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NCLA Amicus Brief Asks Ohio Supreme Court to Stop Courts from Deferring to Agency Interpretations

TWISM Enterprises, LLC v. State Board of Registration for Professional Engineers and Surveyors

Washington, DC (April 18, 2022) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus brief](#) today in *TWISM Enterprises, LLC v. State Board of Registration for Professional Engineers and Surveyors*, urging the Supreme Court of Ohio to declare agency deference unconstitutional. NCLA argues that the Hamilton County Court of Appeals erred by deferring to the Ohio Board of Registration for Professional Engineers and Surveyors’ “reasonable interpretation” of what the court characterized as “ambiguous statutes and administrative rules.” Agency deference violates the Ohio and federal constitutions by requiring judges to abandon their duty of independent judgment.

TWISM Enterprises, LLC, a small, Cincinnati-based engineering firm, applied for a Certificate of Authorization (COA) to provide professional engineering services to the public, which was denied by the Board on February 28, 2019. According to the Board, TWISM’s application was denied solely because TWISM “did not designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering ... activities and decisions, and those designated persons shall be registered in this state,” as required by state law. The Board claimed that the Ohio Administrative Code precluded TWISM from designating their independent contractor, a licensed professional engineer who himself held a COA, to serve as the firm’s manager.

The Hamilton County Common Pleas Court had ruled in favor of TWISM, finding that the statute “does not put forth any requirements regarding what kind of employment, *i.e.*, ‘W-2’ or ‘1099’ employment,” is mandated, nor does it “state that a designated manager must devote all his or her time” to a single firm. On appeal, the appellate court, however, concluded that, because “both parties’ definitions of ‘full-time manager’ are reasonable,” it *must* defer to “the Board’s reasonable interpretation[.]”

Granting deference to agency statutory interpretations, NCLA’s brief argues, 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 IV of the Ohio Constitution. Second, agency deference violates the Due Process Clauses of the Ohio Constitution and the Fourteenth Amendment of the U.S. Constitution by commanding judicial bias in favor of a (government) litigant. 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 the same in principle as a court deferring to statutory interpretations announced by a congressional committee, a group of expert legal scholars, or *The Columbus Dispatch’s* editorial page.

NCLA released the following statements:

“Deference to agency decisions raises a host of constitutional concerns as it impermissibly requires courts to place their thumb on the scale in favor of a particular litigant—the government. The Ohio Supreme Court would do well to join its sister state supreme courts and jettison the practice of deference altogether.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Agency deference abrogates the duty of the courts to say what the law is, resulting in an unconstitutional aggrandizement of the power of executive agencies at the expense of the judicial and legislative branches. The Ohio Supreme Court’s past use of deference is particularly concerning due to its inconsistent application of the doctrine. This case presents an opportunity for the Court to clarify its jurisprudence by refusing to defer to the Board’s statutory interpretation and by repudiating agency deference, generally.”

— Casey Norman, Staff Counsel, NCLA

For more information, visit the *amicus* brief page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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