THE DEMISE OF AGENCY DEFERENCE: FLORIDA TAKES THE LEAD

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The year 2018 was a banner year for amendments to the Florida Constitution. Twelve proposed amendments appeared on the general election ballot in November 2018,[1] and all but one obtained the 60% passage rate required by the Florida Constitution.[2] Seven were proposed by a 37-member Florida Constitution Revision Commission, which convenes by constitutional command every 20 years and has plenary authority to submit proposals to amend the constitution directly to the voters.[3]

One of the more obscure, but most significant amendments proposed by the commission and approved by the voters, was an amendment to prohibit

all Florida state court justices, judges, and administrative law judges from deferring to administrative agencies in the interpretation of the statutes and rules they are charged to administer.[4] At the federal level, this concept is commonly known as "*Chevron* deference." The federal doctrine originates from the landmark 1984 case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that a court and agency must give effect to the expressed intent of Congress when analyzing an unambiguous statute.[5] If, however, the statute is unclear, the court's determination is limited to whether the agency's interpretation of the statute is based on a permissible construction of the statute.[6] Until abolished by the voters in the last general election, the Florida analog to "*Chevron* deference" was known simply as "agency deference."

The Florida prohibition of agency deference applies at every level of the courts of the state and to every officer who hears an administrative action under general law, prominently including actions arising under the Florida Administrative Procedure Act.[7] It appears in a new Fla. Const. art. V, §21, and reads as follows:

> *In 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.*

Although *Chevron* remains the law at the federal level, at least for now, there is a national insurgency, including among several members of the U.S. Supreme Court, directed to abandoning the practice of deferring to an agency's interpretation of the statutes and rules it is charged with administering. Florida is leading the way in the movement to abandon the practice with the passage of art. V, §21, by the voters in the last general election. This article describes how Florida became a leading force in the movement.

The Rise of Agency Deference in Florida

In Florida, agency deference first appeared in the 1941 case of *Lee v. Gulf Oil Corp.*, 4 So. 2d 868, 870 (Fla. 1941), where the Florida Supreme Court wrote, "[w]e recognize the rule to be too well settled to require citation of authorities that administrative and departmental constructions of statutes, the duty of enforcement of which rests upon such departmental or administrative office, is persuasive but it is not controlling." Although the court stated as much, no reported authority in Florida supported the contention that courts employed agency deference in Florida before *Lee*.

Eight years later, in *City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949), the Florida Supreme Court held that "[t]he construction placed actually or by conduct upon a statute by an administrative board or commission is, of course, not binding upon the courts. However, it is often persuasive and great weight should be given it." Although the Florida Supreme Court's pre-1950 dispositions teased the idea of agency deference,

the court did not fully endorse the concept until the 1952 decision of *Gay v. Canada Dry Bottling Co. of Florida,* 59 So. 2d 788, 790 (Fla. 1952):

> *Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.****[8]***

Thereafter, the doctrine idled through the 1950s, with only six cases considering its application: three applied *Gay*'s clearly erroneous standard,**[9]** while the other three appeared to be persuaded by the agency's interpretation, but did not outright employ or endorse the clearly erroneous standard.**[10]** The doctrine's slow unfurling continued through the 1960s**[11]** and 1970s,**[12]** where it was applied four and five times, respectively.

The 1980s brought an outbreak of cases that applied the agency deference doctrine after *Chevron* was decided. In fact, Florida courts repeatedly clung to it, as its use more than tripled from the 1970s to the 1980s with more than 20**[13]** reported appellate decisions. The trend continued in the 1990s with greater than 45**[14]** reported appellate decisions applying agency deference, and it showed no signs of stopping with nearly 100**[15]** reported appellate decisions since 2000. Time and time again, the agency's interpretation of a statute or rule was affirmed in its favor.**[16]**

