THE PENNSYLVANIA BAR ASSOCIATION

Quarterly

PENNSYLVANIA BAR ASSOCIATION
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JULY 2025 • VOLUME XCVI, NO. 3

Administrative Agency Appeals — How the Organized Bar Fostered Order From Chaos, Where We Are Now and How We Got Here, With a Focus On Agency Deference

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ABSTRACT

During a previous period of self-described chaos, the Pennsylvania Bar Association (PBA) studied how to make the growing administrative state comport with due process and the rule of law. PBA appointed a committee in 1938 to study the situation and make recommendations. In 1941, the committee gave way to the Administrative Law Section which submitted proposed legislation which formed the basis of the Administrative Agency Law (AAL). Although the New Deal bought a revolution in the law much to the consternation of Taft-era conservatives, the change came via the rule of law: Congress legislated, the executive implemented, and the courts adjudicated challenges. The process provided a mechanism to ensure that changes occurred according to applicable law, be it statutory or constitutional, and enabled public acceptance of those changes.

It is 2025 and most of us with administrative law practices have done so under the 1968 Constitution and the 1970 establishment of Commonwealth Court. Perhaps a few practiced when Dauphin County Common Pleas Court had jurisdiction over appeals from state agency decisions. However, before 1945 there was no consistently effective mechanism to ensure adequate review of those decisions. Even with the 1945 enactment of the AAL, judicial review of agency decisions often did not address their merits. Only after 1968 was the process we know today established.

Now that initial review of agency actions is as of right, one aspect of review with which counsel must reckon is the amount of deference to be afforded the action being challenged. Pennsylvania law has not moved in lockstep

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with its federal counterpart. Although Pennsylvania has not adopted federal deference jurisprudence, our Supreme Court has stated that its holding was indistinguishable from the rubric adopted by the United State Supreme Court in Chevron. *Recent changes at the federal level have shined a spotlight on Pennsylvania's jurisprudence. This article also will outline the development of judicial review of administrative agency actions with a look at deference and where Pennsylvania may be headed.*

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While Pennsylvania developed workable rules for agency appeals, a definitive deference standard has eluded the Supreme Court, sparking questions after recent changes in federal precedent.

I. LIFE BEFORE 1945

Although administrative regulatory agencies existed before the twentieth century,[2] between the turn of the century and the 1940's their proliferation and the breadth of their coverage of economic life resulted in the recognition that agencies made many decisions that affected rights but there was no effective review mechanism.

As administrative agencies and the attendant promulgation of regulations mushroomed between 1900 and 1940, attempted challenges to agency actions also grew. However, challengers discovered that the "great writs,"[3] principally equity, were difficult to use and not an effective mechanism, and that there was no uniform method to challenge administrative procedures. This led in the late 1930's to "study commissions" that laid the

2 Pennsylvania formed a Board of Agriculture in 1876 to oversee use of scientific methods in farming. The General Assembly by the Act of Mar. 13, 1895, P.L. 17, No. 8, created the Pennsylvania Department of Agriculture and transferred to it three basic functions previously held by the Board: law enforcement, education, and prevention of plant and animal disease. *See* Agriculture in Pennsylvania, The Pennsylvania Historical & Museum Commission, Archived from the original on February 5, 2013. https://web.archive.org/web/20130205110111/http://www.portal.state.pa.us/portal/server.pt/community/things/4280/agriculture/478680.

3 The "great writs" are commonly understood to be injunction, mandamus, habeas corpus, prohibition, quo warranto, and certiorari. *See* Pennock, J. R. (1942). Judicial Control of Administrative Decisions. The ANNALS of the American Academy of Political and Social Science, 221(1), 184.

foundation for laws by which agencies' actions could be challenged.

The bar at both the federal and Pennsylvania levels recognized the issue, and the federal Administrative Procedure Act[4] (APA) and the AAL[5] were the respective legislative responses. The procedures established by these enactments in large measure remain in effect today.[6]

Pennsylvania's reform effort began in 1938 with PBA's formation of a Special Committee on Administrative Law to "analyze the present practices and procedures before the various state agencies."[7] The Committee submitted its report in 1939 which discussed federal administrative law, listed all Pennsylvania administrative agencies and noted for each whether its orders were subject to direct appeals with a chart showing availability and timing of review for those agencies, discussed the method of obtaining review where there were no direct appeals, and the organization, functions, duties and procedure before those agencies.[8] The Committee also reported that "existing law is in a condition of chaos and confusion which merits the early sponsoring of remedial measures."[9] The Committee Secretary expressed similar thoughts in a separate article, while stating that "Administrative tribunals are likely here to stay."[10]

In 1940, the Committee recommended that its efforts be coordinated with the Joint State Government Commission, which also had begun a study of Pennsylvania administrative procedure.[11] The Commission detailed its purposes, membership and statutory basis in a 1940 Statement.[12] Also, PBA in 1941 created the Administrative Law Section to carry on the Committee's purposes.[13] The efforts of the Commission and the Administrative Law Section resulted in draft legislation aimed at ameliorating Pennsylvania's administrative law issues,[14] and the AAL was enacted by the General Assembly in 1945.

The efforts of the ABA and PBA to bring order and function to administrative law notwithstanding, the administrative agency regime has never been universally popular. President Coolidge used the appointment power to maintain control over federal regulatory agencies by appointing agency heads who were opposed to the core mission of the agencies they were appointed to administer.[15]

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4 5 U.S.C. §§ 551-559.

5 Act of June 4, 1945 (P.L.1388, No.442).

6 Administrative Agency Law, Act of April 28, 1978, P.L. 202, *as amended*, 2 Pa. C.S. §§101-754.

7 44 PA. B. A. REP. 134-136 (1938).

8 45 PA. B. A. REP. 344-419 (1939).

9 45 PA. B. A. REP. 344, 350 (1939).

10 Gilbert Nurick, Much Ado About Something - The Story of Administrative Chaos in Pennsylvania, 45 Dick. L. Rev. 85 (1941), https://ideas.dickinsonlaw.psu.edu/dlra/vol45/iss2/1.

11 46 PA. B. A. REP. 248 (1940).

