HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
MARCH 16, 2023

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2296

Chairman Schauer and members of the Committee:

My name is Claire Ness, Chief Deputy Attorney General, and I appear on behalf of the Attorney General in opposition to Senate Bill 2296. Because deference to administrative agencies is a constitutional doctrine established by our courts and rooted in the separation of powers doctrine that sustains our governmental checks and balances, the Office of Attorney General recommends a do not pass on Senate Bill 2296.

Deference is a Judicial Doctrine Based on the Courts' Interpretation of the Constitution.

The Supreme Court of North Dakota established our state courts' doctrine of limited deference to administrative agencies. This deference doctrine arises from a judicial interpretation of our constitution, particularly the separation of powers among the three branches of government. As recently as 2020, the North Dakota Supreme Court reiterated:

> "We have consistently held our review of an agency's decision involving the exercise of its discretion is limited under the separation of powers doctrine"[1] and "[t]he deferential standard of review for an agency's findings of fact, conclusions of law and decision is anchored in the separation of powers doctrine."[2]

Since at least 1803, constitutional interpretations, such as the court's deference doctrine, have been indisputably within the judicial branch's authority. Legislation requiring the courts to

[1] E.g., Nat'l Parks Conservation Ass'n v. N. D. Dep't of Env't Quality, 2020 ND 145 ¶ 15, 945 N.W.2d 318 (emphasis added).
[2] E.g., Jundt v. N.D. Dep't of Transp., 2020 ND 232, ¶ 4, 951, N.W.2d 243, (internal citations omitted) (emphasis added).

abandon this constitutionally based doctrine triggers concerns under the separation of powers doctrine because the legislation would curtail judicial authority to interpret the constitution.

There has been informal discussion of a few other states' recent attempts to inhibit judicial deference. However, most of those actions have been taken by the courts, not the legislatures, or have resulted from state constitutional amendments. The other few have been narrowly tailored or have not yet been subjected to judicial scrutiny for constitutionality.[3] Additionally, at least one court continued to defer to agency findings of fact regardless of the state statutory language attempting to prevent courts from granting deference.[4] Litigation regarding state legislatures' authority to limit courts' constitutional interpretations and thereby eliminate the deference doctrine may reasonably be anticipated.

Legislative and Judicial Checks on North Dakota Executive Agencies' Actions

There are multiple legislative and judicial checks to ensure North Dakota state agencies do not exceed their legislatively granted authority. First, the Legislative Assembly decides how much authority to grant agencies, so the authority for agencies to make rules and adjudicate appeals is controlled by the Legislative Assembly. Moreover, every agency rule is reviewed by the Legislative Assembly's Administrative Rules Committee after being scrutinized by the Office of Attorney General for compliance with legislative language and other legal criteria. The Administrative Rules Committee can void or otherwise dispose of agencies' proposed rules, for example, if the rules exceed an agency's lawful authority.

Second, our state courts do not defer to agency interpretations that are contrary to legislative enactments.

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[3] E.g., San Carlos Apache Tribe v. State, 520 P.3d 670 (Ariz. Ct. App. 2022) (declining to decide whether the new statute is constitutional because the question was not necessary for the appeal.)

[4] E.g., Pourshirazi v. Arizona State Board of Dental Examiners, No. 1 CA-CV-220351, 2023 WL 1113525, *1, ("We defer to the Board's factual findings if supported by substantial evidence and consider the evidence in the light most favorable to upholding the final decision.").

> "Although an administrative construction of a statute by the agency administering the law is ordinarily entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language, questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision."[5]
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> "We will ordinarily defer to a reasonable interpretation of a statute by the agency enforcing it, but an interpretation which contradicts clear and unambiguous statutory language is not reasonable."[6]

Courts do not defer to agency actions or rules in a vacuum. Our constitutional balance of powers limits state agencies to the authority granted to them by the constitution or the Legislative Assembly, and courts enforce that limitation on executive power. When agencies step outside those bounds, their decisions and interpretations are not granted deference.

Lack of Impact on *Chevron* Deference

In previous hearings, concerns were raised about deference to federal agencies under a long line of United States Supreme Court cases beginning with Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.[7] These cases concern the **federal** deference doctrine known as "*Chevron* deference." North Dakota courts' deference doctrine is not *Chevron* deference. When our state Supreme Court held that deference to administrative agencies was constitutionally required, it was interpreting and referring to our state constitution. *Chevron* deference instead relies on the federal constitution. Comments in hearings indicate that some believe *Chevron* deference will be overturned by this bill. However, state legislatures are unable to override United States Supreme Court holdings, such as the one that established *Chevron* deference.

Fiscal Impacts

[5] Victor v. Workforce Safety & Ins., 2006 ND 68, ¶ 12, 711 N.W.2d 188, 192 (N.D. 2006) (quoting Houn v. Workforce Safety & Ins., 2005 ND 115, ¶ 4, 698 N.W.2d 271).
[6] GO Comm. ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 701 N.W.2d 865 (quoting Lee v. N.D. Workers Comp. Bureau, 1998 ND 218 ¶ 11, 587 N.W.2d 423).
[7] Chevron, U.S.A., Inc. v. Nat. Res. Council, Inc., 467 U.S. 837, (1984).

If passed, this bill would have significant effects on administrative agencies which would result in an increase in litigation. Litigation regarding the statute also may be anticipated. This office anticipates two full-time attorneys would be required to handle the increase in litigation.

For these reasons, the Office of Attorney recommends a do not pass. Thank you for your time and consideration, and I would stand for any questions.