The advent of the agency deference doctrine in Florida mirrored its federal counterpart, but its effect on Florida decisions was far more draconian. Unlike at the federal level, Florida courts paid little, if any, attention to whether an agency interpretation claiming deference was promulgated in accordance with the agency's rulemaking authority. In addition, deference was routinely given to any interpretation that was not clearly erroneous.[17] The "clearly erroneous" standard is a higher burden than the "preponderance of the evidence" standard and even more arduous than the "clear and convincing" standard that litigants must satisfy to overturn judicial fact finding.[18] It sits just below the "beyond a reasonable doubt" standard, the hallmark burden of proof needed to sustain a criminal conviction. As *Chevron* deference began to reach an apogee in federal courts, deference to agency interpretations of statutes and rules was seemingly unassailable in Florida.

Mounting Criticism

Supreme Court observers and academics have found no evidence from what is known about the internal deliberations of the Court that any of the participating justices viewed *Chevron* as a decision of significance at the time.[19] As the *Chevron* decision itself recognized, agency deference at the federal level existed before *Chevron*.[20] Nor, according to at least one scholar who knew Justice John Paul Stevens, is there any evidence that Justice Stevens himself, the author of the opinion, regarded *Chevron* as having inaugurated any change in the way courts were to approach agency interpretation.

[21] Nevertheless, after the decision issued, it roused legions of critics, a maelstrom of judicial expositions, and innumerable academic tracts seeking to explain, defend, or discredit the doctrine.**[22]**

In the midst of this, four current members of the U.S. Supreme Court have called *Chevron's* constitutionality into question. For example, in *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013), the Court found that the Federal Communications Commission's construction of the Telecommunications Act was entitled to *Chevron* deference. In his dissenting opinion, Chief Justice Roberts advocated for limiting *Chevron*:

> *...Chevron deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority. An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before Chevron can apply.**[23]***

In *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015), the Court found that the Environmental Protection Agency's interpretation of the Clean Air Act was not entitled to deference because it was unreasonable to disregard cost in determining whether a regulation was "appropriate and necessary." In his concurrence, Justice Thomas noted "that [the Environmental Protection Agency's] request for deference raises serious questions

about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[24]

Before his elevation to the Supreme Court, Justice Gorsuch also challenged the continued desirability of *Chevron* deference in *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring): "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[25] So, too, did Justice Kavanaugh while on the Court of Appeals for the District of Columbia Circuit, calling *Chevron* deference "an atextual invention by courts," that, he said, affected a "judicially orchestrated shift of power from Congress to the executive branch."[26]

Former members of the Supreme Court also questioned the practice of agency deference. Even Justice Scalia, an ardent supporter of agency deference early in his career,[27] began to question whether deference clashed with the framers' fundamental view of the Constitution. He expressed this concern in his concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co.,* 564 U.S. 50, 68 (2011) (Scalia, J., concurring):

> *[W]hile I have in the past uncritically accepted [the rule that courts defer to an agency's interpretation of its own regulations], I have become increasingly doubtful of its validity.... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.*

Later, in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1213 (2015), Justice Scalia entirely rejected the deference given to regulations promulgated by an agency:[28] "I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the [a]ct in order to make up for *Auer* [*v. Robbins*, 519 U.S. 452, 461 (1997)],[29] but by abandoning *Auer* and applying the [a]ct as written."[30] Finally, Justice Kennedy was similarly critical of *Chevron* and suggested that the Court reconsider "the premises that underlie *Chevron* and how courts have implemented that decision."[31]

As for the federal circuit courts of appeals, last year, the *Harvard Law Review* published a survey of 42 sitting federal appellate judges, which was conducted by Professor Abbe Gluck of Yale University and former Court of Appeals Judge Richard Posner. Of the judges surveyed, most did not favor *Chevron* deference (except those on the D.C. circuit). The opponents of *Chevron* deference were divided equally among philosophical persuasions.[32]

Judges in Florida have been similarly critical of agency deference. In *Housing Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419, 426 (Fla. 3d DCA 2016), the Third District Court of Appeal concluded that the Florida Fair Housing Act requires a private claimant to exhaust administrative remedies before filing a civil action under the statute. The dissent argued that the court should have given "great deference" to the

