THE DEMISE OF AGENCY DEFERENCE IN FLORIDA HAS PRODUCED MIXED RESULTS REGARDING SEPARATION OF POWERS AND DUE PROCESS

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I. INTRODUCTION

In 2018, Florida citizens voted to constitutionally abolish the judicial rule of deference to an administrative agency's interpretation of an ambiguous statute, rule, or regulation—a principle hereinafter referred to as "agency deference" at the state level and "*Chevron* deference" at the federal level.[1] Due to the similarities between agency deference in Florida and *Chevron*

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1. Frank Shepherd et al., *The Demise of Agency Deference: Florida Takes the Lead*, FLA. B.J., Jan.–Feb. 2020, at 18, 18.

deference federally, Part II analyzes *Chevron* deference and its related issues as a means to preface similar problems surrounding Florida's now-abolished rule of agency deference,[2] which is detailed in Part III.[3] Part IV describes the current landscape of Florida jurisprudence following the abolition of agency deference—where inconsistent application, disagreement over basic norms of statutory interpretation, and the impact of binding precedent promoting a deferential standard, mirror the same separation of powers and due process problems that critics found inherent in the agency deference doctrine.[4]

II. *CHEVRON*: AGENCY DEFERENCE AT THE FEDERAL LEVEL

The United States Supreme Court articulated the principle of agency deference at the federal level in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;[5] namely, that the judiciary will defer to an agency's interpretation of an ambiguous statute so long as that interpretation is reasonable.[6] *Chevron* is among the most cited cases in modern federal administrative law.[7] The principle of "*Chevron* deference" rests on the notion that a statutory ambiguity is the deliberate design of Congress to afford administrative agencies discretion over their execution of statutes they are charged with enforcing.[8] *Chevron* deference essentially forbids judges from interpolating their own readings of laws when a permissible agency interpretation is available.[9] Since *Chevron*, the Court has both expanded and retracted its scope in decisions such as *Auer v. Robbins*,[10] *United States v. Mead Corp.*,[11] and more recently, *West Virginia v. EPA*.[12]

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2. *See* discussion *infra* Part II.
3. *See* discussion *infra* Part III.
4. *See* discussion *infra* Part IV.
5. 467 U.S. 837 (1984).
6. *Id.* at 843, 844, 845; Josh Gerstein & Alex Guillén, *Supreme Court Move Could Spell Doom for Power of Federal Regulators*, POLITICO, http://www.politico.com/news/2023/05/01/supreme-court-chevron-doctrine-climate-change-00094670 (May 1, 2023, 3:14 PM).
7. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1404 (2017).
8. *See Chevron*, 467 U.S. at 843–44.
9. *See id.* at 844; Gerstein & Guillén, *supra* note 6.
10. 519 U.S. 452, 457–58 (1997) (extending *Chevron* to administrative agencies' interpretations of their *own* rules and regulations).
11. 533 U.S. 218, 226–27 (2001) (extending *Chevron* to situations where it "appears" that Congress has delegated authority to an agency to make rules carrying the force of law).
12. 142 S. Ct. 2587, 2633–34, 2635 (2022) (introducing the major questions doctrine as a limitation on *Chevron* deference).

At the time of writing, there were two major challenges to *Chevron*, the first being *Cargill v. Garland*,[13] where the Fifth Circuit abrogated *Chevron* deference in favor of lenity.[14] The second was *Loper Bright Enterprises v. Raimondo,*[15] where the District of Columbia Circuit Court upheld the application of *Chevron* to the National Marine Fisheries Service's promulgation of a rule in accordance with its authorizing statute, requiring that commercial herring fishing companies bear costs of at-sea monitoring.[16]

Raimondo represents a fundamental disagreement within the judiciary over how to apply *Chevron* deference: the majority interpreted *Chevron* to require deference "if the statute is silent *or* ambiguous with respect to the specific issue."[17] The dissenting judge interpreted *Chevron* to require deference if both of the following conditions are met: the statute is ambiguous, and Congress delegated authority to the administrative agency to redress such ambiguity—either expressly or impliedly.[18] The majority's interpretation reflects the literal, plain text of *Chevron*,[19] whereas the dissenting opinion digs a bit deeper at the "ambiguity" prong.[20] The dissenting opinion fashions a definition of statutory ambiguity based on the very next paragraph in *Chevron* that elucidates the legislative intent behind Congress leaving "a gap for the agency to fill."[21] Nonetheless, leaving the gap open, as it were, follows the Supreme Court's rationale in fashioning *Chevron* deference to begin with, as a conflict in the meaning of the statute may elucidate "conflicting policies that were committed to the agency's care by the statute."[22] In this light, *Chevron*, therefore, reflects a form of judicial restraint whereby the judiciary respects the competence of non-judicial institutions, especially "policymaking branch[es] of government."[23] On the other hand, Justice Scalia penned a lengthy dissent in *United States v. Mead Corp.* about the dangers of broadening *Chevron*, where he argued that "[when] *Chevron* applies, statutory ambiguities *remain* ambiguities subject to the agency's ongoing clarification,"

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13. 57 F.4th 447 (5th Cir. 2023).
14. *Id.* at 469.
15. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).
16. *Id.* at 363.
17. *Id.* at 369 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
18. *Id.* at 374 (Walker, J., dissenting).
19 *See id.* at 369.
20. *Raimondo*, 45 F.4th at 374 (Walker, J., dissenting).
21. *Id.*; *Chevron* 467 U.S. at 843–44.
22. *Chevron*, 467 U.S. at 845.
23. *See* Joseph S. Diedrich, *Article III, Judicial Restraint, and This Supreme Court*, 72 SMU L. REV. 235, 256 (2019).

where the executive branch is left with the matter in perpetuity, potentially in violation of the nondelegation doctrine.[24]

Seizing on the apparent confusion among judges on how best to apply *Chevron*, the petitioners in *Raimondo* have sought certiorari with the federal Supreme Court, calling for *Chevron* to be overruled or significantly weakened.[25] In their brief, the petitioners argue that *Chevron* deference contravenes separation of powers and due process principles.[26] By requiring Article III courts to defer to the constructions of a statute offered by an executive agency under Article I, *Chevron* deference abrogates the ability of the court to "say what the law is."[27] Additionally, *Chevron* requires courts to make a precommitment to favor the government's judgments about the law.[28]

In addition to *Raimondo*, the United States Supreme Court has now granted a petition for certiorari to hear *Relentless, Inc. v. Department of Commerce*,[29] a companion case asking the court to abolish *Chevron* deference.[30] The Court agreed to hear the first question presented in the petition, to wit: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[31] The Court will hear oral arguments in both *Raimondo* and *Relentless* in January of 2024.[32]

Underlying the principle of agency deference is the rationale that courts lack the expertise required to interpret technical and complex regulatory schemes, and therefore *must* defer the proper interpretation of an authorizing

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24. *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (emphasis added); *Nondelegation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle (based on the separation of powers concept) limiting Congress's ability to transfer its legislative power to another governmental branch, esp. the executive branch.").

25. Brief for Petitioners at 2, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-451).

26. *See id.* at 15.

27. *See id.* at 15, 24 (citing Marbury v. Madison, 5 U.S. 137 (1803)).

28. *Id.* at 27.

29. 62 F.4th 621 (1st Cir. 2023), *cert. granted*, No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023).

30. *Relentless, Inc. v. Department of Commerce*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/relentless-inc-v-department-of-commerce (last visited Dec. 22, 2023).

31. *Id.*; Petition for a Writ of Certiorari at i, Relentless, Inc. v. U.S. Dep't of Com., No. 22-1219, 2023 WL 6780370 (U.S. Oct. 13, 2023).

