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Kisor v. *Wilkie*: U.S. Supreme Court Upholds – But Limits – *Auer* Deference

U.S. Supreme Court Declines to Overrule Principle of Deference to Agencies' Interpretations of Their Own Regulations, but Clarifies Limitations on Its Scope

SUMMARY

Today, the U.S. Supreme Court released a highly anticipated decision addressing the question of whether to overrule *Auer* v. *Robbins*, which generally requires courts to defer to agencies' reasonable interpretations of their own ambiguous regulations.[1] In a splintered 5-4 decision, the Court declined to abolish *Auer* deference (sometimes referred to as *Seminole Rock* deference)[2] as a matter of *stare decisis*, but reiterated and expanded important limitations on the doctrine's application. Significantly, under *Kisor*, courts should apply *Auer* deference only if they determine that (i) a regulation is genuinely ambiguous after exhausting all traditional tools of interpretation, (ii) the agency's interpretation is reasonable, and (iii) the "character and context of the agency interpretation entitles it to controlling weight,"[3] because it reflects the official, expert, considered, and consistent judgment of the agency.

Prior to today's opinion, several lower courts had routinely applied *Auer* to agency interpretations of their own regulations. Going forward, *Auer* will likely require deference in fewer cases, though the scope of the limitations articulated in the Court's opinion are certain to engender significant future litigation. Indeed, certain Justices stated that, post-*Kisor*, *Auer* will be meaningfully applied in very few circumstances. The Court's narrowing of *Auer* might encourage agencies to resort to clearer and more detailed rulemaking, and also afford a defendant stronger arguments against an agency's interpretation of its own regulation in a manner adverse to the defendant.

It is also worth noting that although *Kisor* did not concern the larger question of *Chevron* deference—which allows agencies, under certain circumstances, to interpret ambiguous statutes—several Justices

commented on the potential import *Kisor* might (or might not) have for *Chevron*. It thus remains an open question to what extent *Kisor* will play into continuing debates over *Chevron*'s viability.

BACKGROUND

In 1982, James Kisor, a veteran who served in the Vietnam War, was denied benefits for post-traumatic stress disorder ("PTSD") by the Department of Veterans Affairs ("VA") on the ground that he did not suffer from that condition.[4] After Kisor sought to reopen his claim in 2006, the VA this time agreed that Kisor suffered from PTSD, but awarded only prospective—not retroactive—benefits.[5]

The Board of Veterans' Appeals ("Board") affirmed.[6] The Board's decision hinged on a VA regulation providing for retroactive benefits if "relevant" official records were not considered in the original denial.[7] The Board recognized that Kisor had presented two additional service records in connection with the motion to reopen his claim in 2006. However, the Board held that records are "relevant" only if they speak to the reason for the initial denial.[8] The Board determined that, because Kisor's service records did not establish that he suffered from PTSD, they were not "relevant" under this standard, and retroactive benefits were thus unavailable.[9] The Court of Appeals for Veterans Claims affirmed the Board's decision.[10]

Kisor appealed the decision to the Federal Circuit.[11] That court concluded that the term "relevant" was ambiguous: it could be read to refer to any records pertinent to the veteran's claim in general or (as the Board had held) only those documents pertinent to the basis for the prior denial.[12] Rather than resolving this ambiguity, the Federal Circuit deferred to the Board's interpretation under *Auer*, which generally prescribes judicial deference to an agency's reasonable interpretation of its own ambiguous regulation.[13] In the Federal Circuit's view, because the regulation was ambiguous and the agency's interpretation was not "plainly erroneous or inconsistent with the VA's regulatory framework," deference was warranted.[14] The Federal Circuit thus affirmed, and denied rehearing *en banc* over a three-judge dissent.[15]

Kisor subsequently sought review in the Supreme Court, which granted *certiorari* to decide whether *Auer* should be overruled.

THE SUPREME COURT'S DECISION

In a 5-4 decision written by Justice Kagan, the Court declined to overrule *Auer* formally. Noting that the Supreme Court's prior decisions had not always been consistent in enforcing appropriate limits on *Auer*'s application, the majority began by "tak[ing] the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent."[16]

First, *Auer* applies only when the regulation at issue is genuinely ambiguous.[17] To determine whether this condition is satisfied, a court must exhaust all traditional tools of interpretation.[18] Only if a residual zone of ambiguity remains may the court defer to the agency's interpretation.

Second, to warrant deference, an agency's interpretation must be reasonable—in other words, it must fall within that zone of ambiguity.[19]

Third, *Auer* is limited to situations where the "character and context of the agency interpretation entitles it to controlling weight."[20] Although the Court declined to announce any "exhaustive test" on this point, it did articulate several "especially important markers."[21] For example, the interpretation must represent the agency's "authoritative" or "official" position.[22] This requirement excludes *ad hoc* statements that do not emanate from those with policymaking authority within the agency.[23] The interpretation must also implicate the agency's substantive expertise.[24] Courts need not defer when the agency lacks any comparative advantage in the subject matter, or when the regulation at issue, rather than reflecting the agency's technical expertise, merely parrots the statutory text.[25] The interpretation must likewise reflect the agency's "fair and considered judgment."[26] Deference is thus generally unwarranted when the interpretation is inconsistent with prior agency interpretations, represents nothing more than a convenient litigating position or a *post hoc* rationalization, or would inflict unfair surprise on regulated parties.[27]