Commission on Human Relations' interpretation of the act.[33] The majority rejected the dissent's argument, stating:

> *The "great deference" mantra cited by the dissent… seems to have become so much a part of our legal culture as to be incontestable. An important separation-of-powers issue lurks just below the surface, however. There is no reason for the rule when we are as capable of reading the statute or rule as the agency, which may well have its own…agenda.*[34]

The Third District Court of Appeal considered the doctrine again in *Pedraza v. Reemployment Assistance Appeals Commission*, 208 So. 3d 1253, 1256 (Fla. 3d DCA 2017), where the court found that the commission's statutory interpretation was clearly erroneous and not entitled to deference. In a concurrence, a co-author to this article probed the limits of the judicially manifested doctrine:

> *I concur in the result in this case. I write only to rail once again, as I have on more than one prior occasion…that this [c]ourt should seriously consider the constitutional implications of blindly adhering to the mantra so regularly incanted by the Court to support, uphold, or approve agency decision-making that an agency's interpretation of a statute, with which it is entitled with administering shall be accorded great weight and should not be overturned unless clearly erroneous, arbitrary, or unreasonable, as well as the many variations on the theme….*

> *In my view, deference to an agency's construction or application of a statute implicates important due process and separation of powers questions deserving of serious contemplation by future members of this and other courts around the state.* ***[35]***

Finally, there is evidence that even those judges whose every case has an arm or department of a state or local government as a disputant, the administrative law judges who serve under the Florida Department of Administrative Hearings, are peculiarly uncomfortable applying agency deference in their judicial proceedings. As one of their number, Judge John G. Van Laningham, recently explained:

> *Unlike the judiciary, ALJs are participants in the decision-making processes that lead to administrative interpretations of statutes and rules — the very administrative interpretations to which courts defer. The ALJ's duty is to provide the parties an independent and impartial analysis of the law with a view towards helping the agency make the correct decision. In fulfilling this duty, the ALJ should not defer to the agency's interpretation of a statute or rule, as a court would; rather, the ALJ should make independent legal conclusions based upon his or her best interpretation of the controlling law, with the agency's legal interpretations being considered as the positions of a party litigant, entitled to no more or less weight than those of the private party. Otherwise, whenever a private litigant is up against a state agency and the outcome depends upon the meaning of an ambiguous statute or rule administered by that agency, the agency's thumb would always be on the scale, even during the putatively de novo administrative hearing, and the non-agency party's interpretive arguments would never be heard by a judge who could be completely neutral in deciding such questions of construction.*[36]

Why have judges and legal scholars inveighed against the agency deference doctrine? Well, the doctrine's criticism stemmed primarily from its contribution to the erosion of individual liberty in the face of the vastly expanding power of the administrative agencies. It also posed grave due process and separation of powers issues. The notion that a court should defer to one litigant's statutory or regulatory interpretation is

incompatible with our constitutional guarantees of due process of law,[37] especially when its natural workings afforded enhanced power to the executive branch, the very institution the Florida Constitution's Declaration of Rights was enacted to protect the citizenry against.

Agency deference is also inconsistent with the separation of powers provision explicit in Florida's constitution since statehood. Unlike the U.S. Constitution, Florida has an express separation of powers provision in its constitution.[38] The provision reads: "The powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches *unless expressly provided herein.*"[39]

In Florida, the robustness of the doctrine is well recognized.[40] For example, in *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), the Florida Supreme Court considered the constitutionality of a state statute authorizing the governor to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient. The court, finding the law unconstitutional, stated in no uncertain terms that "the judiciary is a coequal branch of the Florida government vested with the *sole* authority to exercise the judicial power...."[41] The judiciary's practice of outsourcing the interpretation of statutes and rules to the executive, a co-equal branch of Florida government — and, coincidentally, the same branch charged with fashioning those rules — is unsupported by the text and spirit of the Florida Constitution.

