ALERT MEMORANDUM

Supreme Court Limits, But Declines To End, Deference To Administrative Agencies' Interpretations Of Their Own Ambiguous Regulations

July 3, 2019

In a much-anticipated opinion, on June 26, 2019, the United States Supreme Court held that, in appropriate circumstances, federal courts should continue to defer to the reasonable interpretations that administrative agencies give to their own ambiguous regulations.[1] In doing so, the Court declined to overrule so-called *Auer* deference, a doctrine rooted in the 1997 decision *Auer v. Robbins*, 519 U.S. 452 (1997) and a World War II-era predecessor, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The decision is notable for at least two different reasons.

First, it is clear that the effect of the decision will be to narrow significantly the circumstances in which agency interpretations will be entitled to deference to those which relate to the agency's own expertise (rather than general legal principles), are within the zone of the ambiguity, are reasonable, and were officially adopted in circumstances that make it reliable evidence of the agency's original intent.

Second, concurring opinions by Chief Justice Roberts, Justice Gorsuch (joined by Justice Thomas and joined in part by Justice Kavanaugh and Justice Alito), and Justice Kavanaugh (joined by Justice Alito) continue to signal the Court's interest in reviewing the separate question of whether agencies' interpretations of statutes should continue to receive deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and make clear that this decision does not address that issue.

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[1] *Kisor v. Wilkie*, 588 U.S. ___, No. 18-15, 2019 WL 2605554 at *3 (June 26, 2019).

1. Overview of *Auer* Deference

In *Auer*, the Supreme Court considered whether sergeants and a lieutenant employed by the St. Louis Police Department were salaried "exempt" employees under the Fair Labor Standards Act.[2] To resolve that dispute, the Court was asked to interpret regulations promulgated by the Secretary of Labor concerning when employees are "exempt" from overtime rules, and in particular whether they can be exempt if their pay is "subject to" disciplinary deductions.[3] Finding the Secretary of Labor's regulations on the matter to be ambiguous, the Court invited the Secretary himself to offer a view by way of an amicus curiae brief, which he did and which explained that the Department of Labor's view was that an employee was denied "exempt" status if his or her pay was subject to deductions "as a practical matter."[4]

Writing for a unanimous Supreme Court, Justice Antonin Scalia explained that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation."[5] The Court went on to hold that "[t]hat deferential standard is easily met here."[6]

And with that, *Auer* deference was born.

Although formally announced in 1997, *Auer* deference was not new at that time. Indeed, in support of deferring to the Secretary of Labor's views in *Auer*, Justice Scalia relied on *Seminole Rock*, a case concerning World War II price controls on crushed stone. In *Seminole Rock* – which notably pre-dated the Administrative Procedure Act ("APA") by a year – the Court explained that, when interpreting an administrative regulation, "if the meaning of the words used is in doubt," then "[t]he intention of Congress or the principles of the Constitution may be relevant . . . But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[7]

That the doctrine came to be known by reference to the *Auer* decision a half-century later is perhaps due to its more frequent invocation following the unanimous 1997 ruling. While the doctrine has often been relied on by administrative agencies to bolster their litigation positions, it has also been limited by later Supreme Court holdings. In particular, in *Christensen v. Harris County*, 529 U.S. 576 (2000), again construing regulations from the Department of Labor, the Supreme Court declined to apply *Auer* deference to an interpretive letter issued by the Acting Administrator of the Department's Wage and Hour Division. In doing so, the Court re-affirmed that "an agency's interpretation of its regulation is entitled to deference" but cautioned that:

> *Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous – it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.[8]

The Court went on to hold that the regulation in question was "not ambiguous" and therefore "*Auer* deference is unwarranted."[9]

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2 519 U.S. at 454-55.

3 *Id*. at 459-60.

4 *Id*. at 461.

5 *Id*. (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)) (internal quotation marks omitted).

6 *Id*.

7 325 U.S. at 414.

8 *Christensen*, 529 U.S. at 588.

9 *Id*.

In the years since *Christensen*, members of the Court have increasingly voiced unease with a doctrine that permits administrative agencies to issue authoritative interpretations of their own regulations outside of the notice-and-comment rulemaking procedure sanctioned by the APA. For example, concurring in *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), Chief Justice Roberts, joined by Justice Alito, observed that "[i]t may be appropriate to reconsider [*Auer*] in an appropriate case."[10] Last year, Justices Thomas and Gorsuch did the same, dissenting from the denial of a writ of certiorari in *Garco Constr. Inc. v. Speer*, 138 S. Ct. 1052 (2018), and observing that such deference was "constitutionally suspect."[11]

These observations primed the Court to consider in *Kisor v. Wilkie*, 588 U.S. ___, No. 18-15, 2019 WL 2605554 (June 26, 2019) whether to overrule *Auer*. With the addition of Justice Kavanaugh, who was considered generally hostile to deference doctrines including *Chevron*, many believed that the Court would overturn *Auer* in *Kisor*. But it was not to be.

2. Background on *Kisor*

Kisor came before the Supreme Court from the Court of Appeals for the Federal Circuit.