12 Joint State Government Commission, a Statement of the History, Purposes, and Activities of the Joint State Government Commission of the General Assembly of Pennsylvania (1940).

13 47 PA. B. A. REP. 27, 37 (1941).

14 *See*, JOINT STATE GOVERNMENT COMMISSION, REPORT TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA ON UNIFORM PRACTICE AND PROCEDURE BEFORE DEPARTMENTS, BOARDS AND COMMISSIONS OF THE COMMONWEALTH (1943), and 48 PA. B. A. REP. 239 (1942).

15 *See* Michael J. Gerhardt, The Forgotten Presidents 196 (Oxford Univ. Press 2013).

William F. Buckley bemoaned "a gigantic, parasitic bureaucracy."[16]

In this vein, Justice Bell illuminated the purpose of the AAL in *Keystone Raceway Corp. v. State Harness Racing Commission* where he opined that:

> Regardless of the admirable purpose for which these agencies are usually established, it is a matter of frequent complaint and common knowledge that the agencies at times act arbitrarily, or capriciously, and unintentionally ignore or violate rights which are ordained or guaranteed by the Federal or State Constitution, or established by law. For these reasons it is imperative that a checkrein be kept upon them.[17]

II. LIFE AFTER 1945 — ISSUES REMAINED

The AAL as enacted failed to address the problem of the lack of direct appeals for some agencies, as it allowed no appeal unless the agency was one of the 48 listed therein.[18] Decisions of bodies not listed could not be appealed as of right unless the agency's enabling statute created a supplementary appeal right.[19] For state agencies not listed in 71 P.S. §1710.51(a) as well as all local agencies, appeal was by permission via writ of certiorari[20] to the Supreme Court. If granted, review was governed either by narrow or broad certiorari.[21]

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16 *See* William F. Buckley, Publisher's Statement, National Review, Volume 1, Issue 1, 5 (Nov. 19, 1955), https://archive.org/stream/sim_national-review-1955_1955-11-19_1_1/sim_national-review-1955_1955-11-19_1_1_djvu.txt.

17 173 A.2d 97, 99 (Pa. 1961).

18 71 P.S. §1710.51(a), repealed by the Act of April 28, 1978, P.L. 202, No. 53, § 2(a)[1244], eff. June 27, 1978.

19 MEC Pennsylvania Racing v. Pennsylvania State Horse Racing Commission, 827 A.2d 580, 586-88 (Pa. Cmwlth. 2003). *See*, e.g., Department of Labor and Industry v. Snelling & Snelling, 89 Dauph. 51 (C.P. Pa. 1968) (AAL's appeal procedures not applicable to labor department decision because department not one of listed agencies).

20 "Certiorari" literally means "to be more fully informed". https://www.law.cornell.edu/wex/writ_of_certiorari#:~:text=The%20word%20certiorari%20comes%20from,higher%20court%20may%20review%20it. The term as used here has a different connotation than that attached to modern U.S. Supreme Court practice:

> certiorari, in common-law jurisdictions, a writ issued by a superior court for the reexamination of an action of a lower court. Certiorari also is issued by an appellate court to obtain information on a case pending before it. The writ of certiorari was at first an original writ from England's Court of Queen's Bench to the judges of inferior courts ordering them to present certain records. Certiorari was later expanded to include the chancery (equity) courts. The writ was abolished in 1938, but the High Court of Justice retained the right to make an order of certiorari. Such orders have been useful in the review of decisions of administrative courts from which there is no regular means of appeal, particularly in reviewing questions of error in the admission and exclusion of evidence.

https://www.britannica.com/topic/certiorari. *See also* Harris v. Barber, 129 U.S. 366, 369 (1889) (discussing certiorari in the nature of "writ of error")

21 Man O'War Racing Association, Inc. v. State Horse Racing Commission., 250 A.2d 172, 174-175 (Pa.1969).

Narrow certiorari applied where the statute forbade judicial review. The writ initially was limited to inspection of the record for jurisdiction below and correction of errors appearing on the face of the record; neither the opinion of the court below nor the evidence in the case was part of the record, and the merits could not be inquired into. Thus "narrow certiorari" only looked at the fairness of the proceeding, not the outcome.[22]

Broad certiorari applied where the statute was silent regarding review. The Supreme Court developed "broad certiorari" where the appellate court looked beyond jurisdiction of the court below and regularity of the proceedings to determine, by examining the testimony, whether the court's findings were supported by evidence or whether it committed an abuse of discretion or an error of law.[23] This practice was codified in Supreme Court Rule 68 1/2.[24]

This circumstance remained until the 1968 constitutional amendments established a right of appeal for all judicial and administrative decisions. Article V, Section 9 provides:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

The right of appeal established in Article V, Section 9, is not self-executing.[25] The right of appeal from a state agency action is further provided by AAL Section 702.[26] The right exists "notwithstanding prohibition on appeals set forth in other statutes . . . ."[27] AAL Section 702 governs all appeals from state agencies

22 *Id.* (citing Keystone Raceway Corp. v. State Harness Racing Commission, 173 A.2d 97, 99 (Pa. 1961)).

23 *Id.*

24 416 Pa. xxv (1964). For the Rule's history, see City of Philadelphia v. Chase & Walker Corp., 240 A.2d 65, 66-67 (Pa. 1968). Rule 68 1/2 provided in pertinent part:

> Where the subject matter does not fall within the statutory jurisdiction of the Superior Court, an appeal to the Supreme Court in the nature of a certiorari from a judgment, order or decree will lie only if specially allowed by the Court or by a Judge thereof, where a statute expressly provides that there shall be no appeal from the decision or order or judgment or decree of a Court, or that the decision or order or judgment or decree of a Court shall be final or conclusive or shall not be subject to review, or where the statute is silent on the question of appellate review.

25 Manheim Township School District v. State Board of Education, 276 A.2d 561, 563-65 (Pa. Cmwlth. 1971).

26 2 Pa.C.S. § 702 provides: "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals."

