rights[,]" the Arkansas Court of Appeals declined to address these challenges as his "constitutional arguments were neither presented to, nor decided by, the Commission and are therefore not properly before us." *Reece v. Eaton Corp.*, 2015 Ark. App. 77, at 1; *see also City of Fort Smith v. McCutchen*, 372 Ark. 541, 547, 279 S.W.3d 78, 83 (2008) (statutory provisions requiring state courts to conduct de novo trials are consistent with the state constitution's separation-of-powers clause).

[2] *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has

Assuming for purposes of argument that *stare decisis* applies, "[i]t is well-settled that precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable." *Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 397, 36 S.W.3d 281, 284 (2001) (citation and internal quotation marks omitted). The test for this Court is "whether adherence to the rule would result in great injury or injustice." *Id.* (citation and internal quotation marks omitted). Thus, while this Court affords great respect to the principles of *stare decisis*, it is not bound by the doctrine when such precedent gives a "result so patently wrong, so manifestly unjust"—such as a denial of due process rights for an entire class of litigants, and a strain on judicial independence—"that a break becomes unavoidable."

Stare decisis therefore presents no obstacle to analyzing these constitutional objections and declaring agency deference unconstitutional. And in all events, a court's ultimate duty is to enforce the Constitution—even if that comes at the expense of judicial opinions that never considered the constitutional problems with

---

no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

what they were doing. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). This approach makes particularly good sense where, as here, this Court has in recent years repeatedly declined to mention "great deference" to agency statutory interpretations. *See Walther v. FLIS Enters., Inc.*, 2018 Ark. 64, 540 S.W.3d 264; *Walther v. Carrothers Constr. Co. of Arkansas, LLC*, 2016 Ark. 209, 492 S.W.3d 504; *Walther v. Weatherford Artificial Lift Sys., Inc.*, 2015 Ark. 255, 465 S.W.3d 410.

This Court may be inclined to decide the first issue on appeal narrowly based on the anti-deference amendment to Ark. Code Ann. § 26-18-406. But the constitutional infirmities of the deference doctrine appear in contexts beyond the taxing authority, and this case presents an opportunity to address the inherent constitutional problems of agency deference. Indeed, because of the courts' duty to say what the law is, they must opine on the doctrine's failings. *Amicus curiae* respectfully asks the Court to refuse to grant deference to the agency's statutory interpretation and to repudiate agency deference on constitutional grounds in its opinion.

The Court should give serious consideration to the above option—if only to avoid the potential hazard agency deference presents to lower courts in Arkansas. The Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . . the judge has a personal bias or prejudice concerning a party." Ark. Code Jud. Conduct Rule 2.11(A)(1). Though agency deference involves an institutionally imposed bias rather than per-

sonal prejudice, the resulting partiality is inescapable, for the doctrine requires judges systematically to favor an agency's statutory interpretations over those offered by opposing litigants. And judges cannot excuse this bias by invoking their duty to follow precedent, for there is no "superior-orders defense" available in the Code of Judicial Conduct. These fundamental constitutional questions will continue to haunt punctilious judges until this Court addresses them.

"Great deference" to an administrative agency's interpretations of statutes puts lower court judges in an impossible situation; it is an assault on their duty of independence, their oath, and the unbiased due process of law that courts owe to each and every litigant that appears before them. It thus compels them to betray the core responsibilities of judicial office. It is long past time for conscientious judges to call out the ways in which this "deference" has misled the judiciary—and to advocate a return to the judicial independence and unbiased judgment that our Constitution demands.

CONCLUSION

The Court should reverse the decision of the circuit court by declaring agency deference unconstitutional. Alternatively, the Court could decline to defer to the agency's statutory interpretations in accordance with the anti-deference amendment to Ark. Code Ann. § 26-18-406 in its judgment, while calling out the constitutional defects of granting "great deference" to the agency's statutory interpretations in its opinion.

Respectfully submitted,

Date: March 16, 2020

/s/ Brett D. Watson

Brett D. Watson
BRETT D. WATSON, ATTORNEY AT LAW, PLLC
P.O. Box 707
Searcy, Arkansas 72145-0707
Telephone: (501) 281-2468
Facsimile: (501) 421-1756
watson@bdwpllc.com

Jessica L. Thompson
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
Jessica.Thompson@NCLA.legal
Counsel for Amicus Curiae
New Civil Liberties Alliance

Certificate of Service

I certify that the foregoing has been filed on March 16, 2020, via the electronic-filing system, which will forward a copy to all counsel of record.

/s/ Brett D. Watson
Brett D. Watson