Courts Have Recognized the Existence of Art. V, §21

Fla. Const. art. V, §21, went into effect on January 8, 2019. [42] Since then, the Florida Supreme Court, the district courts of appeal, and the Florida Department of Administrative Hearings, which hears most cases where art. V, §21, is implicated, have cited the new constitutional provision and applied the doctrine in appropriate cases on more than two dozen occasions. [43] Acknowledgment of the passage of this provision is also making its way into secondary sources for future reference.[44] The abolition of agency deference seems to be well on its way to becoming well-ensconced in the courts and administrative bodies of this state.

Conclusion

The erosion of individual liberty, due process, and the separation of powers, as a result of the agency deference doctrine, dominated Florida's administrative law jurisprudence for the greater part of the last century. Agency deference often permitted biased judgment in favor of the government and left disadvantaged litigants in its wake, all while the administrative agencies continued to burgeon at the expense of its opponents. The elimination of agency deference in Florida enhances the rule of law and the appearance of neutral, evenhanded justice. It thwarts the concentration of unfettered power against which James Madison warned in Federalist Paper No. 47 when he observed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary,

self-appointed, or elective, may justly be pronounced the very definition of tyranny."[45] The new amendment helps level the playing field between the government and its citizens and similarly reaffirms Chief Justice John Marshall's later proclamation in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."[46]

[1] *See* Fla. Department of State Division of Elections, *Proposed Constitutional Amendments and Revisions for the 2018 General Election* (2018), *available at* https://dos.myflorida.com/media/699824/constitutional-amendments-2018-general-election-english.pdf.

[2] In 2006, the voters amended the Florida Constitution to require a supermajority vote of 60% to approve an amendment to the Florida Constitution. Fla. Const. art. XI, §5(e). The 12 amendments proposed in the 2018 general election were the most proposals to appear on the ballot since the supermajority requirement was adopted. In addition, the 12 amendments obtained the highest overall passage rate ever recorded. Florida Department of Elections State Division of Elections, Election Results, https://results.elections.myflorida.com.

[3] Fla. Const. art. XI, §2.

[4] Given the unrestrained nature of its charge, the ballot proposals approved by the Constitution Revision Commission were numerous and wide-ranging in their subject. Commission proposals were bundled together into seven proposals for an up or down vote on each for ballot presentation purposes. *See* Election Results, Florida Department of State Division of Elections,

https://elections.myflorida.com/elections. Amendment 6, which included the proposal prohibiting judges from deferring to administrative agencies in the interpretation of the statutes and rules they are charged to administer, was bundled with a proposal constitutionalizing victims' rights, and a proposal to raise the retirement age for state court judges to 75. *Id*. The eradication of the agency deference doctrine in Florida courts is the only structural amendment among those proposed and adopted.

[5] *Chevron*, 467 U.S. at 842-43.

[6] *Id*. at 843.

[7] *See generally* Fla. Stat. Ch. 120 (2018).

[8] Quoting *Coca-Cola Co. v. State Bd. of Equalization*, 156 P.2d 1, 2-3 (Cal. 1945).

[9] *See Green v. Stuckey's of Fanning Springs, Inc*., 99 So. 2d 867, 868 (Fla. 1957); *Fla. Indus. Comm'n v. Manpower, Inc. of Miami*, 91 So. 2d 197, 199 (Fla. 1956); *Miami Beach First Nat. Bank v. Dunn*, 85 So. 2d 556, 560 (Fla. 1956).

[10] *See Green v. Home News Pub. Co.*, 90 So. 2d 295, 296 (Fla. 1956); *Volusia Jai-Alai, Inc. v. McKay*, 90 So. 2d 334, 340 (Fla. 1956); *Harvey v. Green*, 85 So. 2d 829, 831 (Fla. 1956).