32. Amy Howe, *Justices Grant Four New Cases, Including Chevron Companion Case*, SCOTUSBLOG (Oct. 13, 2023, 3:16 PM), http://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case.

statute to the agency charged with enforcing such statute.[33] The United States Supreme Court articulated the special expertise rationale in *Chevron*, as well as a potential separation of powers issue attendant to interfering with the political processes of distinctly political branches of government, i.e., the legislature and executive:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. *While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices*—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[34]

Prior to *Chevron*, the Court had previously endorsed deferential standards in light of agencies being "at the frontiers of science."[35] *Chevron* cites *Skidmore v. Swift & Co.*[36] to support its special-expertise rationale for agency deference.[37] The reasoning and ruling in *Skidmore*, however, was much narrower: the Court announced that statutory interpretations of administrative agencies, although never binding on the courts, comprise a persuasive body of "experience and informed judgment to which courts . . . may properly resort for guidance" because such body of knowledge arises from "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[38] By comparison, the Court famously left open the question in its *Chevron* decision of what properly

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33. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

34. *Id.* (emphasis added).

35. Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

36. 323 U.S. 134 (1944).

37. *See Chevron*, 467 U.S. at 865 n.40.

38. *Skidmore*, 323 U.S. at 139–40.

constitutes the relevant "expertise" that justifies deference.[39] Nonetheless, the deference to policymaking institutions, as articulated in *Skidmore*, gives *stare decisis*-like weight to the wisdom of those agencies "whose substantive knowledge in a particular area may be greater than the judge deciding the instant case."[40]

Florida appellate courts, meanwhile, have expressed a suspicion toward the special expertise of agencies since decisions like *Chevron* and *Skidmore*.[41] In fact, Florida courts need not defer to an agency's interpretation and execution of a statute if "special agency expertise is not required."[42] The special-expertise prong allowed Florida courts to effectively sidestep deference if the courts concluded sua sponte that the subject matter in question did not require special expertise.[43] Florida appellate courts have refused to review agency matters with deference when such matters involve contractual obligations and public nuisances.[44]

III. THE RISE OF AGENCY DEFERENCE IN FLORIDA

The Florida Supreme Court first fully endorsed its own *Chevron*-style deference in *Gay v. Canada Dry Bottling Co. of Florida*.[45] Florida courts were thereafter required to greatly defer to the interpretation of a statute by the

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39. *Cf. id.*; *see Chevron*, 467 U.S. at 865–66; Sidney Shapiro & Elizabeth Fisher, Chevron *and the Legitimacy of "Expert" Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 465 (2013).

40. *See Skidmore*, 323 U.S. at 140; Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 661 (1992).

41. *See, e.g.*, City of Safety Harbor v. Commc'ns Workers of Am., 715 So. 2d 265, 267 (Fla. 1st Dist. Ct. App. 1998); Bd. of Trs. of Nw. Fla. Cmty. Hosp. v. Dep't of Mgmt. Servs., 651 So. 2d 170, 173 (Fla. 1st Dist. Ct. App. 1995); Schoettle v. Dep't of Admin., 513 So. 2d 1299, 1301 (Fla. 1st Dist. Ct. App. 1987).

42. Doyle v. Dep't of Bus. Regul., 794 So. 2d 686, 690 (Fla. 1st Dist. Ct. App. 2001).

43. *See, e.g., id.*; Miami-Dade Cnty. v. Gov't Supervisors Ass'n of Fla., 907 So. 2d 591, 594 (Fla. 3d Dist. Ct. App. 2005) ("We find the issue raised to be one of simple contract interpretation requiring no agency expertise. Thus, we decline to give PERC's interpretation of the CBA deference in this case."); State Bd. of Optometry v. Fla. Soc'y of Ophthalmology, 538 So. 2d 878, 886 (Fla. 1st Dist. Ct. App. 1988).

44. *See* And Just. For All, Inc. v. Fla. Dep't of Ins., 799 So. 2d 1076, 1078 (Fla. 1st Dist. Ct. App. 2001) ("Determination of whether there is a contractual obligation to provide a specific service does not require expertise in the field of insurance."); *see also* State *ex rel.* Shevin v. Tampa Elec. Co., 291 So. 2d 45, 48 (Fla. 2d Dist. Ct. App. 1974); Shepherd et al., *supra* note 1, at 21.

45. 59 So. 2d 788, 790 (Fla. 1952); Shepherd et al., *supra* note 1, at 18.

agency charged with enforcing it.[46] Courts would not defer to an administrative agency's interpretation of a statute "if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute."[47] The underlying rationale was that "[a]dministrative agencies are in the best position to interpret the statutes they implement and enforce."[48] The majority in *Housing Opportunities Project v. SPV Realty, LC*[49] noted that an agency's construction of a statute may be motivated by an agenda or a case of legislation by the executive branch.[50] *Gay* established the "clearly erroneous" standard of review for judicial overrides of agency-originated statutory interpretation.[51] This heightened standard reduces the ability for parties who were unsuccessful at the administrative hearing level to prevail upon judicial review.[52] Agency deference and its heightened standard of review pose significant due process concerns, with Senior Judge Shepherd noting in *Pedraza v. Reemployment Assistance Appeals Commission*[53] that "[i]t ordinarily would be dangerous for a judge in a case to defer to the views of one of the parties . . . [n]onetheless, this is what the judges have done."[54] Problems of due process and separation of powers are inherently attendant on the practice of judicial abdication to one party's particular view in a case, especially when an executive agency's reading of a statute is automatically afforded more weight than the judiciary's reading.[55]

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46. Fla. Hosp. v. Agency for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st Dist. Ct. App. 2002).

47. *Id.* at 848; Hous. Opportunities. Project v. SPV Realty, LC, 212 So. 3d 419, 425–26 n.9 (Fla. 3d Dist. Ct. App. 2016).

48. Chiles v. Dep't of State, 711 So. 2d 151, 155 (Fla. 1st Dist. Ct. App. 1998).

49. 212 So. 3d 419 (Fla. 3d Dist. Ct. App. 2016).

50. *Id.* at 425–26 n.9.

51. Gay v. Canada Dry Bottling Co. of Fla., 59 So. 2d 788, 790 (Fla. 1952).

52. Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 361 n.117, 365 n.140 (2009); *see*, *e.g.*, Muratti-Stuart v. Dep't of Bus. & Pro. Regul., 174 So. 3d 538, 541 (Fla. 4th Dist. Ct. App. 2015) (finding that, despite due process concerns, an administrative agency's decision to deny appellant a license to perform work was not in error); Summer Jai Alai Partners v. Dep't of Bus. & Pro. Regul, 125 So. 3d 304, 305 (Fla. 3d Dist. Ct. App. 2013) (affirming the decision of an administrative agency in denying a permit conversion); Goodwin v. Fla. Dep't of Child. & Fams., 194 So. 3d 1042, 1044, 1048 (Fla. 1st Dist. Ct. App. 2016) (affirming an agency's decision to deny a skilled nursing facilitator the ability to deduct unpaid nursing home bills).

53. 208 So. 3d 1253 (Fla. 3d Dist. Ct. App. 2017).

54. *Id.* at 1257 (Shepherd, J., concurring).

55. *See* Whynes v. Am. Sec. Ins., 240 So. 3d 867, 871 (Fla. 4th Dist. Ct. App. 2018) (Levine, J., concurring).

Legislative choices and judicial norms produced the principle of court deference to administrative agencies at the federal level.[56] The United States Code broadly lays out the procedural requirements of informal rulemaking.[57] In contrast, rulemaking authority in Florida is relatively more constrained.[58] No administrative agency enjoys the broad discretion that the legislature does.[59] Executive agencies lack inherent rulemaking authority, unless vested by the Florida Legislature.[60] The judicial rule of agency deference, as established in *Gay*, allowed courts to be indifferent to "whether an agency interpretation claiming deference was promulgated in accordance with the agency's rulemaking authority," which seems at odds with clear legislative intent and the Florida Constitution.[61]

Some Florida appellate courts recognized the need to sidestep agency deference, as in the Florida Third District Court of Appeal in *Housing Opportunities Project v. SPV Realty, LC*.[62] The majority declined to apply deference to the Florida Commission of Human Rights' interpretation of the Florida Fair Housing Act.[63] Counsellors for the Commission and petitioners argued that because the Florida Fair Housing Act tracks its federal counterpart, the judicial analysis must be the same.[64] However, the Third District identified two potentially competing legislative intents that it felt ill-equipped to resolve and thus, resorted to several well established principles of statutory interpretation to resolve textual ambiguity.[65] Meanwhile, the dissenting judge used the sample tools, in concert with agency deference, to arrive at an opposite conclusion.[66]

Agency deference was not necessarily a "blind mantra" as the majority in *Housing Opportunities Project* put it, considering that nothing required the courts to defer to an interpretation outside the spectrum of possible, reasonable

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56. Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 301 (2022).

