DECLINING TO OVERRULE A LONG-STANDING AGENCY DEFERENCE DOCTRINE, THE SUPREME COURT NONETHELESS CAUTIONS THAT ITS LIMITATIONS PROVIDE A MEANINGFUL CHECK ON FEDERAL AGENCIES' POWER TO REGULATE BUSINESS ACTIVITIES

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Federal agencies issue hundreds of significant rules each year, affecting virtually all aspects of U.S. economic activity. For decades, businesses, consumers, environmental and labor groups, and others have challenged these regulations and their interpretations in court as going “too far” or “not far enough.” A key question in these challenges is often the degree to which a reviewing court must defer to the agency's interpretation of its rules. In the closely watched case of *Kisor v. Wilkie*, the U.S. Supreme Court declined to overrule a doctrine known as *Seminole Rock or Auer* deference, under which a court reviewing an agency's interpretation of its own regulation gives that interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”[1]

A controlling portion of the *Kisor* opinion cautions, however, that the Court “has cabined *Auer*'s scope in varied and critical ways,” and thus “maintained a strong judicial role in interpreting rules.”[2] Before giving deference, a court must make a searching inquiry into whether the regulation is genuinely ambiguous, whether the result is reasonable, and whether the agency has fairly considered the matter.[3] While the opinion does not purport to change the Court's understanding of how to apply deference, it should serve as a strong signal that application of *Auer* should not be, and was never intended to be, reflexive. Moreover, three justices, including the Chief Justice who was the deciding vote in *Kisor*, expressly noted that the future of the related doctrine of *Chevron* deference, which governs the deference given to an agency in the review of its statutory interpretations,[4] remains very much an open question.

The Federal Circuit's Misapplication of Auer/Seminole Rock Deference

Kisor came to the Court on the petition of a military veteran whose claim for disability benefits was initially denied in 1982, but then granted after he reopened it by submitting a new medical report in 2006. The agency interpreted one of its regulations to require that the benefits begin on the date of the veteran's motion to reopen his claim, rather than the date of his initial application. The Federal Circuit deferred to the agency's interpretation on the basis that “[b]oth parties insist that the plain regulatory language supports their case, and neither party's position

strikes us as unreasonable," which it stated made the regulation ambiguous and required deferring to the agency.[5]

Justice Kagan's lead opinion in *Kisor* sets forth numerous reasons supporting the principle of *Auer* deference, but also makes clear that the Federal Circuit's superficial approach to applying it will not do. The question is not simply whether a reasonable-sounding argument can be made in favor of the agency's reading, but whether a rigorous three-part test for application of *Auer* has been met.

First, a court must find the regulation is "genuinely ambiguous," even after exhausting all tools of statutory construction. A regulation is not ambiguous just because its true meaning may be hard to figure out, since "hard interpretive conundrums, even relating to complex rules, can often be solved."[6]

Second, even if a court finds ambiguity, the agency's interpretation must be reasonable, that is, "within the zone of ambiguity the court has identified after employing all its interpretative tools." The test is no looser than what an agency must meet in interpreting a statute, and it is "a requirement an agency can fail."[7]

Third, the reviewing court must examine "whether the character and context of the agency interpretation entitles it to controlling weight." This requires examination of whether the agency's interpretation (1) was made through an official position, such as formal memos or opinions of agency heads or staff, rather than informal communications; (2) comes from its own subject-matter expertise; and (3) is based on consistent precedent, rather than being a convenient litigation view or a new position that upsets settled expectations through "unfair surprise."[8]

Having articulated the proper framework for *Auer* deference, Justice Kagan, writing for four justices, found no good reason to "doubt *Auer* deference."[9] Chief Justice Roberts declined to join the portions of her opinion reaffirming the wisdom of *Auer*, but joined the discussion of the limitations on *Auer*, and in the opinion's holding that the doctrine should be maintained under the principle of *stare decisis*, the "special care we take to preserve our precedents." Since no "special justification" had been presented to overrule a "'long line of precedents' -- each one reaffirming the rest and going back 75 years or more," *stare decisis* would justify the rule even if it might have been incorrectly adopted in 1945.[10]

The majority concluded by disapproving of the Federal Circuit's application of *Auer* deferring to the VA's interpretation of its regulations, first because the court "jumped the gun in declaring the . . . regulation ambiguous before bringing all its interpretive tools to bear on the question," and second because it "assumed too fast that *Auer* deference should apply in the event of genuine ambiguity."[11] Four justices concurred in this result, but dissented on the matter of preserving *Auer*.