27 Maritime Management, Inc. v. Pennsylvania Liquor Control Bd., 611 A.2d 202, 203 (Pa. 1992).

unless the agency enabling statute contains an express alternative.[28]

III. LIFE AFTER 1968 — PROVISIONS GOVERNING APPEALABILITY OF AGENCY DECISIONS[29]

A. Definitions

The AAL definitions section[30] defines salient provisions including Adjudication, Commonwealth Agency, Executive Agency, Government Agency and Independent Agency. Of those, Adjudication is noteworthy as it will provide guidance on whether the agency has taken an appealable action. If an agency action affects only the interest of the public in general, then the action is not an adjudication.[31]

B. Appeals from Agency Decisions

Supreme Court: The Court's jurisdiction takes two forms relevant here: appeals as of right which consist of appeals from Commonwealth Court original jurisdiction matters such as petitions for enforcement of administrative orders and actions such as petitions for declaratory relief,[32] and petitions for allowance of appeal (allocator) seeking review of final orders involving appeals from agency adjudications.[33]

Commonwealth Court:[34] Under Section 702 of the Judicial Code,[35] Commonwealth Court has jurisdiction over final orders and interlocutory appeals as of right and by permission.[36] The court's jurisdiction over final orders of agency decisions is found in Section 763 of the Judicial Code,[37] and includes all appeals from agencies including the Environmental Hearing Board (EHB). AAL Section 752[38] uses the same language used for Commonwealth agencies

28 2 Pa.C.S. § 106 provides: "[n]o subsequent statute shall be held to supersede or modify the provisions of this title except to the extent that such statute shall do so expressly."

29 For those interested in a deeper dive into the period from the late 1930's until 1968, I commend three other law review articles: Clark Byse, Administrative Procedure Reform in Pennsylvania, 97 U. Pa. L. Rev. 22 (1948), https://scholarship.law.upenn.edu/penn_law_review/vol97/iss1/2; F. E. Reader, Judicial Review of "Final" Administrative Decisions in Pennsylvania, 67 Dick. L. Rev. 1 (1962), https://ideas.dickinsonlaw.psu.edu/dlra/vol67/iss1/1; John K. Heisey, Judicial Review of Administrative Action in Pennsylvania: An Updated Look at Reviewability and Standing, 16 Duq. L. Rev. 201 (1977), https://dsc.duq.edu/dlr/vol16/iss2/7.

30 2 Pa.C.S. § 101.

31 *See* Xun Imaging Associates, Ltd. v. Dep't of Health, 644 A.2d 255 (Pa. Cmwlth. 1994).

32 Section 723 of the Judicial Code, 42 Pa. C.S. § 723.

33 Section 725 of the Judicial Code, 42 Pa. C.S. § 725.

34 All appeals from local agency decisions initially go to common pleas courts. Appeals from some state agencies also go to common pleas, notably PennDOT driver's license suspension appeals and appeals from the refusal to renew and the suspension or revocation of liquor licenses.

35 42 Pa. C.S. § 702.

36 *See also*, Pa.R.A.P. 341 (Final Orders; Generally). Relevant here, Section 762 of the Judicial Code, 42 Pa. C.S. § 762, provides jurisdiction over final orders of common pleas courts, including second level review of appeals from agencies which are taken initially to common pleas, regulatory criminal proceedings, local government civil and criminal matters, eminent domain actions, not-for-profit proceedings, and waiver of immunity.

37 42 Pa. C.S. § 763.

38 2 Pa. C.S. § 752.

for local agency appeals.

Standing. To have standing to appeal, one need only be an aggrieved person, who has a direct interest, as opposed to a direct, immediate and substantial interest, in the adjudication.[39] To establish a direct interest in an adjudication one must show that the adjudication caused harm to one's interest, or that the harm alleged resulted in some demonstrable way from the adjudication.[40] The requirement of a substantial interest in the subject matter of litigation simply means that there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.[41] AAL Section 752[42] regarding local agency appeals contains the same language as AAL Section 702.

Associational Standing. "An association may have standing solely as the representative of its members and may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action."[43]

In a 1984 decision involving both associational standing and pre-enforcement relief/exhaustion of administrative remedies, *Arsenal Coal Co. v. Department of Environmental Resources,*[44] the Supreme Court faced the broad question of whether the Environmental Quality Board (EQB) in promulgating regulations governing the anthracite coal industry exceeded the authority given by the General Assembly. However, the "immediate" issue presented to the Court was the availability of pre-enforcement review as a remedy under the AAL and whether the fifty-five coal operators who filed an action in Commonwealth Court seeking preliminary and permanent injunctive relief barring the Department of Environmental Resources (DER) from implementing and enforcing the regulations had standing to seek such relief. Commonwealth Court sustained DER's preliminary objections finding that the operators had an adequate administrative remedy, and petitioners took a direct appeal to the Supreme Court.

The Court held that the availability of individual appeals to the EHB was not an adequate remedy and that the operators were thus aggrieved and could seek pre-enforcement review. The Court held further that the pre-enforcement relief

39 Pennsylvania Automotive Ass. v. State Board of Vehicle Manufacturers, Dealers and Salespersons, 550 A.2d 1041 (Pa. Cmwlth. 1988).

40 *Id.*

41 MEC, 827 A.2d at 588.

42 2 Pa.C.S. § 752.

43 Robinson Twp. v. Commonwealth, 83 A.3d 901, 922 (Pa. 2013) (alleged injury to one member is sufficient).

44 477 A.2d 1333 (Pa. 1984).

sought was preserved as a remedy by AAL Section 703, Scope of Review.[45] Prior to the codification of portions of the Purdon's Statutes,[46] the language in Section 703 was found at 71 P.S. §1710.42 of the AAL.[47] The Court noted that the equitable relief available at the time of the AAL's 1945 enactment was preserved in subsection 703(b), citing *Western Pennsylvania Hospital v. Lichliter*.[48] In *Lichliter*, the Supreme Court stated that courts may exercise the equitable powers conferred upon them by the Act of 1836, P.L. 784, 17 P.S. 281, and the Act of 1857, P.L. 39, 17 P.S. 285, unless these powers have been taken away from them by some statute, and that, in the exercise of their equitable powers, courts may enjoin an administrative agency from exercising powers not conferred upon them or unconstitutionally conferred upon them.