57. *See* 5 U.S.C. § 553 (2022).

58. *See* FLA. STAT. § 120.54(1)(a) (2023).

59. *See* FLA. CONST. art. III, § 1; FLA. STAT. § 120.54(1)(a).

60. FLA. STAT. § 120.54(1)(e).

61. *See* Shepherd et al., *supra* note 1, at 20.

62. Hous. Opportunities Project v. SPV Realty, LC, 212 So. 3d 419, 422 (Fla. 3d Dist. Ct. App. 2016); *see also* Chiles v. Dep't of State, 711 So. 2d 151, 155 (Fla. 1st Dist. Ct. App. 1998) (creating and subsequently applying its own ad hoc exception to agency deference where the judiciary may not defer to an administrative agency's reading of a statute if "unrelated to the functions of the agency" to then invalidate an administrative agency's reading).

63. *Hous. Opportunities Project*, 212 So. 3d at 425–26.

64. *Id.* at 425.

65. *See id.* at 420–21.

66. *See id.* at 428.

interpretations.[67] Furthermore, Florida courts refused to adhere to an agency's view of a statute when plainly contrary to the statute's ordinary meaning.[68] The burden on litigants challenging agency decisions based on that agency's interpretation of a statute was still high: "An agency's statutory construction is entitled to great weight and is not to be overturned on appeal, unless clearly erroneous."[69] Nonetheless, Florida appellate courts have inconsistently applied their own *Chevron*-style deference rule.[70] Most notably in *McKenzie Check Advance of Florida, LLC. v. Betts*[71] the Supreme Court of Florida completely disregarded the Department of Banking and Finance's interpretation of its authorizing statute, bypassing any deferential standard and looking solely to the plain language of the text.[72] Such disregard for the deference standard was elucidated solely by Justice Cantero's partial dissent, who argued that the Department's interpretation was entitled to deference because the authorizing statute was ambiguous and such interpretation was reasonable.[73] Even this dissent, however, frames deference as non-threatening to separation of powers principles on the basis that agency deference is implemented out of respect to "institutional competence," but that ultimately, "the courts always remain the final authority on the interpretation of statutes . . . ."[74] As opposed to the majority's position, the dissent's argument is bolstered by precedent affirming deference.[75]

Further, when applying agency deference—as in *International Academy of Design, Inc. v. Department of Revenue*[76]—courts can bypass ordinary rules of statutory interpretation and overlook reasonable alternatives, thereby aligning with an agency's position.[77] Courts often decipher the meaning of a statute by consulting a dictionary.[78] The Florida Supreme Court has stated that dictionaries may be used "to ascertain the plain and ordinary

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67. *See* Fla. Dep't of Educ. v. Cooper, 858 So. 2d 394, 396, 397 (Fla. 1st Dist. Ct. App. 2003).

68. *See* Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1997).

69. Braman Cadillac, Inc., v. Dep't of Highway Safety & Motor Vehicles, 584 So. 2d 1047, 1050 (Fla. 1st Dist. Ct. App 1991).

70. *See id.*; *Werner*, 689 So. 2d at 1214; Int'l Acad. of Design, Inc. v. Dep't of Revenue, 265 So. 3d 651, 654–55 (Fla. 1st Dist. Ct. App. 2018).

71. 928 So. 2d 1204 (Fla. 2006).

72. *See id.* at 1208.

73. *See id.* at 1211–12 (Cantero, J., concurring in part and dissenting in part).

74. *See id.* at 1215 (Cantero, J., concurring in part and dissenting in part).

75. *Id.* at 1216 (Cantero, J., concurring in part and dissenting in part).

76. 265 So. 3d 651 (Fla. 1st Dist. Ct. App. 2018).

77. *See id.* at 654-55.

78. *See* Lawrence Sloan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993).

meaning" of statutes.[79] The Florida First District Court of Appeal, however, interpreted this commandment to mean consulting dictionaries that were several decades old.[80] The Court emerged with two definitions for the word describe: list and define.[81] The Court found both to be reasonable interpretations of the statute, which would ordinarily require consulting rules of statutory interpretation.[82] The rule of agency deference short-circuited this analysis, allowing the Court to automatically favor an agency's interpretation of the statute.[83] Notwithstanding agency deference, the Court ultimately uses the strict construction against taxpayers to resolve the ambiguity.[84]

IV. THE FALL OF AGENCY DEFERENCE IN FLORIDA

In 2018, Florida voters took to the polls and abolished Florida's version of *Chevron* deference, known simply as agency deference.[85] Article V, section 21 of the Florida Constitution now states that "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, *and must instead interpret such statute or rule de novo*."[86] Therefore, appellate courts in Florida no longer defer to an agency's interpretation of a statutory term.[87]

Florida is among six states that have abolished judicial deference to administrative agencies, alongside Arizona, Mississippi, North Carolina, Ohio, and Wisconsin.[88] The underlying rationale for judicial deference among these jurisdictions was a shared understanding that administrative agencies, as

79. L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) (per curiam).
80. *See Int'l Acad. of Design*, 265 So. 3d at 654.
81. *Id.*
82. *See id.*
83. *See id.* at 654–55.
84. *See id.* at 655.
85. *See* Shepherd et al., *supra* note 1, at 18. Additionally, *Chevron* deference was expanded by the federal Supreme Court in *Auer v. Robbins* by finding that agencies have a high level of deference in interpreting their own regulations. Auer v. Robbins, 519 U.S. 452, 462–63 (1997). Article V, section 21, of the Florida Constitution also abolishes the principle of *Auer* deference, thereby allowing courts to construe agency's interpretations of their *own* rules *de novo*. FLA. CONST. art. V, § 21.
86. FLA. CONST. art. V, § 21 (emphasis added).
87. S. Baptist Hosp. of Fla. v. Agency for Health Care Admin., 270 So. 3d 488, 502 (Fla. 1st Dist. Ct. App. 2019).
88. *See* ARIZ. REV. STAT. ANN. § 12-910(F) (2023); WIS. STAT. § 227.57(5) (2023); King v. Miss. Mil. Dep't, 245 So. 3d 404, 408 (Miss. 2018); N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs, 821 S.E.2d 376, 379 (N.C. 2018); TWISM Enters., LLC v. State Bd. of Registration for Pro. Eng'rs & Surveyors, No. 2021-1440, slip op. at ¶ 42 (Ohio Dec. 29, 2022).

part of the executive branch, are equipped with the requisite special expertise to address "particular subject area[s] . . . to which the [legislature] has delegated the responsibility of implementing the legislative command."[89]

A. *The Florida Supreme Court Embraces Plain Meaning*

The Florida Supreme Court has only invoked Article V, section 21 on two occasions.[90] In the first, *Furst v. DeFrances*,[91] the section is mentioned solely in a footnote.[92] The second, *Citizens v. Brown*,[93] presents an extended discussion of statutory interpretation in light of the de novo standard.[94] The Florida Office of Public Counsel, in appealing an administrative decision to allow a public utility to recover environmental compliance costs from ratepayers, argued that the phrase "protect the environment" does not include measures to "mitigate[], remediate[], or otherwise clean[] up existing harm."[95] The rule of agency deference would have required the court to abide by this definition if the court were to conclude that reasonable minds could differ on the definition of "protect the environment."[96] However, the abolition of agency deference allowed the court to resurrect the rule of plain meaning "when the language of the statute is clear and unambiguous."[97] The Court acknowledged that "protect" means to keep safe from injury, i.e., that the term refers to present efforts to prevent some kind of future harm.[98] In the context of the environment, however, protection requires remedying "existing conditions caused by past actions, provided the harm . . . continues to adversely impact the environment."[99]

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89. OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy, 671 N.E.2d 1087, 1094 (Ohio Ct. App. 1996); Dioguardi v. Superior Ct., 909 P.2d 481, 484 (Ariz. Ct. App. 1995); ARIZ. REV. STAT. ANN. § 12-910(F); WIS. STAT. § 227.57(5); *King*, 245 So. 3d at 408; *N.C. Acupuncture Licensing Bd.*, 821 S.E.2d at 379; *TWISM Enters.*, slip op. at ¶ 42.

