State ex rel. McCann v. Delaware County Board of Elections

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On first glance, *State ex rel. McGann v. Delaware County Board of Elections*,[1] an expedited elections case decided by the Ohio Supreme Court, appears to be an unremarkable, run-of-the-mill statutory interpretation case. In *McGann*, the court addressed the question of whether petition forms used to place a township zoning referendum on the ballot were filled out correctly. One could imagine that few people other than the citizens of Harlem Township, Ohio would care about the Ohio Supreme Court's opinion on the matter.

But just as a book should not be judged by its cover, neither should court opinions be judged solely by the limited holdings that make their way to case summaries. In separate concurring and dissenting opinions in *McCann*, four of the Ohio Supreme Court's seven justices signaled their openness to ending Ohio's continued application of *Chevron* deference.

I. An Anti-*Chevron* Trend?

There has been much discussion in recent years regarding the possibility that the United States Supreme Court may revisit the standard for judicial deference to administrative agencies' interpretations of statutes set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[2] Speculation increased with the nominations and confirmations of Justices Neil Gorsuch and Brett Kavanaugh, both of whom have written opinions critical of *Chevron* deference. Then-Judge Gorsuch went right to the heart of criticisms that *Chevron* gives too much power to the administrative state when he wrote that "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[3]

Concern about *Chevron* deference is not limited to the federal courts. In 2018, both the Wisconsin Supreme Court and the Mississippi Supreme Court issued decisions rejecting *Chevron*-style deference for judicial review of state administrative agency regulations.[4] Now, it appears that Ohio may soon join the short but growing list of states abandoning *Chevron*.

II. The *McCann* Decision: Background and Per Curiam

The *McCann* case arose in the context of a local zoning battle. Ohio law allows citizens to place certain referenda on the ballot if they gather enough voter signatures.[5] Signatures are collected on petition forms.[6] A group of citizens in Harlem Township, Ohio who wanted a zoning referendum placed on the ballot filed petitions with the Delaware County Board of Elections.[7] Two other citizens challenged the board of elections' decision to count the signatures on certain petitions they believed were defective under state law.[8] They sought a writ of prohibition from Ohio's highest court.[9]

The Ohio Supreme Court issued its decision on August 21, 2018. Three of the seven justices joined a per curiam decision finding that the writ of prohibition should be granted.[10] To reach this conclusion, the three justices explicitly relied on the Ohio Secretary of State's interpretation of the relevant Ohio election statute concerning petition circulators' obligations when completing a petition form.[11] The per curiam opinion stated that "This court has looked to the design of the secretary of state's forms to suggest the secretary's interpretation of statutes, to which this court typically gives 'great deference.'"[12] The per curiam opinion also stated that "the secretary's interpretation of the requirement on [petition] form 6-O is owed deference."[13]

The importance of *McCann*, however, lies not in the per curiam opinion, but in a concurrence and a dissent.

III. Justices DeWine and Fischer Concur in *McCann* to Criticize *Chevron*

Justice R. Patrick DeWine wrote a separate opinion, joined by Justice Patrick Fischer, concurring in the court's judgment only.[14] Like the three justices who joined the per curiam opinion, Justice DeWine concluded that the writ of prohibition should be granted, but he based this conclusion solely on the text of the relevant statute.[15] After referring to the per curiam opinion's "great deference" to the Ohio Secretary of State's interpretation of the relevant statute, Justice DeWine stated that "[i]n an appropriate case, we ought to take a hard look at our practice of deferring to statutory interpretations made by administrative agencies and nonjudicial officials."

Justice DeWine then explained in detail why he believed the court should more closely examine the issue of deference. He noted that "[j]udicial deference to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions," and noted

1 State ex rel. McCann v. Del. Cty. Bd. of Elections, 2018-Ohio-3342, 2018 U.S. Dist. LEXIS 2055, 2018 WL 4026314 (Ohio Aug. 21, 2018).

2 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

3 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

4 Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 382 Wis. 2d 496, 2018 WI 75, 914 N.W.2d 21 (Wis. 2018); King v. Miss. Military Dep't, 245 So.3d 404 (Miss. 2018).

5 *McCann*, 2018-Ohio-3342, at ¶ 2.

6 *Id.* at ¶¶ 14-17.

7 *Id.* at ¶ 2.

8 *Id.* at ¶¶ 8-10.

9 *Id.* at ¶ 10.

10 *Id.* at ¶¶ 1-25.

11 *Id.* at ¶¶ 20, 23.

12 *Id.* at ¶ 20.