[11] *See Daniel v. Fla. State Tpk. Auth.*, 213 So. 2d 585, 587 (Fla. 1968); *State v. Fla. Dev. Comm'n*, 211 So. 2d 8, 12 (Fla. 1968); *Miller v. Brewer Co. of Fla.*, 122 So. 2d 565, 566 (Fla. 1960); *State ex rel. Volusia Jai-Alai, Inc. v. Ring*, 122 So. 2d 4, 6 (Fla. 1960).

[12] *See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dep't of Bus. Regulation*, 276 So. 2d 823, 828 (Fla. 1973); *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 362 So. 2d 474, 475 (Fla. 4th DCA 1978); *Heftler Const. Co. & Subsidiaries v. Dep't of Revenue*, 334 So. 2d 129, 132 (Fla. 3d DCA 1976); *Hillsborough Cty. Envtl. Prot. Comm'n v. Frandorson Props.*, 283 So. 2d 65, 68 (Fla. 2d DCA 1973); *City of Waldo v. Alachua Cty.*, 239 So. 2d 63, 67 (Fla. 1st DCA 1970), *aff'd in part, disapproved in part*, 249 So. 2d 419 (Fla. 1971).

[13] *See, e.g.*, *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988); *State, Dep't of Admin., Div. of Ret. v. Moore*, 524 So. 2d 704, 707 (Fla. 1st DCA 1988); *All Seasons Resorts, Inc. v. Dep't of Bus. Regulation, Div. of Land Sales, Condos. & Mobile Homes*, 455 So. 2d 544, 547 (Fla. 1st DCA 1984).

[14] *See, e.g.*, *Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999); *Proenza Sanfiel v. Dep't of Health*, 749 So. 2d 525, 527 (Fla. 5th DCA 1999); *Metro. Dade Cty. v. State Dep't of Envtl. Prot.*, 714 So. 2d 512, 515 (Fla. 3d DCA 1998).

[15] *See, e.g.*, *Level 3 Commc'ns, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003); *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002); *S.C. v. Agency for Persons with Disabilities*, 159 So. 3d 1033, 1036 (Fla. 3d DCA 2015).

[16] *See, e.g.*, *Muratti-Stuart v. Dep't of Bus. & Prof'l Regulation*, 174 So. 3d 538 (Fla. 4th DCA 2015); *Big Bend Hospice, Inc. v. Agency for Health Care Admin.*, 904 So. 2d 610 (Fla. 1st DCA 2005); *Brenner v. Dep't of Banking & Fin.*, 892 So. 2d 1129 (Fla. 3d DCA 2004).

[17] *See, e.g.*, *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Ins. v. Se. Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983); *S. Baptist Hosp. of Fla. v. Agency for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019); *Addison v. Agency for Persons with Disabilities*, 113 So. 3d 1053, 1056 (Fla. 1st DCA 2013).

[18] *See N.L. v. Dep't of Children & Family Servs.*, 843 So. 2d 996, 999 (Fla. 1st DCA 2003).

[19] Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. Rev. 551, 557 (2012).

[20] *Chevron*, 467 U.S. at 843. *Chevron's* story really began in the 1940s with cases that administrative law professors are quite familiar with. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941).

[21] Merrill, *Justice Stevens and the Chevron Puzzle*.

[22] According to Westlaw, *Chevron* has been cited in more than 16,300 judicial decisions; 3,200 administrative decisions; and 20,000 secondary sources.

[23] *City of Arlington,* 569 U.S. at 321-22 (Roberts, C.J., dissenting).

[24] *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring).

[25] Nor has Justice Gorsuch relented from his challenge since joining the U.S. Supreme Court. *See, e.g.*, *Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2 (2017).

[26] Brett Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzman, Fixing Statutory Interpretation Judging Statutes (2014)).

[27] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511 (1989).

[28] Scalia, J., concurring in the judgment.

[29] In *Auer*, the Supreme Court expanded *Chevron* deference to an agency's interpretations of the rules that it is charged to administer as well. This concept is commonly known as *Auer* deference.

[30] *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment).