90. *See* Furst v. DeFrances, 332 So. 3d 951, 957 n.5 (Fla. 2021); Citizens v. Brown, 296 So. 3d 498, 504 (Fla. 2019).

91. 332 So. 3d 951 (Fla. 2021).

92. *Id.* at 957 n.5.

93. 269 So. 3d 498 (Fla. 2019).

94. *Id.* at 504.

95. *Id.*

96. *See id.*

97. *See id.* (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

98. *Brown*, 269 So. 3d at 504; *Protect*, DICTIONARY.COM, http://www.dictionary.com/browse/protect (last visited Dec. 22, 2023).

99. *Brown*, 269 So. 3d at 504.

B. *Plain Meaning and Due Process Are Restored*

1. Plain Meaning "Protects" the Environment

In *Sierra Club v. Department of Environmental Protection*,[100] the Florida First District Court of Appeal reversed the decision of the Department of Environmental Protection ("DEP") in approving Basin Management Action Plans ("BMAPs") as a result of de novo review of the DEP's authorizing statute.[101] Section 403.067(7) of the Florida Statutes authorizes the DEP to develop these BMAPs to restore Florida springs from pollution.[102] The Sierra Club commenced a four-year legal battle, alleging the DEP produced ineffective BMAPs for several Florida springs.[103] The DEP contended that its reading of the statute precluded it from conducting a "detailed allocation" among specific point sources of pollution and specific categories of nonpoint pollution sources.[104] The First District disagreed, reviewing the DEP's reading de novo pursuant to Article V, section 21, of the Florida Constitution, and applying the rule of surplusage to conclude that a "detailed allocation" must be made if "only an initial allocation among point and nonpoint sources is made."[105] The *Sierra Club* hailed the ruling as a victory for preserving Florida's springs and manatees.[106]

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100. 357 So. 3d 737 (Fla. 1st Dist. Ct. App. 2023).

101. *Id.* at 738, 742; *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, SIERRA CLUB: FLA. CHAPTER (Feb. 19, 2023), http://www.sierraclub.org/florida/blog/2023/02/victory-fdep-must-rewrite-outstanding-florida-springs-basin-management-action.

102. FLA. STAT. § 403.067(7) (2023); *Sierra Club*, 357 So. 3d at 738; *see VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101.

103. *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101; *see Sierra Club*, 357 So. 3d at 738, 744.

104. *Sierra Club*, 357 So. 3d at 739, 742.

105. *Id.* at 742 (internal quotation marks omitted); *see* Chris Micheli, *Canon of Statutory Construction — Rule Against Surplusage*, CAL. GLOBE (Oct. 24, 2022, 6:55 AM), http://californiaglobe.com/articles/canon-of-statutory-construction-rule-against-surplusage/.

106. *VICTORY: FDEP Must Rewrite Outstanding Florida Springs Basin Management Action Plans*, *supra* note 101; *see Sierra Club*, 357 So. 3d at 738, 744.

2. Notice, Hearing, and Lenity Are Restored

a. *Notice and an Opportunity to Be Heard*

Due process requires notice and an opportunity to be heard.[107] The abolition of agency deference allowed the Third District, for example, to adhere to due process principles by conducting a plain reading of the Florida Administrative Code to reverse the denial of a Medicaid fair hearing for a disabled thirteen-year-old child.[108] The Code mandated hearing officers to render final orders with "findings of fact," language which the Third District noted was based on due process concerns.[109] Applying Article V, section 21's de novo review to an agency's conclusion of fact, coupled with a de novo standard of review for an agency's conclusion of law, enabled the court to effectively treat the Florida Agency of Health Care Administration Office of Fair Hearings as a court of law, subjecting the agency's findings to judicial review.[110] As the First District demonstrated, de novo review allows the courts to prevent administrative agencies from developing "a potentially limitless fount of regulatory power."[111]

The abolition of agency deference allowed the Third District, in a separate matter, to preserve the due process rights of a student accused of plagiarism.[112] Florida International University (the "University") sought to preserve a hearing officer's exclusion of testimony that would have borne relevance to the bias and motive behind the charges against the student.[113] Freed from deferring to the University's strained interpretation of its own Student Code of Conduct, the Third District instead relied on the canons of ordinary meaning and whole text; this granted the student the right to cross-examine a witness when the student claimed that the charges were fabricated

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107. *See* U.S. CONST. amend. XIV § 1; Pena v. Rodriguez, 273 So. 3d 237, 240 (Fla. 3d Dist. Ct. App. 2019).

108. *See* A.C. v. Agency for Health Care Admin., 322 So. 3d 1182, 1184, 1187 (Fla. 4th Dist. Ct. App. 2019).

109. *Id.* at 1188 (citing Borges v. Dep't of Health, 143 So. 3d 1185, 1187 (Fla. 3d Dist. Ct. App. 2014)).

110. FLA. STAT. § 120.68(1)(a) (2023) (entitling a party who is adversely affected by final agency action to judicial review); *see* FLA. CONST. art. V, § 21; *A.C.*, 322 So. 3d at 1187 n.6.

111. Citizens v. Fla. Pub. Serv. Comm'n, 294 So. 3d 961, 967 (Fla. 1st Dist. Ct. App. 2019).

112. Fla. Int'l Univ. v. Ramos, 335 So. 3d 1221, 1223, 1224 (Fla. 3d Dist. Ct. App. 2021).

113. *See id.* at 1225.

against her.[114] While the University argued that the Code allowed the hearing officer to place limits on testimony, the Court explained that this was technically accurate but an incomplete reading of the Code: the University was required to allow the student to present testimony and cross-examine witnesses.[115] The Court concluded that the University's failure to do so "undermined basic tenets of due process."[116]

The Third District again balanced the due process concerns of individuals versus administrative bodies in *Rodriguez v. Department of Business & Professional Regulation*.[117] The Court concluded that the Florida Department of Business and Professional Regulation exhausted nearly every method, short of actual notice, that complied with both federal and state constitutions by adhering to the plain meaning of the Florida Administrative Code.[118]

b. *The Return of Lenity*

In the absence of agency deference, the First District, in *Loebig v. Florida Commission on Ethics*,[119] applied a version of the rule of lenity to resolve the ambiguity of a statute in favor of a public employee "[b]ecause the Florida Code of Ethics is penal in nature."[120] The Fifth Circuit observed that "the [United States] Supreme Court has never held that the Government's reading of a criminal statute is entitled to any deference," let alone *Chevron* deference.[121] The Court further explained that the application of *Chevron* deference undermines a central purpose of the rule of lenity: "to promote fair notice to those subject to criminal laws."[122] The Florida Supreme Court has

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114. *See id.* at 1224, 1225; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 69, 167 (1st ed. 2011).

115. *Ramos*, 335 So. 3d at 1225.

116. *Id.*

117. 326 So. 3d 796 (Fla. 3d Dist. Ct. App. 2021).

118. *See id.* at 798, 799.

119. 355 So. 3d 527 (Fla. 1st Dist. Ct. App. 2023) (per curiam).