The equitable relief codified in the current version of the AAL was found in the original version enacted in 1945. That provision in the original AAL itself preserved the remedy recognized in enactments from 1836 and 1857. In *Arsenal* the Supreme Court reaffirmed that the equitable remedy found in AAL Section 703(b) AAL was available to restrain a state agency's unlawful exercise of powers.

IV. OBSTACLES TO OBTAINING APPELLATE REVIEW

Appellate Court Jurisdiction. A court may be without jurisdiction to hear an appeal filed there. The appellate courts are required to raise *sua sponte* their jurisdiction to hear an appeal.[49] However, there are occasions where an appellate court may exercise its discretion to hear a matter where none of the parties object and where hearing the matter serves judicial economy.[50] Section 705 of the Judicial Code[51] provides that Superior Court and Commonwealth Court each

45 2 Pa.C.S. § 703:

> (a) General rule.--A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.
>
> (b) Equitable relief.--The remedy at law provided by subsection (a) shall not in any manner impair the right to equitable relief heretofore existing, and such right to equitable relief is hereby continued notwithstanding the provisions of subsection (a).

46 Purdon's is an unofficial codification of Pennsylvania statutes. The General Assembly most recently authorized an official codification by the Act of Nov. 25, 1970, P.L. 707, No. 230. *See* 1 Pa.C.S. Ch. 1-5. The project is ongoing. The official codification is titled "Pennsylvania Consolidated Statutes."

47 AAL §42, as amended, repealed by the Act of April 28, 1978, P.L. 202, § 2(a).

48 17 A.2d 206 (Pa. 1941).

49 School District of the Borough of West Homestead v. Allegheny County Board of School Directors, 269 A.2d 904, 906 (Pa. 1970).

50 *See*, e.g., Zikria v. Western Pennsylvania Hospital, 668 A.2d 173, 173-74 (Pa. Super 1995). *But see*, Dynamic Sports Fitness Corp. of America, Inc. t/a The Sports Club v. The Community YMCA of Eastern Delaware County, 751 A.2d 670, 672-73 (Pa. Super. 2000) (long term interests support transfer to Commonwealth Court where that court has historically heard appeals of this nature and has expertise in area of law).

51 42 Pa. C.S. §705.

have the power to transfer a case to the other court.

Adjudicating Tribunal Jurisdiction. An appellate court has jurisdiction over an appeal of a final order by a lower court, agency or administrative tribunal. Moreover, it can vacate that order where it finds that the agency did not have jurisdiction.[52]

Reviewability. There are several prerequisites that must be met before a court can conduct judicial review of an agency decision. First, the agency decision must be an adjudication. The appeal must be filed within the time limit provided by statute or rule, generally 30 days, from the entry of the order.[53] The appellant must have standing, i.e., they must be aggrieved.[54] A prevailing party in the proceeding below is not aggrieved and thus lacks standing.[55] Taxpayer(s) may have standing even when their interest may not be substantial, direct, and immediate if the governmental action will go unchallenged unless the taxpayer can intervene via the appeal process.[56]

Record. Judicial review cannot occur without a proper, complete record of the proceedings below.[57] When the agency exercises discretion, the record must disclose some basis for that exercise.[58]

Exhaustion of Administrative Remedies. In most instances, judicial review is not available until the aggrieved party has utilized review procedures provided within the agency. Another narrow exception exists for constitutional issues where the facts are uncontested.[59]

Finality. Per Pa.R.A.P. 341, appeals may be taken only from final orders.

Serving the Attorney General. If the appeal presents a facial challenge to a statute's constitutionality, Pa.R.A.P. 521 requires that the Attorney General immediately be given written notice.[60]

Ripeness. If an appellant's alleged harm is prospective rather than current, the issue is not ripe for review. When assessing ripeness, a court will assess the fitness of the issue for immediate review and the hardship to the parties if

52 *See, e.g.*, HJH, LLC v. Department of Environmental Protection, 949 A.2d 350 (Pa. Cmwlth. 2008) (court sua sponte determined DEP did not take final action, petitioner was not aggrieved and EHB lacked jurisdiction over appeal; court vacated EHB order on appeal and remanded with direction to quash appeal).

53 *See* Pa. R.A.P. 903 and 1512. See, e.g., Philadelphia v. Tirrill, 906 A.2d 663 (Pa. Cmwlth. 2006) (appeal periods jurisdictional and may not be extended as matter of grace or mere indulgence) appeal denied, 916 A.2d 1103 (Pa. 2007).

54 William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975).

55 Chicoine v. Workmen's Comp. Appeal Bd. (Transit Management Services), 633 A.2d 658 (Pa. Cmwlth. 1993).

56 Sprague v. Casey, 550 A.2d 184 (Pa. 1988).

57 Canonsburg General Hospital v. Dep't of Health, 422 A.2d 141 (Pa. 1980).

58 Bell v. Com., Bd. of Vocational Rehabilitation, 436 A.2d 1072 (Pa. Cmwlth. 1981).

59 St. Clair v. Pennsylvania Board of Probation and Parole, 493 A.2d 146 (Pa. Cmwlth. 1985).

60 The Appellate Court Procedural Rules Committee on April 12, 2025, proposed amendments to Pa.R.A.P. 521. https://pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol55/55-15/482.html

review is denied.[61]

Primary Jurisdiction. Commonwealth Court may invoke the judicially-created doctrine of primary jurisdiction in cases brought in its original jurisdiction that it wishes to defer to the agency.[62] The doctrine allows a court to refer cases to administrative agencies possessing greater subject matter expertise and experience; however, it does not allow a court to refer a case to an agency which lacks the express statutory jurisdiction to hear the matter in the first instance.[63]

V. SCOPE AND STANDARD OF REVIEW

Scope and standard of review establish the extent to which an appellate court can substitute its discretion for that of the fact finder.[64] Pa.R.A.P. 1551, Scope of Review, provides that the court shall conduct review on the record made below of the validity of the applicable statute, the agency's jurisdiction, and any question the court finds could not have been raised below. AAL Section 703(a)[65] similarly provides that the court's scope of review includes matters raised by a party in the proceedings before the agency and the validity of the applicable statute. Standard of review is found in AAL Section 704[66] which provides that the court shall affirm unless the adjudication is contrary to law or the constitution or necessary findings of fact are not supported by substantial evidence.