13 *Id.* at ¶ 23.

14 *Id.* at ¶¶ 26-34.

15 *Id.* at ¶¶ 26-29.

that the Ohio Constitution explicitly vests judicial power *only* in the state's courts.[16] Justice DeWine then quoted from three concurring and dissenting opinions written by Chief Justice John Roberts and Justice Clarence Thomas in which the Justices questioned deference to administrative agencies and emphasized the judiciary's need to protect its role in saying what the law is.[17] Justice DeWine stated that "judicial deference to administrative agencies on matters of legislative interpretation aggrandizes the power of the administrative state at the expense of the judiciary and officials directly accountable to the people."[18]

Justice DeWine also noted that federal *Chevron* deference "has come under severe and repeated criticism," that the U.S. Supreme Court "pulled back on the reach of *Chevron* deference" in *King v. Burwell*, and that Wisconsin and Mississippi recently "retreat[ed] from doctrines that afforded deference to agency interpretations of law."[19]

Justice DeWine also made the important point that Ohio's version of *Chevron* deference is "not well developed" and "could be seen as more expansive than . . . *Chevron*."[20] In support of this claim, he noted that the per curiam opinion, unlike opinions that more closely follow *Chevron*, did not first conclude that the relevant statutory language was ambiguous before deferring to the Secretary of State's interpretation.[21]

IV. Justices Kennedy and French May Be Open to Reconsidering Deference

Justice Sharon Kennedy authored a dissenting opinion joined by Justice Judith French. Applying a textual analysis, Justice Kennedy disagreed with the conclusions of both the per curiam opinion and Justice DeWine's concurrence regarding the meaning of the relevant statute.[22] She explained that "[i]n construing a statute, we may not add or delete words" and concluded that the majority had done exactly that by requiring that the petition circulator physically write in the number of signatures on the petition form.[23]

In a footnote, Justice Kennedy wrote, "I will leave for another day the issue whether the judicial branch truly owes deference to administrative agencies' interpretations of statutes."[24] But while Justice Kennedy could have said nothing more about deference, she went further, quoting Justice Anthony Kennedy's concurrence in *Pereira v. Sessions*:

> [I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* . . . and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.[25]

It appears, then, that Justices Kennedy and French may share the concerns of Justices DeWine and Fischer that the Ohio Supreme Court's *Chevron*-style deference to administrative agency interpretations may not have respected the Ohio Constitution's vesting of judicial power solely in the courts. These four justices constitute a majority of the Ohio Supreme Court.

V. Bottom Line

A majority of Ohio Supreme Court justices have essentially issued an invitation for a challenge to *Chevron*-style deference under Ohio state law. Any takers?

16 *Id.* at ¶ 30 (quoting Ohio Const., Art. IV, § 1).

17 *Id.* at ¶ 31 (quoting Michigan v. Environmental Protection Agency, __ U.S. __, 135 S. Ct. 2699, 2712, 192 L. Ed. 2d 674 (2015) (Thomas, J., concurring) ("deference to administrative agency interpretations of the law "wrests from Courts the ultimate interpretive authority to 'say what the law is,' . . . and hands it over to the Executive"); Perez v. Mtge. Bankers Assn., __ U.S. __, 135 S. Ct. 1199, 1219, 191 L.Ed. 2d 186 (2015) (Thomas, J., concurring) (discussing the judiciary's role in providing an independent check on the executive branch); City of Arlington v. FCC, 569 U.S. 290, 312-317, 133 S.Ct. 1863, 185 L.Ed. 2d 941 (2013) (Roberts, C.J., dissenting) (discussing problems with the growing power of the administrative state and *Chevron* deference)).

18 *Id.* at ¶ 31 (citing *City of Arlington*, 569 U.S. at 312-17).

19 *Id.* at ¶ 33 (citing Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J. L. & Pub. Pol'y 103 (2018); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016)); King v. Burwell, __ U.S. __, 135 S. Ct. 2480, 2488-2489, 192 L. Ed. 2d 483 (2015); *Miss. Military Dep't*, 245 So.3d 404; *Tetra Tech EC*, 382 Wis. 2d 496.

20 *McCann*, 2018-Ohio-3342, at ¶ 32.

21 *Id.*

22 *Id.* at ¶¶ 35-50.

23 *Id.*at ¶ 50.

24 *Id.* at ¶ 44 n. 2.

25 *Id.* (quoting Pereira v. Sessions, __ U.S. __, 138 S. Ct. 2105, 2120, 201 L. Ed. 2d 433 (2018) (Kennedy, J., concurring)).