120. *Id.* at 530, 533 (citing Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting)).

121. *See id.* at 467 (quoting United States v. Apel, 571 U.S. 359 (2014)). This assertion by the Fifth Circuit ignores the holding of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, where the United States Supreme Court rejected the argument that the rule of lenity should *always* foreclose deference to an agency's interpretation of a statute solely because the statute includes criminal penalties. *See id.*; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995).

122. *Cargill*, 57 F.4th at 468 (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)).

similarly held that the purpose of the rule of lenity is to provide clear notice of what conduct is proscribed by statute.[123]

Lenity returned in the case of *Galvan v. Dep't of Health*,[124] where an ex-registered nurse appealed the permanent revocation of her license to practice nursing in Florida.[125] The Court interpreted the agency's interpretation of its *own* rule de novo, determining that revocation of a nursing license is a penalty and must be strictly construed in favor of the license holder.[126] Essential to the Florida Department of Health's rule that authorizes the revocation of nursing licenses are two elements: "[f]irst, the person must [be] convicted [of], found guilty of, or have taken a plea . . . [and] [s]econd, [the] crime must be directly related to the practice of nursing or to the ability to practice nursing."[127] The Third District found no nexus between the nurse's "plea to the crime of taking a kickback and the requirement that the pled-to offense be directly related to the practice of nursing."[128] If agency deference had not been abolished, the Department's interpretation of its own rule authorizing the revocation of the appellant's nursing license would have likely been upheld.[129]

C. *"Zombie* Chevron*" Problem in Florida Jurisprudence*

1. The *Raik* Decision and the Problem of Statutory Interpretation

In *Raik v. Dep't of Legal Affairs*,[130] the First District reversed a decision of the Florida Department of Legal Affairs, Bureau of Victim Compensation ("Bureau"), when it denied the wife of a homicide victim compensation under the Florida Crimes Compensation Act ("the Act").[131] Because the Bureau was an administrative agency, the First District used the de novo the standard of review.[132] The Court looked to legislative intent, plain meaning, and the absurdity doctrine, and used a myriad of canons of statutory construction to afford the appellant compensation that the Legislature declared

123. City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993) (citing State v. Llopis, 257 So. 2d 17, 18 (Fla. 1971)).
124. 285 So. 3d 975 (Fla. 3d Dist. Ct. App. 2019).
125. *Id.* at 976.
126. *Id.* at 979.
127. *Id.* (internal quotation marks omitted).
128. *Id.* at 980 (internal quotation marks omitted).
129. *See Galvan*, 285 So. 3d at 980.
130. 344 So. 3d 540 (Fla. 1st Dist. Ct. App. 2022).
131. *Id.* at 541.
132. FLA. CONST. art. V, § 21; *Raik*, 344 So. 3d at 542.

was within her right.[133] The Bureau construed the FCCA requirements for victim compensation too tightly, arbitrarily limiting the number of crime victims who can receive relief under the Act.[134] The court conducted a historical analysis of the FCCA and its various amendments to establish that the Legislature clearly intended to include more crime victims within the scope of the Act.[135] Next, the court declared the Bureau's construction of section 960.03(3)(c) of the Florida Statutes absurd, which would deny compensation to victims of less-culpable forms of vehicular homicide.[136] The majority in *Raik* cited heavily from its previous decisions.[137] The court explained the hazard that canons of construction, like the absurdity doctrine, can pose to the separation of powers; namely, "[c]ourts must be careful in applying the absurdity doctrine so as to not 'substitute their judgment of how legislation *should* read, rather than how it *does* read, in violation of the separation of powers.'"[138]

The dissent in *Raik*, written by Judge Makar, reaches the opposite conclusion and votes to the petitioner's relief because vehicular homicide, while a crime under Florida law, failed to fall within the Act's narrower definition of "crime" to entitle the petitioner to compensation.[139] Rather than primarily rely on legislative history as the majority did, Judge Makar first looked to the plain language of section 960.03(3)(b) of the Florida Statutes.[140] This section enumerates only the *first*-degree violation of vehicular homicide,

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133. *See Raik*, 344 So. 3d at 544, 549; SCALIA & GARNER, *supra* note 114, at 234 (defining the absurdity doctrine, whereby "[a] provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.").

134. *See Raik*, 344 So. 3d at 544.

135. *Id.* at 544–45.

136. *See id.* at 546–47. Discussing these potential denials of compensation:

> For example, the Bureau's interpretation would exclude the offense which resulted in the death of a child in *State v. Ellison* 561 So. 2d 576 (Fla. 1990). Ellison was convicted of second-degree murder, later reduced to manslaughter, after losing control of a vehicle in a high-speed police chase and hitting another vehicle, killing a sixteen-month-old victim. Under the Bureau's interpretation, the child's parents would not be eligible for compensation, because the perpetrator in *Ellison* did not intentionally use the vehicle: 'Ellison's act of losing control of the car was not committed from ill-will or spite.' Thus, under the Bureau's literal reading of subsection (3)(c) in isolation, the state would fail in its 'moral responsibility' to aid those victims in violation of the stated purpose of the Act.

Id. at 547 (discussing *State v. Ellison*, 561 So.2d 576 (Fla. 1990)).

137. *See id.* at 549–50.

138. Owens v. State, 303 So. 3d 993, 998 (Fla. 1st Dist. Ct. App. 2020) (quoting Nassau Cnty. v. Willis, 41 So. 3d 270, 279 (Fla.1st Dist. Ct. App. 2010)).

139. *Raik*, 344 So. 3d at 550 (Makar, J., dissenting).

140. *Id.* at 552.

which was not the specific charge in the petitioner's case.[141] Then, the dissenting judge looked to subsection 960.03(3)(c), which explicitly excluded operations of motor vehicles resulting in death that were *non*-intentional.[142] Judge Makar then wields two other modes of statutory interpretation: the general-specific provision rule and the rule against surplusage.[143] The general-specific rule states that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails."[144] Judge Makar reasoned that sections 960.03(3)(b) and 960.03(3)(c) act as a "qualification" or limitation of section 960.03(3)(a), which imposes the general definition of "crime" throughout the chapter.[145] Judge Makar bolsters this interpretation using the rule against surplusage, interpreting sections 960.03(3)(a), 960.03(3)(b), and 960.03(3)(c) harmoniously instead of in conflict.[146]

Raik, with its conflicting opinions, demonstrates a fundamental challenge in judicial evaluation of an agency's interpretations of statutes and rules after the constitutional abolition of agency—the confusion over what constitutes a statute's plain meaning.[147] The dissent in *Raik* noted that "[t]he Department's view, to which no deference is due, is nonetheless the *most faithful* to principles of textual analysis."[148] If agency deference had not been abolished, perhaps the view of the Department would have been given significantly more weight, preempting a lengthy discussion by the majority in *Raik* about the legislative intent behind the Florida Crimes Compensation Act.[149] Despite the serious disagreement over what constitutes the "plain meaning" of the Act, neither the dissent nor majority in *Raik* cite *Holly v. Auld*[150] or any other guidance in case law on properly deciphering a statute's plainness or ambiguity in meaning.[151] Thus, the *Raik* decision runs the risk of

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141. *Id.*; *see* FLA. STAT. § 960.03(3)(b) (2023).

142. *Raik*, 344 So. 3d at 552 (Makar, J., dissenting); FLA. STAT. § 960.03(3)(c).

143. *Raik*, 344 So. 3d at 553 (Makar, J., dissenting) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183 (1st ed. 2011)); *see e.g.*, Mcdonald v. State, 957 So. 2d 605, 610 (Fla. 2007); Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003); Mendenhall v. State, 48 So. 3d 740, 749 (Fla. 2010) (per curiam).

144. SCALIA & GARNER, *supra* note 114, at 183; *Raik*, 344 So. 3d at 553.

145. *Raik*, 344 So. 3d at 553.

146. *See id.* at 553–54.