A. Review of Questions of Fact

Substantial Evidence. "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[67] Even if the court disagrees with the agency's findings, it must affirm if there is substantial evidence to support the finding. The weight of evidence and credibility are solely within the discretion of the factfinder to decide; however, the court reviews the

61 Pennsylvania Independent Oil & Gas Ass'n v. Com., Dep't. of Environmental Protection, 135 A.3d 1118, 1127-28 (Pa. Cmwlth. 2015).

62 *See* Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980).

63 *See* Machipongo Land & Coal Company, Inc. v. Commonwealth, Department of Environmental Resources, 648 A.2d 767 (Pa. 1994), vacated and remanded, 676 A.2d 199 (Pa.1996).

64 In Morrison v. Dep't of Pub. Welfare, Off. of Mental Health (Woodville State Hosp.), 646 A.2d 565 (Pa. 1994), our Supreme Court explained the concepts as follows:

> "Scope of review" and "standard of review" are often--albeit erroneously--used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." In other words, it refers to the matters (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the manner in which (or "how") that examination is conducted . . . we also referred to the standard of review as the "degree of scrutiny" that is to be applied.

Id. at 570. (citations omitted)

65 2 Pa.C.S. § 703(a).

66 2 Pa.C.S. § 704.

67 Feinberg v. Unemployment Comp. Board of Review, 635 A.2d 682 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 652 A.2d 840 (Pa. 1994).

sufficiency of that evidence.

Findings. An agency is not required to set forth findings specifically on every allegation.[68] However, if crucial findings are not made, the case must be remanded to the agency.[69] Only necessary findings of fact need to be supported.[70] The court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences which can logically and reasonably be drawn from the evidence.[71]

Evidence. Agencies are not bound by technical rules of evidence, and generally all relevant evidence of reasonably probative value is admitted.[72] An agency has broad discretion in admitting or rejecting evidence.[73]

Hearsay. Hearsay does not constitute substantial evidence. If properly objected to, it cannot support a finding. *Walker v. Unemployment Compensation Board of Review.*[74]

Unobjected to Hearsay. Under the Legal Residuum Rule,[75] aka the *Walker* Rule, unobjected to hearsay is given its natural probative effect if it is corroborated by any competent evidence in the record. The residuum rule requires a reviewing court to set aside a finding unless it is supported by some evidence which would be admissible in a jury trial. Under this rule, the legal character of the evidence as hearsay is determinative; no consideration is given to the reliability of the evidence or the circumstantial setting in which it arises.[76]

B. Review of an Agency's Legal Interpretation

Plenary Scope of Review. On pure questions of law, appellate scope of review is plenary.[77] As long as the issue was preserved below, Commonwealth Court may address whether the AAL's procedural rules were followed, as well as whether the applicable regulations and statutes were properly applied. Agencies have ancillary jurisdiction to rule on the validity of regulations in a challenge to their application or enforcement, unless such authority is proscribed by their enabling statute.[78] An agency is bound by its regulations as though they are a

68 Roth v. Workmen's Comp. Appeal Board (Armstrong World Industries), 562 A.2d 950 (Pa. Cmwlth. 1989).

69 Underkoffler v. State Employees' Retirement Bd., 432 A.2d 319 (Pa. Cmwlth. 1981).

70 Peoples First National Bank v. Unemployment Comp. Bd. of Review, 632 A.2d 1014 (Pa. Cmwlth. 1993).

71 Feinberg, 635 A.2d at 684.

72 2 Pa.C.S. § 505.

73 Gwinn v. Pennsylvania State Police, 668 A.2d 611 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 679 A.2d 231 (Pa. 1996).

74 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

75 The legal residuum rule has its origin in Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916).

76 Walker, 367 A.2d at 370.

77 Thornburgh v. Lewis, 470 A.2d 952 (Pa. 1983).

78 Arsenal, 477 A.2d at 1339; but see, Pennsylvania Dep't of Health v. North Hills Passavant Hospital, 674 A.2d 1141 (Pa. Cmwlth. 1996) (statute prohibits agency from addressing validity).

statute.[79]

C. Deference to Agency Legal Interpretation by Pennsylvania Courts

As a starting point, Section 1921(c)(8) of the Statutory Construction Act,[80] allows courts to consider administrative interpretations where the statute is ambiguous. AAL Section 704[81] also provides for deference to administrative agency adjudications under the familiar rubric that Commonwealth Court must affirm the agency unless necessary findings of fact are not supported by substantial evidence, or the decision violates applicable law or the constitution.[82]

"[A]n administrative agency's expert interpretation of a statute for which it has enforcement responsibility is entitled to great deference and will not be reversed unless clearly erroneous."[83] Where the statutory scheme is complex, the reviewing court must be even more cautious in substituting its discretion for the expertise of an administrative agency.[84]

Slippery Rock Area School Dist. v. Unemployment Compensation Bd. of Review[85] is a good starting point for evaluating the amount of deference a court might provide to an agency interpretation in Pennsylvania. The Court there distinguishes between legislative and interpretive regulations and how to measure the validity of those regulations. Both types of regulations receive some degree of deference.

Interpretive regulations are those agency regulations that interpret the enabling statute but do not add additional duties or requirements beyond those imposed by the act. Pennsylvania courts uphold such regulations unless the interpretation is unwise or contrary to legislative intent. Legislative regulations are those that seek to add additional duties or requirements consistent with, but beyond those established in, the enabling statute. Under *Slippery Rock*, a legislative regulation is unreasonable where the court finds that it "is so entirely at odds with fundamental principles as to be the expression of whim rather than an exercise of judgment."[86] Pennsylvania courts look askance where it appears that the agency's challenged interpretation is at odds with its prior interpretations

79 Pennsylvania Human Relations Commission v. Norristown Area Sch. Dis., 342 A.2d 464 (Pa. Cmwlth. 1975), aff'd, 374 A.2d 671 (Pa. 1977).

80 1 Pa.C.S. § 1921(c)(8).

81 2 Pa.C.S. § 704.