[31] *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

[32] Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298 (2018).

[33] *Housing Opportunities Project,* 212 So. 3d at 427 (Salter, J., dissenting).

[34] *Id*. at 431 n.9. Co-author Frank Shepherd wrote the majority opinion in this case.

[35] *Pedraza*, 208 So. 3d at 1256-57 (Shepherd, J., concurring in result) (footnote and internal quotation marks omitted).

[36] *The Public Health Trust of Miami-Dade Cty. v. Dep't of Health*, No. 15-3171, 2016 WL 1255758, at *28 (Fla. Div. Admin. Hrgs. Feb. 29, 2016).

[37] *See* Fla. Const. art. I, §9 ("No person shall be deprived of life, liberty or property without due process of law....").

[38] Fla. Const. art. II, §3.

[39] *Id.* (emphasis added).

[40] *See, e.g.*, *Corcoran v. Geffin*, 250 So. 3d 779, 783 (Fla. 1st DCA 2018) ("'It would be hard to compose a more demanding requirement in organic law' than Florida's separation of powers." (quoting *Barati v. State*, 198 So. 3d 69, 83 (Fla. 1st DCA 2016))).

[41] *Bush v. Schiavo*, 885 So. 2d at 330 (emphasis added).

[42] *See* Fla. Const. art. XI, §5(e).

[43] *See, e.g., Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019) (reviewing question of statutory interpretation by Florida Public Service Commission de novo, citing Fla. Const. art. V, §21); *S. Baptist Hosp. of Fla. v. Agency for Health Care Admin.*, 270 So. 3d 488, 502 (Fla. 1st DCA 2019) (reversing ALJ's deference to agency interpretation of rules implementing legislative mandates to reduce reimbursement rates for Medicaid outpatient hospital services on ground that existing and proposed versions of rule were an invalid exercise of

delegated legislative authority while recognizing that under newly enacted Fla. Const. art. V, §21, deference to agency rule setting forth the methodology by which it would reimburse Medicaid providers would likewise be improper); *Safirstein v. Dep't of Health, Bd. of Med*., 271 So. 3d 1178, 1180 (Fla. 3d DCA 2019) (recognizing that the court's standard of review of an agency's interpretation of a statute is de novo on review of an affirmance of decision of the Department of Health Board of Medicine to revoke doctor's license to practice medicine); *Halifax Hosp. Med. Ctr. v. State*, 44 Fla. L. Weekly S149 at *5 n.2 (Fla. Apr. 18, 2019) (acknowledging the adoption of art. V, §21, but finding it unnecessary to decide applicability to the case because "[e]ven before this new constitutional provision we did not apply the deference principle to unambiguous statutes"); *Citizens of State through Fla. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 44 Fla. L. Weekly D703 (Fla. 1st DCA Mar. 13, 2019) (citing art. V, §21, and stating that the Florida Public Service Commission's "discretion is limited…by the constitutional amendment that prohibits courts from deferring to an agency's interpretation of a statute"); *Lee Mem'l Health Sys. Gulf Coast Med. Ctr. v. Agency for Health Care Admin.*, 272 So. 3d 431, 437 (Fla. 1st DCA 2019) (acknowledging that art. V, §21, abolishes prior law in which "an agency's interpretation of a statute it has authority to administer was not overturned on appeal unless clearly erroneous"); *Flint v. U. of Cent. Fla.*, No. 19-0520, 2019 WL 2566429 at *7 (Fla. Div. Admin. Hrgs. June 4, 2019) (acknowledging that since the adoption of Amendment 6 by the voters at the November 6, 2018,

general election, “appellate courts may no longer defer to an agency’s statutory interpretation, and must instead apply a *de novo* review”).

[44] *See* 4 Florida Administrative Practice 4-1 (The Florida Bar 2019); 12 Florida Administrative Practice 12-1 (The Florida Bar 2019).

[45] The Federalist No. 47 at 324 (James Madison) (The Easton Press ed. 1979).

[46] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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