Implications for Challenges to Agency Interpretations of Regulations

The majority's assertion that the limitations it states as to the application of *Auer* do not materially change existing law appears accurate. All of those limitations appear in prior decisions, many of which are cited in Justice Kagan's opinion.[12] As the Federal Circuit's decision in *Kisor* itself reflects, however, courts have not always been scrupulous in applying these limitations. By reminding courts that they cannot simply rubber stamp an agency's interpretation, but must undertake a careful and multi-pronged inquiry before upholding an agency's regulatory interpretation, the decision may work a change in practice, even if not in doctrine. The message is that courts must do their job, and that if they do the number of cases that actually turn on deference may prove to be small.[13]

Implications for Chevron

The *Kisor* decision is noteworthy for what it both says and implies about the *Chevron* doctrine governing the deference to be given to an agency's construction of the statutes it is charged to administer. Chief Justice Roberts took pains in his concurrence to say that his acceptance of *Auer* deference does not imply the same result in a challenge to *Chevron*, as the issues surrounding *Auer* are “distinct” from those raised by *Chevron*, and that he did not “regard the Court's decision today to touch upon” *Chevron*. Justice Kavanaugh, joined by Justice Alito, expressly endorsed these statements. Moreover, by voting to uphold *Auer* only on stare decisis grounds, the Chief Justice will not be bound by any of Justice Kagan's reasoning affirming the wisdom of *Auer* should the Court, as many expect, accept a case to reconsider *Chevron* in the next term or two.

The limitations confirmed in *Kisor* on the application of *Auer* also track in large part the rules courts have adopted in applying *Chevron*. For example, the Court's most recent reaffirmation of *Chevron*, Justice Scalia's opinion in *City of Arlington v. Federal Communications Commission*, noted that the way to keep agencies within their proper bounds was not to apply artificial exceptions to *Chevron* deference but to “apply[] rigorously, in all cases, statutory limits on agencies' authority.”[14] *Kisor* similarly seeks not to eliminate deference but to be rigorous in its application.

Justice Scalia is no longer on the Court, and Justice Roberts dissented forcefully in *Arlington*, leading Justice Scalia to observe “the ultimate target here is *Chevron* itself.”[15] If in fact there are now enough votes on the Court to overturn *Chevron*, the Court may nonetheless seek middle ground there, as the Chief Justice did in voting to preserve *Auer*. Maintaining *Auer* was said by several of the justices to be of relatively little moment as long as rigorous rules of its application are applied. The same may ultimately be said if *Chevron* is overturned -- deference is of less importance when courts are rigorous in determining the bounds of legitimate statutory interpretation, and if they defer to agencies only when they act consistently and with the requisite care and level of formality.

Implications for the regulatory process

The *Kisor* decision will also be important in the development stage of agency regulations and interpretations. Challenges to agency actions are almost always based on the “record” of information and comments presented to the agency. *Kisor* allows regulated parties to remind agencies as they develop and apply regulations that they face meaningful judicial limitations. Parties need also to be aware that limitations on agency deference, while useful in cabining agency power, can also reduce the certainty that agency decisions will be upheld in court. This can be significant to parties that, for example, structure their businesses around agency regulatory approvals. Careful attention to all aspects of the regulatory process is thus necessary.

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[1] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). This formulation was followed in Auer v. Robbins, 519 U.S. 452, 461 (1997) (which itself quoted the same language in Robertson v. Methow Valley Citizens Council, 490 U. S. 332, 359 (1989)).

[2] *See* Kisor v. Wilkie, No. 18-15, slip op. at 18–19 (U.S. June 26, 2019).

[3] *Id.* at 11–19.

[4] The doctrine is named for the seminal case of Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984), which announced a two step approach under which the court first determines if the statute unambiguously forecloses the agency's interpretation, and, if not, upholds the interpretation if it is reasonable.

[5] *Id.* at 3.

[6] *Id.* at 13–14.

[7] *Id.* at 14.

[8] *Id.* at 15–18.

[9] *Id.* at 19-25.

[10] *Id.* at 19, 25-28.

[11] *Id.* at 28-29.

[12] *See also* Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 YALE L. & POL'Y REV. 175, 189 (2014) (collecting cases that set out all of limitations that appear in Justice Kagan's opinion).

[13] As Justice Kavanaugh put it in his dissent, at 1, “If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation.”

[14] 569 U.S. 290, 307 (2013).

[15] *Id.* at 304.

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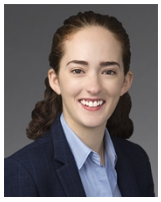

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