82 *See, e.g.*, Popowsky v. Pennsylvania Public Utility Com'n, 706 A.2d 1197 (Pa. 1997) (Commonwealth Court "exceeded its scope of review" by failing to give PUC deference in interpreting provisions of Public Utility Code). But see, Crown Castle NG East LLC v. Pennsylvania Public Utility Commission, 234 A.3d 665, 677 (Pa. 2020) (court does not defer to agency's interpretation of plain meaning of unambiguous statute because statutory interpretation is question of law for court)

83 Alpha Auto Sales, Inc. v. Dep't of State, Bureau of Professional and Occupational Affairs, 644 A.2d 153, 155 (Pa. 1994) (citation omitted).

84 Grimaud v. Pa. Ins. Dep't, 995 A.2d 391 (Pa. Cmwlth. 2010); but see Justice Donohue's concurrence in Woodford v. Insurance Dep't, 243 A.3d 60, 77-84 (Pa. 2020).

85 983 A.2d 1231 (Pa. 2009).

86 983 A.2d at 1242 (quoting Pa. Human Rel. Comm. v. Uniontown Area Sch. Dist., 313 A.2d 156, 169 (Pa. 1973).

and/or appears to be offered only as a litigation position.[87] Unless otherwise provided by statute, the agency whose interpretation is entitled to deference is the agency that issued the regulation.[88]

Pennsylvania courts have characterized deference with various modifiers, creating at least the appearance of degrees of deference. The characterizations include great deference;[89] deference or some deference;[90] substantial deference;[91] **c**onsiderable weight and deference;[92] and no deference.[93]

The basics aside, the U. S. Supreme Court's 2024 overruling of *Chevron*[94] in *Loper Bright*[95] has many wondering what this means for Pennsylvania deference law. Briefly, in 1984 the Court enunciated the *Chevron* test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[96]

87 Crown Castle NG East, LLC v. Pennsylvania Public Utility Comm., 188 A.3d 617 (Pa. Cmwlth. 2018) (agency reversed long-held prior interpretation), aff'd, 234 A.3d 665 (Pa. 2020); Malt Beverages Distributors Ass'n. v. Pennsylvania Liquor Control Bd., 974 A.2d 1144 (Pa. 2009) (convenient litigation position)

88 Dep't of Env't Prot. v. North American Refractories Co., 791 A.2d 461 (Pa. Cmwlth. 2002).

89 Nationwide Insurance Co. v. Schneider, 960 A.2d 442 (Pa. 2008) (only appropriate where agency expertise implicated).

90 Street Road Bar & Grille, Inc. v. Liquor Control Bd., 876 A.2d 346, 354 n.8 (Pa. 2005) (interpretation entitled to deference or some deference only where consistent with legislative intent or not unwise.); Corman v. Acting Sec'y of Pennsylvania Dep't of Health, 266 A.3d 452 (Pa. 2021) ("where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute.… But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake.").

91 Schuylkill Twp. v. Pennsylvania Builders Ass'n, 7 A.3d 249, 253 (Pa. 2010) (agency's interpretation of statute agency "is charged with implementing and enforcing."); *but see*, Marcellus Shale Coal. v. Dep't of Envtl. Prot., 185 A.3d 985 (Pa. 2018) (preliminary injunction implicates "less deferential standard relative to the agency's interpretation of the governing statute than would be applicable to a trial court's final merits determination.").

92 Rubino v. Pennsylvania Gaming Control Bd., 1 A.3d 976 (Pa. Cmwlth. 2010) (interpretation of own regulations), appeal denied, 16 A.3d 504 (Pa. 2011).

93 McCloskey v. Pennsylvania Pub. Util. Comm'n, 255 A.3d 416 (Pa. 2021) (interpretation of clear and unambiguous statute not entitled to deference).

94 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

95 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

96 Chevron, 467 U.S. 837, 842-43 (1984).

That test became the dominant, but not exclusive, test applied by the federal courts in reviewing agency legal interpretations.[97]

Then, in 2024, four decades later, the Court abandoned *Chevron* in *Loper Bright*, holding:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[98]

The implications for Pennsylvania law may be surprising. While it has applied the federal deference rubrics in what the Court determined were appropriate circumstances, Pennsylvania never officially adopted them as law. The Court in *Seeton v. Pa. Game Commission*[99] stated:

> This Court has never expressly adopted this limitation of *Chevron* deference. . . . Indeed, we appear never to have explicitly adopted even *Chevron's* general rule in the context of state administrative law. The *Chevron* approach to such cases at the federal level, however, is indistinguishable from our own approach to agency interpretations of Commonwealth statutes. . . .[100]

In his concurring opinion in *Crown Castle NG East LLC v. Pa. PUC,*[101] Justice Wecht in a lengthy discussion excerpted here questioned the basis for both reliance on federal law and deference to agencies generally:

> In matters of agency deference, this Court historically has chosen (by volition rather than by command) to take its cues from federal law.
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> I question whether and to what extent this Court should rely upon federal law for purposes of assessing whether, when, and

97 *See, e.g.*, United States v. Mead Corporation, 533 U.S. 218 (2001) (courts can apply two deference levels to agency's interpretation of statute it is charged with enforcing: Chevron deference and Skidmore deference where interpretation must be given some deference depending on its power to persuade); Skidmore v. Swift & Co. 323 U.S. 134 (1944); Kisor v. Wilke, 588 U.S. 558 (2019) (Court upheld Auer/Seminole Rock deference generally while "reinforc[ing]" its scope); West Virginia v. EPA, 597 U.S. 697 (2022) (Major Questions Doctrine: "extraordinary cases" where the "history and the breadth of the authority" asserted and "economic and political significance" of assertion require heightened level of review).

98 Loper Bright, 603 U.S. at 412.

99 937 A.2d 1028 (Pa. 2007).

100 *Id*. at 1037 n.12.

101 234 A.3d 665, 686-92 (Pa. 2020) (Wecht, J., concurring).

> to what extent Pennsylvania courts should defer to Pennsylvania agency interpretations of their Pennsylvania enabling statutes.
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> ***
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> Over time, this Court has developed a simplified dichotomy that distinguishes simply between "substantive" and "interpretative" rulemaking. To the former, we have applied something resembling *Chevron* deference. For the latter, we have employed an approach akin to *Skidmore's*.