147. *See* Conage v. United States, 346 So. 3d 594, 598 (Fla. 2022) (reasoning that following a plain meaning rule, with nothing else, "leaves the interpreter in the dark about how to determine whether a particular word or phrase has a clear meaning").

148. *Raik*, 344 So. 3d at 553 (Makar, J., dissenting) (emphasis added).

149. *See id.* at 542, 544; Arza v. Fla. Elections Comm'n, 907 So. 2d 604, 606 (Fla. 3d Dist. Ct. App. 2005).

150. 450 So. 2d 217 (Fla. 1984). It is helpful to note that *Raik* was decided prior to the abrogation of *Holly* in *Conage*. *Conage*, 346 So. 3d at 598.

151. *See Raik*, 344 So. 2d at 548.

being entirely arbitrary, threatening due process principles.[152] The problem is compounded by *Holly*'s abrogation in *Conage v. United States*,[153] where the Florida Supreme Court abrogated the plain, ordinary meaning rule in favor of requiring judges to rely on "traditional canons of statutory interpretation" without specifying which ones, in what context, and for what purpose.[154] *Chevron* is criticized for "reallocating power away from the courts and Congress and concentrating it in the executive."[155] However, the problems posed by Florida's abolition of agency deference gifts power to a judiciary beholden solely to whatever *amuse-bouche* of traditional canons of statutory interpretation.[156]

Conage's command that "judges must exhaust all the textual and structural clues that bear on the meaning of a disputed text,"[157] the abolition of agency deference, and the fact that the rule of lenity is a statutory command, not a mere "canon of construction,"[158] may fast-track judicial deference to defendants and the application of lenity to construe ambiguous criminal or otherwise penal statutes.[159] Such a result was directly envisioned by the dissenting judge in *Cargill*, who noted that "under the majority's rule, the defendant wins by default whenever the government fails to prove that a statute unambiguously criminalizes the defendant's conduct."[160] This is, in

152. *See* United States v. Carmack, 329 U.S. 230, 247 (1946) (defining an 'arbitrary' decision as one made "without adequate determining principle"); 16C C.J.S. *Constitutional Law* § 1864 (2023) ("The purpose of . . . due process is to prevent governmental encroachment against, or arbitrary invasion of, the life, liberty, or property of individuals, through executive, legislative, judicial, or administrative authority.").

153. 346 So. 3d 594 (Fla. 2022).

154. *Conage*, 346 So. 3d at 598.

155. Brief for Petitioners, *supra* note 25, at 32.

156. *See* Macey & Miller, *supra* note 40, at 649 (discussing the highly variable use and *non*-use of canons of statutory construction in judicial decision-making).

157. *See Conage*, 346 So. 3d at 598 (citing Alachua County v. Watson, 333 So. 3d 162, 169 (Fla. 2022)) (internal quotation marks omitted).

158. *Id.* at 602 (citing FLA. STAT. § 775.021(1) (2023)).

159. *See id.* at 598; *see also* FLA. STAT. § 775.021 (2023). There is evidence that this has already taken place. *See* Loebig v. Fla. Comm'n on Ethics, 355 So. 3d 527, 528 (Fla. 1st Dist. Ct. App. 2023) (per curiam). There, a taxpayer rights advocate, although a position created within the Department of Revenue, was deemed by the First District to be "employed" by the Chief Inspector General within the Executive Office of the Governor of Florida after the court examined "all textual and structural clues" in line with *Conage*'s command. *See id.* at 531–32. Without explicitly commenting on the challenged statute's plainness or ambiguity, the court concluded by noting that even if the definition of "employed" were ambiguous, the ambiguity must be resolved in favor of lenity. *Id.* at 533.

160. Cargill v. Garland, 57 F.4th 447, 480 (5th Cir. 2023) (Higginson, J., dissenting).

fact, the point of lenity as a principle that "ensures fair warning" in compliance with due process principles.[161]

2. Ignoring the Will of the Legislature

The case of *Florida Department of Health v. Louis Del Favero Orchids, Inc.*[162] demonstrates how an administrative agency, without deference in interpretating statutes, can maintain an erroneous interpretation of a statute and avoid attorney's fees and costs through the deferential substantial justification standard.[163] The Florida Legislature granted the Florida Department of Health the rulemaking authority to issue and renew licenses for Medical Marijuana Treatment Centers.[164] Under the terms of section 381.986(8)(a) applicants are given preference when he/she can demonstrate that "they own one or more *facilities*" previously used for citrus-processing.[165] The Department proposed an administrative rule that substituted the word "facilit[ies]" for "propert[ies]," a construction that an administrative law judge found to be an invalid exercise of legislative authority that allowed "citrus preferences to be awarded to a broader group of applicants" than contemplated by the statute.[166] The respondent was awarded attorney's fees and costs against the Department, a decision which the Department timely appealed.[167] The First District reversed, reasoning that the Department's construction of its authorizing statute was "substantially justified" under the terms of section 120.595(2) of the Florida Statutes.[168] The majority, in effect, deferred to the Department's construction of the statute as extending citrus preference to property owners.[169] Despite not expressly mentioning agency deference, the First District nonetheless gives the game away by appealing to the special-expertise rationale:

> The executive director of the Department of Citrus testified at the merits hearing that her department advised the Department on its interpretation of the citrus preference statute and what type of "facilities" might be contemplated by its "otherwise processing of citrus fruit" language. *It makes sense that the Department of Health*

161. United States v. Lanier, 520 U.S. 259, 266 (1997).
162. 313 So. 3d 876 (Fla. 1st Dist. Ct. App. 2021).
163. *See id.* at 881–82; *see* FLA. STAT. § 120.595(2) (2023).
164. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 877.
165. *See* FLA. STAT. § 381.986(8)(a)(3) (2023) (emphasis added).
166. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 878.
167. *Id.*
168. *Id.* at 878–79.
169. *Id.* at 880.

> *would reach out to citrus-industry experts for advice about this statutory language instead of going at it alone.* Because the ALJ's decision to discount the Department's advice-seeking efforts stemmed from its incorrect view that the proposed rule's "property" language defied the statute, we cannot accept its evaluation that the Department unreasonably relied on bad advice that was "facially contrary to the Citrus Code." Rather, *the Department's legwork in seeking out industry-specific advice tended to show that it responded reasonably to its constitutional and statutory rulemaking responsibilities here*, even though it lost on the merits in the rule challenge litigation.[170]

Pursuant to Article V, section 21, the dissent found the Department's construction impermissibly broad.[171] In construing the statute to give preference to properties, the Department essentially allowed unimproved pieces of land to receive preference for registration over facilities previously designed for processing citrus fruit.[172] The dissent concluded that, although a deferential standard of review applied to the Department's findings of fact, deference was constitutionally abolished and therefore inapplicable to the Department's construction of its authorizing statute.[173] In its substitution of the word property for facility, the Department substituted its will for that of the Legislature.[174]

Meanwhile, the Second District's decision to reverse the denial of a childcare center's license renewal was predicated on a rather stilted reading of the statute.[175] The Florida Department of Children and Families ("DCF") refused to renew the Laura Center's childcare license on the basis that the facility's owner lacked "good moral character" under the meaning of section 402.305(2) of the Florida Statutes.[176] Once again, pursuant to Article V, section 21, the Second District reviewed the statute's meaning de novo and gave no deference to DCF's reading of section 402.305(2).[177] The Second District concluded that nothing in the statute provided that a verified finding of child abuse amounts to an absence of "good moral character."[178] The child abuse and neglect registry was "one of many" databases that the DCF was

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170. *Id.* at 881–82 (emphasis added).
171. *Louis Del Favero Orchids, Inc.*, 313 So. 3d at 884 (Makar, J., dissenting).
172. *See id.* at 883 (Makar, J., dissenting).
173. *See id.* at 884 (Makar, J., dissenting).
174. *See id.* (Makar, J., dissenting).
175. *See* Laura's Learning & Enrichment Ctr. v. Dep't of Child. & Fams., 351 So. 3d 1253, 1254, 1256 (Fla. 2d Dist. Ct. App. 2022).
176. *Id.*
177. *Id.* at 1255.
178. *Id.* at 1256.