After explaining these limitations, the Court concluded that *Auer* merited continued adherence as a matter of *stare decisis*. The majority reasoned that, although "*stare decisis* is not an inexorable command," "any departure from the doctrine demands special justification—something more than an argument that the precedent was wrongly decided."[28] In the Court's view, the force of *stare decisis* in this case was particularly powerful, given that overruling *Auer* would upset a slew of judicial decisions that had deferred to particular administrative interpretations in reliance on *Auer*.[29] And in any event, unlike a constitutional precedent, Congress was free to displace *Auer* if it wished.[30] Ultimately, the Court concluded that Kisor had failed to show any "special justification" to overcome these concerns, and that his arguments for overruling *Auer* simply repeated his merits arguments.[31]

Finally, the Court vacated and remanded the judgment for the Federal Circuit to address whether the Board interpretation at issue merited deference.[32] It reasoned that remand was appropriate because the Federal Circuit had failed to properly exhaust all interpretive tools prior to declaring the regulation ambiguous, and had similarly failed to consider fully whether, even assuming the regulation was ambiguous, the Board's interpretation merited deference under the principles articulated in the majority's opinion.[33]

Because certain sections of Justice Kagan's opinion were joined only by Justices Ginsburg, Breyer, and Sotomayor—and not Chief Justice Roberts, who provided the fifth vote for the holding—they did not form part of the majority opinion. In these sections, Justice Kagan argued that *Auer* was rooted in a presumption that Congress generally intended to delegate interpretive power to agencies.[34] She further defended the *Auer* rule on substantive grounds, contending that it was consistent with the Administrative Procedure Act ("APA"), policy concerns, and the Constitution.[35]

Chief Justice Roberts concurred in part. He suggested that the distance between the majority (which stressed the limits on *Auer*'s scope) and the concurrence in the judgment by Justice Gorsuch (which, as described below, recognized that a court might be persuaded to adopt an agency's interpretation in various circumstances) "is not as great as it may initially appear."[36] He further observed that *Auer* raises concerns distinct from those raised by *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,[37] which governs judicial deference to agency interpretations of statutes.[38] In his separate concurrence in the judgment, Justice Kavanaugh, joined by Justice Alito, reiterated both of these points, though noting that he would have overruled *Auer*.[39]

Justice Gorsuch, joined in full by Justice Thomas and in part by Justices Alito and Kavanaugh, concurred in the judgment. Although acknowledging that courts could afford persuasive force to agency interpretations under *Skidmore* v. *Swift & Co.*,[40] Justice Gorsuch argued that *Auer*'s rule of deference should be overturned because it requires judges to "abdicate their job of interpreting the law" in violation of both the APA and constitutional separation-of-powers principles.[41] He also contested the majority's invocation of *stare decisis*, arguing that the doctrine did not apply where, as here, the precedent at issue announced a general interpretive methodology rather than a specific holding about the meaning of a particular law.[42] Justice Gorsuch also criticized the majority for appealing to *stare decisis* while simultaneously changing *Auer* by limiting its application.[43]

IMPLICATIONS

The Court's opinion provides important clarifications regarding *Auer*'s continuing viability and scope. At the most basic level, by declining to overrule *Auer*, the opinion makes clear that *Auer* remains a tool for courts that are reviewing agency interpretations of their own regulations. Nevertheless, in light of the Court's clear focus on "reinforcing" the limits on *Auer*'s applicability,[44] the opinion will likely reduce the number of cases in which deference is required going forward. As a result, the decision should meaningfully increase the ability of regulated parties to successfully challenge informal agency interpretations in court, and might incentivize agencies to enact more detailed formal regulations to avoid having to rely on interpretive guidance in the event of litigation.

The opinion also leaves unanswered a substantial number of questions, which are certain to generate future litigation. In particular, several of the limitations articulated by the Court—for example, that deference is inappropriate when the agency lacks "comparative expertise" in the subject matter at issue[45]—are relatively vague, and will need to be fleshed out in particular cases. The decision's implications for *Chevron* are also unclear. Although both Chief Justice Roberts and Justice Kavanaugh went out of their way to argue that *Auer* and *Chevron* raise separate issues, many of the parties' arguments about *stare decisis*, the APA, the Constitution, and policy concerns necessarily implicate both doctrines.

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ENDNOTES

1 519 U.S. 452 (1997).

2 *See Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

3 *Kisor* v. *Wilkie*, 588 U.S. __ (2019), No. 18-15, slip op. at 15 (June 26, 2019).

4 *Id.* at 2.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 2-3.

10 *Id.* at 3.

11 *Kisor* v. *Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017).

12 *Id.* at 1367.

13 *Id.*

14 *Id.* at 1368.

15 *Kisor* v. *Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018).

16 Slip op. at 12.

17 *Id.* at 13.

18 *Id.* at 13-14.

19 *Id.* at 14.

20 *Id.* at 15.

21 *Id.*

22 *Id.*

23 *Id.* at 15-16.

24 *Id.* at 16.

25 *Id.* at 16-17 & n.5.

26 *Id.* at 17 (internal quotation marks omitted).

27 *Id.* at 17-18.

28 *Id.* at 26 (internal quotation marks omitted).

29 *Id.*

30 *Id.* at 26-27.

31 *Id.* at 27.

32 *Id.* at 28.

33 *Id.* at 28-29.

34 *Id.* at 7 (Kagan, J.).

35 *Id.* at 19-25.

ENDNOTES (CONTINUED)

[36] *Id*. at 1 (Roberts, C.J., concurring in part).

[37] 467 U.S. 837 (1984).

[38] Slip op. at 2 (Roberts, C.J., concurring in part).

[39] *Id.* at 1-2 (Kavanaugh, J., concurring in the judgment).

[40] 323 U.S. 134 (1944).

[41] Slip op. at 2, 13-29 (Gorsuch, J., concurring in the judgment).

[42] *Id.* at 34-35.

[43] *Id.* at 36-37.

[44] *Id.* at 13 (majority opinion).

[45] *Id.* at 17.

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