Justice Wecht spoke further on deference in *Corman v. Acting Secretary of Pa. Dep't of Health,*[102] stating:

> To be clear, where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute . . . . But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake. It is emphatically the province and duty of the judicial department to say what the law is. . . . By keeping clear the line dividing the judiciary's domain from the executive's, we maintain fidelity to the separation of powers.[103]

We can see that Pennsylvania never adopted the federal deference rubrics, instead applying them on an ad hoc basis as appropriate to the circumstances. We can also see that Justice Wecht holds that judicial statutory interpretation should not be controlled by deference to agency interpretation. Indeed, he can be said to have expressed similar views to the *Loper Bright* justices on deference to agency legal interpretations and separation of powers.

The lack of a deference rubric that commands a majority among the Court is illustrated by *Marcellus Shale Coalition v. Dep't of Environmental. Prot.*[104] Commonwealth Court held that regulations promulgated by DEP through the EQB exceeded their legislative rulemaking powers and were invalid and unenforceable.

The Supreme Court reversed. Five justices participated, producing four opinions. Justice Donohue, joined by Chief Justice Todd and as to some portions by Justice Dougherty, wrote the opinion announcing the judgment of the Court (OAJC).[105] Justice Dougherty concurred and dissented, and Justice Mundy dissented and would have found that DEP/EQB exceeded their statutory authority. Both the OAJC and Justice Dougherty's opinion read more like

102 266 A.3d 452 (Pa. 2021).
103 *Id*. at 486 (citation omitted).
104 292 A.3d 921 (Pa. 2023).
105 Section 4.B.3. of the Supreme Court's Internal Operating Procedures, 210 Pa. Code § 63.4.B.3 provides: "An opinion shall be designated as the 'Opinion Announcing the Judgment of the Court' when it reflects only the mandate, and not the rationale, of a majority of Justices."

an extended discussion on statutory construction than a pure conversation regarding deference. Justice Wecht's concurrence and dissent repeats his view that judicial statutory interpretation should not be controlled by deference to agency interpretation.[106]

Woodford v. Insurance Department[107] revealed a similarly divided Court. Writing for the majority, Justice Dougherty, joined by Chief Justice Saylor and Justices Baer and Mundy, held that the Court need not determine if the Department's interpretation is entitled to deference because analysis of the statute showed the Department's and the Court's readings were the same. Justices Donohue and Wecht filed concurring opinions, and Justice Todd filed a concurring and dissenting opinion. In her concurring opinion, Justice Donohue stated regarding the deference issue that:

> A court cannot defer to an agency's view that a statute is ambiguous, and by doing so it abdicates the judiciary's duty to say what the law is.
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> This issue has generated significant disagreement amongst members of the Court as demonstrated by our recent decision in *Harmon v. Unemployment Comp. Bd. of Review*, 652 Pa. 23, 207 A.3d 292 (2019). *See id.* at 300 (observing that precedent permits granting 'some measure of value to [agency] interpretations under certain circumstances') (Dougherty, J., joined by Baer and Todd, JJ.); *id.* at 308 (Saylor, C.J., concurring) ('A pervading question in this field, of course, is how much deference is due in any given context.'); *id.* at 310 (Donohue, J., concurring) ('I reject any rule of construction that would require courts to abdicate our judicial role to administrative agencies.'); *id.* (Wecht, J., concurring) ('I do not agree that reviewing courts should afford what often amounts to unqualified deference—i.e., *Chevron* deference—to an executive-branch agency's interpretation of an ambiguous statute.') (footnote omitted); id. at 313 (Mundy, J., dissenting) ('As noted by Chief Justice Saylor in his concurring opinion, some deference is due[.]').
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> ***
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> When a reviewing court finds that a statute is ambiguous, in my view an agency's interpretation is entitled to deference only in the sense of a recognition that the agency's view should be considered for its persuasive value. This position is distinct from

106 Marcellus Shale Coalition, 292 A.3d at 956-60 (Wecht, J., concurring).
107 243 A.3d 60 (Pa. 2020).

deferring to the agency's view as a matter of law.[108]

So, takeaways regarding deference in Pennsylvania are that there is a set of general rules which the Court applies on a case-by-case basis, rather than applying a specific established doctrine, and the Justices display a wide variance of views. Pennsylvania deference analysis is loosely based on *Chevron* and *Skidmore*, but neither has been adopted specifically as the law in Pennsylvania. Thus, *Chevron's* demise does not directly affect Pennsylvania doctrine, which has treated federal doctrine as persuasive only, and *Loper Bright's* effect in Pennsylvania, if any, is not immediately apparent.

However, the Court on January 28, 2025, agreed to hear a case that could have significant implications for the deference level Pennsylvania courts give agency interpretations of ambiguous statutory/regulatory provisions. Petitioners in *Lutheran Home at Kane and Siemon's Lakeview Manor Estate v. Dep't of Human Services*[109] ask the Court to:

> adopt the updated cabined requirement for "*Auer* Deference" from the decision of the U.S. Supreme Court in *Kisor v. Wilkie* when reviewing agency interpretations of their own regulations, that Courts may only determine a regulation is ambiguous after exhausting all available tools of construction to find the regulation is genuinely ambiguous, and update Pennsylvania law limiting deference to agency interpretations, including for the reasons recently presented by the U.S. Supreme Court's overruling of "*Chevron* Deference"[110]

While *Chevron* and *Loper Bright* addressed deference to agency interpretation of ambiguous statutes, the focus in *Lutheran Home* is on the deference level owed to agency interpretations of their own ambiguous regulations. The federal standard, known as *Auer/Seminole Rock* deference after the U.S. Supreme Court's decisions in *Auer v. Robbins*[111] and *Bowles v. Seminole Rock & Sand Co*.[112] came under attack in a precursor to *Loper Bright*, *Kisor v. Wilkie,*[113]in which *Auer* survived, albeit "potent in its place, but cabined in its scope."[114] *Kisor* now requires that *Auer* deference only be given where a regulation is "genuinely ambiguous," consistent with *Loper Bright's* instruction that ambiguity not be assumed, but definitively established.