required to assess before determining a childcare license applicant had failed the screening set forth by section 402.305(2).[179] Therefore, under the Second District's reading of section 402.305(2) an applicant for a childcare license could be granted his or her license even if DCF finds a history of child abuse in the provider's background.[180] This reading arguably contravenes the legislative intent of Chapter 402, Florida Statutes.[181] Section (1)(b) provides, in relevant part, that the Legislature intends that continued "monitoring and investigation shall safeguard the *health, safety, and welfare of consumers* of services provided by [certain] state agencies."[182]

In *R.C. v. Department of Agriculture & Consumer Services*,[183] the First District reversed the decision of the Florida Department of Agriculture and Consumer Services ("FDACS") to deny a convicted felon's application for a concealed-carry license.[184] Pursuant to Article V, section 21, the Court used de novo review to evaluate the FDACS's interpretation of section 790.06(2)(n) of the Florida Statutes.[185] The Court concluded that the FDACS relied on an erroneous interpretation of both Florida *and* federal statutory law in denying the petitioner's request for a license.[186] If an applicant's civil rights have been restored, they are not prohibited from possessing a firearm.[187] In other words, the FDACS failed to apply the plain text and legislative intent behind both the federal and state statutory provisions that guarantee that a convicted felon, whose civil rights and firearm authority have been restored, should not be precluded from owning a firearm.[188] Compare this result to the decision of the United States Court of Appeals for the Eleventh Circuit in *Decker v. Gibson Products Co. of Albany*.[189] There, the Eleventh Circuit concluded that, under the federal firearms statute, "[r]estoration of civil rights . . . does not change a felon's status for purposes of the act unless expressly provided . . . by the state."[190] This decision flies in the face of the plain legislative intent of the firearms chapter of the United States Code, which states, in relevant part, "[a]ny conviction . . . for which a person . . . has had

179. *Id.*
180. *See Laura's Learning & Enrichment Ctr.*, 351 So. 3d at 1256.; *see also* FLA. STAT. § 402.305(2)(a) (2023).
181. *See* FLA. STAT. § 402.164(1)(b) (2023).
182. *Id.* (emphasis added).
183. 323 So. 3d 275 (Fla. 1st Dist. Ct. App. 2021).
184. *Id.* at 276.
185. *Id.* at 278; *see* FLA. CONST. art. V, § 21; FLA. STAT. § 790.06(2)(n) (2020).
186. *See R.C.*, 323 So. 3d at 276, 279.
187. *Id.* at 279 (citing 18 U.S.C. § 921(a)(20)); FLA. STAT. § 790.23(2)(a) (2023)).
188. *See R.C.*, 323 So. 3d at 279.
189. 679 F.2d 212, 216 (11th Cir. 1982).
190. *Id.* at 214.

civil rights restored *shall not* be considered a conviction for purposes of this chapter."[191]

Not all on the bench, however, were enamored by the majority's reading of the Florida firearms statute: Judge Kelsey's dissent alleges that the majority in *R.C.* violated the negative-implication canon, whereby "[t]he expression of one thing implies the exclusion of others."[192] Judge Kelsey uses this principle to determine that "the Legislature *expressly limited* [the Department's] authority" set forth in section 790.06 of the Florida Statutes.[193] Judge Kelsey further writes that this statutory restriction is consistent with the notion that administrative agencies that exercise powers beyond those expressly designated by the Florida Legislature violate the separation of powers.[194] Judge Kelsey explains that the judiciary's responsibility is not to make law but to say what the law is, adding that courts "lack the power to interpret a statute in a way that would inject requirements the Legislature had not previously adopted."[195] The majority's reading of the firearms statute granted the Department the power to circumvent the proper statutory channel of relying *solely* on criminal justice information reports from the Florida Department of Law Enforcement, which Judge Kelsey notes is a reading that lacks basis in statute.[196] While the principle of agency deference implicated major issues of separation of powers,[197] it seems that even in the wake of its abolition, outstanding separation of powers issues still exist, as is the case with *R.C.*[198]

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191. *See* 18 U.S.C. § 921(a)(20)(B) (emphasis added).

192. *See R.C.*, 323 So. 3d at 295 (Kelsey, J., dissenting); *see also* SCALIA & GARNER, *supra* note 114, at 107.

193. *R.C.*, 323 So. 3d at 295 (Kelsey, J., dissenting) (emphasis in original). Florida's firearms statute states in relevant part that "[t]he Legislature does not delegate to the Department of Agriculture and Consumer Services the authority to regulate or restrict the issuing of licenses provided for in this section, *beyond those provisions contained in this section*." FLA. STAT. § 790.06(16) (2020) (emphasis added).

194. *See R.C.*, 323 So. 3d at 297 (Kelsey, J., dissenting).

195. *Id.* at 296 (Kelsey, J., dissenting); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

196. *See R.C.*, 323 So. 3d at 299 (Kelsey, J., dissenting).

197. Pedraza v. Reemployment Assistance Appeals Comm'n, 208 So. 3d 1253, 1257 (Fla. 3d Dist. Ct. App. 2017) (Shepherd, J., concurring).

198. *See R.C.*, 323 So. 3d at 297 (Kelsey, J., dissenting).

3. Deference Lives on Through Precedent

In *Evans Rowing Club, LLC v. City of Jacksonville*,[199] the First District—without a written opinion—denied review of the decision of the City of Jacksonville to rescind petitioner's land-use permit to operate a rowing club.[200] Three First District judges concurred with the denial per curiam.[201] Judge Wolf's concurrence sharply criticized the reasoning of his colleagues and expressly declared that "[l]ocal land use regulations are not state statutes or rules."[202] Article V, section 21—in Judge Wolf's view—does not affect an appellate court's deferential judicial review of local government land-use decisions.[203] The plain text of the amendment excludes local zoning decisions from its scope, as well as decisions and regulations *not* pursuant to general law.[204] Judge Wolf argues that failure to apply a deferential standard of review would cede control on land-use decisions "from local people who are familiar with local conditions to state appellate judges."[205]

Both Judge Wolf and Judge Thomas acknowledge that despite Article V, section 21, a deferential standard of review applies for local land-use decisions based on the principle that local land-use agencies know better than the courts because they are equipped with the expertise the judiciary lacks over zoning decisions.[206] Nonetheless, Judge Thomas argues that these local land-use cases should not grant greater deference than state administrative agencies once afforded.[207] He argues that the current standard of review, which requires the Court to give deference to the City of Jacksonville's denial of the petitioner's permit, should be replaced with the same de novo standard the Court is now obligated to use in all other instances.[208] Judge Thomas determined from Florida Supreme Court precedent that local zoning decisions are inherently administrative and thus, are still entitled to deference.[209] Therefore, the standard of review for second-tier certiorari cases is deferential to the decisions of local zoning agencies in contravention of the clear purpose

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199. 300 So. 3d 1249 (Fla. 1st Dist. Ct. App. 2020) (per curiam).
200. *Id.* at 1254 (Thomas, J., concurring).
201. *See id.* at 1249 (Wolf, J., concurring), 1250 (Thomas, J., concurring), 1254 (Makar, J., concurring).
202. *See id.* at 1249 (Wolf, J., concurring).
203. *See id.*
204. *Evans*, 300 So. 3d at 1249.
205. *Id.*
206. *See id.* at 1250.
207. *Id.* at 1252.
208. *See id.*
209. *See Evans*, 300 So. 3d at 1250.

behind the popularly enacted Article V, section 21.[210] This deferential standard of review presents the paradox of *local* government decisions receiving deference while *state* government decisions receive none.[211]