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108 Woodford, 243 A.3d at 77-84 (Donohue, J., concurring). In his concurrence Justice Wecht noted "the narrow approach to administrative deference that Justice Donohue advances in her thoughtful concurrence aligns in most respects with my own well-documented views on the subject." Id. at 86-87.

109 7 MAP 2025.

110 In light of what is sure to be the first of many such petitions, it is worthwhile to understand Pennsylvania's ad hoc application of *Chevron, Skidmore* and *Auer*, and to examine the current circumstance at the federal level.

111 519 U.S. 452 (1997).

112 325 U.S. 410 (1945).

113 588 U.S. 558 (2019).

114 *Id*. at 563-64.

The issue comes to the Supreme Court from Commonwealth Court's conclusion that DHS's regulation interpreting a particular statute was ambiguous and thus entitled to *Auer* deference.[115] Petitioners unsuccessfully argued that our Supreme Court's mention of *Kisor* in a footnote in *Corman v. Acting Secretary of Pa Dep't of Health*[116] meant that it had adopted *Kisor's* "cabined" version of *Auer* and that Commonwealth Court should conduct a more rigorous analysis beyond two or more equally plausible interpretations.

Petitioners thus ask the Supreme Court to adopt the now more limited applications of federal deference standards it never adopted in the first instance. Moreover, what standard applies after *Loper Bright* is unknown. The Court cited several pre-1945 and thus pre-APA decisions regarding possible degrees of deference without stating they should be applied or even that they survive.[117] Indeed, both *Loper Bright's* majority and dissent appear to agree that the APA must be read considering what the law of deference was before its 1945 enactment. As detailed in Part I supra, no one in Pennsylvania should be interested in a similar return to pre-AAL conditions, much less those existing between 1945 and 1968 as described in Part II.

Regarding questions of fact, *Loper Bright's* majority emphasizes that courts pre-APA often deferred to agencies on questions of fact, and the APA in Sections 706 (A)(E)[118] explicitly does so. However, on mixed questions of law and fact, the decision is less clear. The Court acknowledged *Gray* and *Hearst* but did not address their continuing viability. This begs the question of whether discretion is delegated on mixed questions because they are sufficiently fact dependent so as not to involve statutory interpretation or not delegated because they involve some statutory interpretation.[119]

Indeed, anyone, however well informed, who claims to know what the federal deference standard is at this juncture, beyond "it's not *Chevron,*"

115 Lutheran Home at Kane and Siemon's Lakeview Manor Estate v. Department of Human Services, 318 A.3d 164 (Pa. Cmwlth. 2024), *appeal granted*, 333 A.3d 305 (Pa. 2025) (per curiam).

116 266 A.3d 452, 485 n.59 (Pa. 2021) (The entirety of the footnote reads: "In *Kisor v. Wilkie* . . . the High Court further qualified the limits of *Auer* deference, professing that it "is potent in its place, but cabined in its scope.") (citation omitted).

117 Given that *Auer* survived by the barest margin in *Kisor*, there is no guarantee per the concurrences that the Court will not abandon it completely at the next opportunity. In addition to *Skidmore*, the pre-APA/1945 decisions cited are *Gray v. Powell*, 314 U.S. 402 (1941) and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

118 5 U.S.C. § 706(A), (E).

119 *Loper Bright* overruled *Chevron* on the basis that it did not comport with the APA. It is thus possible if currently unlikely that Congress could revive *Chevron* by amending the APA. Were that to occur, it is an open question whether there are five votes on the current court to declare that *Chevron* also violates the constitutional separation of powers, a sentiment alluded to by Justice Wecht.

is speculating.[120] At this point, until the federal circuit courts sort out what levels of deference will apply and in what circumstance,[121] and the Supreme Court eventually signals its approval or disapproval of those choices, federal deference jurisprudence is an open book.[122] However, even *Chevron's* demise does not prevent its being applied by state courts which are not bound by the U.S. Supreme Court in such circumstances.

Final Pennsylvania Deference Takeaways (For Now)

Deference to an agency's interpretation is only an issue if the statute (or regulation) is ambiguous. The tools of statutory construction are not applicable otherwise.

Deference is based on the agency's expertise.

Interpreting statutes and regulations involves questions of law to which courts apply a de novo standard of review and a plenary scope of review. Regardless of how deference is characterized, substantial or otherwise, courts have the last word.

120 Compare, for example, Thomas W. Merrill, Comment, *The Demise of Deference — And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227, 265 (2024) "What remains highly uncertain is just how broad or narrow the Court will tailor the category of delegations to agencies to interpret. . . . If the Court tailors the category broadly, it would give agencies significant flexibility, restoring a large part of the discretionary authority taken away with the overruling of *Chevron*." https://harvardlawreview.org/print/vol-138/the-demise-of-deference-and-the-rise-of-delegation-to-interpret/, with Mila Sohoni's response *Chevron's Legacy*, 138 Harv. L. Rev. F. 66 (2025), https://harvardlawreview.org/forum/vol-138/chevrons-legacy/. The sheer number of scholarly articles is too large to summarize here. Indeed, *Loper Bright's* overturning *Chevron* has fostered a cottage industry regarding deference.

121 *See, e.g.*, Moctezuma-Reyes v. Garland, 124 F.4th 416 (6th Cir. 2024) (construing *Loper Bright* narrowly); China Unicom (Ams.) Ops. Ltd. v. FCC, 124 F.4th 1128, 1165 n.11 (9th Cir. 2024) (Bea, J., dissenting) (charging panel majority with giving "succor to *Chevron* resurrectionists" by leaning towards deference rather than de novo review).

122 On June 20, 2025, the Court held in McLaughlin Chiropractic Associates Inc. et al., v. McKesson Corp. et al., No. 23-1226, that district courts are not bound under the Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. § 2344, to accept Federal Communications Commission orders interpreting the Telephone Consumer Protection Act, further restricting deference to agency legal interpretations after *Loper Bright*. *See also* Federal Communications Commission et al. v. Consumers' Research et al., No. 24-354, June 27, 2025 (Kavanaugh, J. concurring), *citing Loper Bright* and West Virginia v. EPA (Major Questions Doctrine) as constraints on the President's (qua the Executive branch) implementation of expansive Congressional delegations of legislative policymaking authority.