A sort of "zombie *Chevron*" problem also exists in Second District jurisprudence, whereby previous case law decided on agency deference principles may continue to govern future decisions.[212] In *Department of Highway Safety and Motor Vehicles v. Chakrin*,[213] the Second District quashed an order by the Circuit Court to reverse the Department of Highway Safety and Motor Vehicles ("DHSMV") decision to deny reinstatement of a motorist's driver's license.[214] The Circuit Court's decision was based on its interpretation of section 322.271(4)(a) of the Florida Statutes drug-free requirement as excluding alcohol.[215] To get his license reinstated, the petitioner, Mr. Chakrin, had to prove that he was drug-free under the meaning of the statute.[216] Mr. Chakrin had consumed alcohol one week before his reinstatement hearing, and thereafter, the hearing officer denied Mr. Chakrin's request for reinstatement based on DHSMV's reading of section 322.271(4)(a) that contemplated alcohol as a drug requiring "complete abstinence."[217] The Circuit Court agreed with Mr. Chakrin, arguing that the statutory requirement "that Mr. Chakrin prove he had remained drug-free could not be interpreted by DHSMV as including alcohol."[218] The Second District quashed the Circuit Court order, noting that the order failed to abide by controlling case law that directly spoke to the issue of the definition of "drug-free."[219] The Circuit Court interpreted the abolition of agency deference to preclude the future application of past cases decided *on* agency deference to ignore case law that included alcohol in the definition of drug-free.[220] The Second District disagreed, ultimately relying on the principle that the trial-level courts must first apply the rules of decision promulgated by the Florida Supreme Court, and then—if there is no conflict between districts—the law of *all* higher courts of appeal throughout the state, of which the First and Second Districts, in this case,

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210. *See id.* at 1252.
211. *See id.*
212. *See* Dep't of Highway Safety & Motor Vehicles v. Chakrin, 304 So. 3d 822, 831 (Fla. 2d Dist. Ct. App. 2020); Cass R. Sunstein, *Zombie* Chevron: *A Celebration*, 82 OHIO ST. L.J. 565, 570 (2021).
213. 304 So. 3d 822 (Fla. 2d Dist. Ct. App. 2020).
214. *Id.* at 825.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Chakrin*, 304 So. 3d at 825.
219. *See id.* at 825, 834; Dep't of Highway Safety & Motor Vehicles v. Abbey, 745 So. 2d 1024, 1024 (Fla. 2d Dist. Ct. App. 1999) (per curiam).
220. *See Chakrin*, 304 So. 3d at 829; FLA. CONST. art. V, § 21.

agreed.[221] Therefore, past decisions relying on agency deference, where no intervening Supreme Court or multidistrict rule exists to expressly disavow those previous decisions, must control.[222]

That *Chakrin* represents a "zombie *Chevron*" problem may be a touch of hyperbole, considering the Second District made a careful reading of *Department of Highway Safety & Motor Vehicles v. Abbey*[223] to conclude that agency deference was not the sole legal standard that informed the Second District's ruling in that case.[224] *Abbey* supported the Department's determination that alcohol is included within the definition of a drug through an admixture of precedent and the intent of the Legislature in other statutory provisions to define "drug-free" as including abstinence from alcohol.[225] There was no conflict with the lenity rule either, as the statute in question was nonpenal in nature, and the statute was relatively unambiguous.[226] However, after considering related statutes and legislative intent, *Abbey* held that the Department's inclusion of alcohol was not just *a* reasonable interpretation but, rather, the *only* reasonable interpretation.[227]

Curiously, a footnote in *Chakrin* states that "it is important for the purposes of this opinion only to note that the [Department's] order relied on the statute without indication that its interpretation was based on an official agency expression interpreting that statute or any other administrative rule."[228] There are, however, plenty of Florida appellate court decisions where there was no clear indication of "official agency expression" interpreting statutes or rules, yet the de novo standard of review inherent in Article V, section 21, of the Florida Constitution was nonetheless invoked, so it is unclear where the Second District fashioned this criterion for agency decision review.[229] The *Chakrin* footnote's "official agency expression" criterion appears remarkably similar to Justice Scalia's requirement that "ambiguit[ies in statutes whereby] . . . Congress intended agency discretion" and, thus, should be resolved in favor of administrative agencies *if* the interpretation by the administering

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221. *See Chakrin*, 304 So. 3d at 829–30.

222. *See id.* at 830.

223. 745 So. 2d 1024 (Fla. 2d Dist. Ct. App. 1999) (per curiam); Sunstein, *supra* note 212, at 570; *Chakrin*, 304 So. 3d at 822.

224. *Chakrin*, 304 So. 3d at 828 n.5, 831.

225. *See Abbey*, 745 So. 2d at 1025.

226. *See id.* at 1025–26 ("The statute is not a criminal statute that must be narrowly interpreted for the benefit of a defendant.").

227. *See id.* at 1025; *cf.* Cargill v. Garland, 57 F.4th 447, 451 (5th Cir. 2023).

228. *Chakrin*, 304 So. 2d at 828 n.5.

229. *See, e.g.*, D.B. v. Agency for Pers. with Disabilities, 357 So. 3d 727, 729 (Fla. 5th Dist. Ct. App. 2022) (per curiam); O.H. v. Agency for Pers. with Disabilities, 332 So. 3d 27, 29 (Fla. 3d Dist. Ct. App. 2021); G.R. v. Agency for Pers. with Disabilities, 315 So. 3d 107, 108 (Fla. 3d Dist. Ct. App. 2020).

agency represents the "official position of the agency."[230] The majority in *Mead* directly addresses Justice Scalia's novel criterion, writing that the late Justice wanted to "limit what is 'authoritative' or 'official' to a pronouncement that expresses the 'judgment of central agency management, approved at the highest levels,' as distinct from the pronouncements of 'underlings.'"[231]

V. CONCLUSION

Overcoming the confusion stemming from the abolition of agency deference in Florida requires more than just temporary wins in restoring the plain meaning rule; a greater emphasis on due process is crucial to uphold due process rights and the separation of powers.[232] The Florida Supreme Court has twice applied the de novo standard set forth in Article V, section 21, and neither application discusses the abolition of agency deference in any meaningful detail.[233] *Evans* and *Chakrin* each present unique variations of the same fundamental constitutional problem whereby precedent built off of deference to agency interpretations can still affect court decisions even after the abolition of agency deference, i.e., the "zombie *Chevron*" problem.[234] The *Raik* decision reveals fundamental issues with Florida's jurisprudence on the rules of statutory interpretation now that deference is off the table.[235] The same vices that plagued *Chevron's* deference at the federal level and agency deference at the state level appear to adversely affect Florida's judicial decision-making, albeit in slightly different ways.[236]

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230. *See Chakrin*, 304 So. 2d at 828 n.5; United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting); *cf. Abbey*, 745 So. 2d at 1025.

231. *Mead Corp.*, 533 U.S. at 238 n.19.

232. *See* discussion *supra* Part IV; Pedraza v. Reemployment Assistance Appeals Comm'n, 208 So. 3d 1253, 1257 (Fla. 3d Dist. Ct. App. 2017).

233. *See* Furst v. DeFrances, 332 So. 3d 951, 957 n.5 (Fla. 2021); Citizens v. Brown, 269 So. 3d 498, 504 (Fla. 2019).

234. *See* Evans Rowing Club, LLC v. City of Jacksonville, 300 So. 3d 1249, 1250 (Fla. 1st Dist. Ct. App. 2020) (per curiam); Dep't of Highway Safety Motor Vehicles v. Chakrin, 304 So. 3d 822, 829 (Fla. 2d Dist. Ct. App. 2020); Sunstein, *supra* note 212, at 570.

235. *See* Raik v. Dep't of Legal Affs., 344 So. 3d 540, 553 (Fla. 1st Dist. Ct. App. 2022).

236. *See* Sunstein, *supra* note 212, at 583; *Raik*, 344 So. 3d at 553; *Evans*, 300 So. 3d at 1250; *Chakrin*, 304 So. 3d at 829.