The plaintiff, James Kisor, is a veteran of the Vietnam War who first filed a claim for disability benefits with the United States Department of Veterans Affairs ("VA") in 1982.[12] A VA psychiatrist concluded that Kisor did not suffer from a disability and denied his claim on that basis.[13] In 2006, Kisor moved to reopen his claim and provided the VA with new service records and a new psychiatrist's report, which concluded that he has a psychiatric disability.[14] The VA subsequently granted Kisor disability benefits with an effective date of 2006.[15] Kisor challenged the decision, arguing that the VA's grant of disability benefits should have been effective as of 1982, the date of his initial submission, not the date he moved to re-open his claim.[16]

The Board of Veterans' Appeals, a division of the VA, affirmed the 2006 effective date for Kisor's benefits citing an agency regulation which states that the VA can only grant retroactive benefits if there are "relevant official service department records" that it had not considered in its initial determination.[17] The Board of Veterans' Appeals did not deem the service records Kisor submitted in 2006 to be "relevant" to the VA's initial determination because the denial of benefits was premised on the lack of a disability diagnosis at that time.[18] Kisor argued that under the regulation, service records are "relevant" if they relate to any criterion of the benefit determination.[19] His argument was subsequently rejected by the U.S. Court of Appeals for Veterans Claims, from which review lay in the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit found the regulation ambiguous and, based on its reading of *Auer*, accorded deference to the VA's interpretation of the regulation.[20] Similar to the deference afforded to agencies' interpretations of ambiguous statutes under *Chevron*, under *Auer*, courts afford "controlling weight" to agencies' reasonable interpretations of their own regulations where those regulations are ambiguous.[21]

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10 *Id*. at 615 (Roberts, C.J., concurring).

11 *Id*. at 1052 (Thomas, J., dissenting).

12 *Kisor*, 2019 WL 2605554, at *3, *20 (Gorsuch, J., concurring).

13 *Kisor*, 2019 WL 2605554, at *3.

14 *Id*., *Id*. at *20 (Gorsuch, J., concurring).

15 *Kisor*, 2019 WL 2605554, at *3, *20 (Gorsuch, J., concurring).

16 *Kisor*, 2019 WL 2605554, at *4, *20 (Gorsuch, J., concurring).

17 *Kisor*, 2019 WL 2605554, at *4 (*citing* 38 CFR § 3.156(c)(1) (2013)).

18 *Id*.

19 *Id*.

20 *Id*. at *14.

21 *Id*. at *9.

Before the Supreme Court, Kisor argued that the Court should overrule *Auer* and adopt an alternative standard of judicial review for agency regulations.[22]

3. The Court's Decision

The decision in *Kisor* facially appeared to divide the Court on ideological lines, with Justice Kagan writing an opinion joined in full by only three other justices (Ginsburg, Breyer and Sotomayor), and Justice Gorsuch writing an opinion that was likewise joined by three justices (Thomas, Alito and Kavanaugh). Chief Justice Roberts wrote separately to join Justice Kagan's opinion in part and, to that extent, make its holding that *Auer* is not overruled the majority. Justice Kavanaugh also wrote a separate concurring opinion. In the end, notwithstanding the four opinions, all nine justices agreed with the Court's judgment that the Federal Circuit's decision should be reversed and remanded.

A. *Auer* holds on by a thread

Auer was not overruled, but the reasoning leaves one to wonder whether what remains is only a hollow shell of *Auer* deference. While in Parts II-A and III-A of her opinion, Justice Kagan set out a lengthy rationale for retaining *Auer* deference, the Chief Justice's crucial concurrence pointedly did not join those parts. Rather, he joined Part II-B, which explains how narrowly *Auer* may now apply, and Part III-B, which held that *Auer* should not be overruled based on principles of *stare decisis*.[23] Thus, only those parts – and not Justice Kagan's defense of *Auer* – constitute the opinion of the Court. The Court upheld *Auer* only on the narrow ground that there was no "special justification" for overruling *Auer*. It cited three specific reasons for upholding *Auer* on *stare decisis* grounds[24]:

- *Auer* is a longstanding precedent that had been applied by the Supreme Court in dozens of cases and by lower courts thousands of times.[25] In the opinion of the Court, "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law."[26]

- Overruling *Auer* would cast doubt on "many settled constructions of rules" and permit "relitigation of any decision based on *Auer*," introducing instability to the law.[27]

- Congress could require *de novo* review of regulations either by amending the APA or by requiring *de novo* review of specific regulatory provisions.[28]

Even while upholding *Auer*, Justice Kagan wrote that the Court took care "to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules."[29]

In response, through Justice Gorsuch's opinion, the other half of the Court attacked the doctrinal foundations of *Auer* deference on both statutory and constitutional grounds. In their opinion, *Auer* deference does not accord with the APA, which governs judicial review of federal agency action.[30] Justice Gorsuch argued that *Auer* deference is contrary to § 706 of the APA, which requires courts to decide all relevant questions of law; § 553, which requires agencies to follow notice and comment procedures when issuing or

22 *Id*. at *10.

23 *Id*. at *7-10, *13-14. A majority of the Court did not join Parts II-A and III-A of Justice Kagan's opinion where she expounded on why *Auer* deference, properly applied, is good policy. *See also id*. at *16 (Gorsuch, J., concurring) ("a majority retains *Auer* only because of *stare decisis*."). Chief Justice Roberts also joined Part I of Justice Kagan's opinion, which summarizes the background of Kisor's case, and Part IV, which announces the judgment of the Court.

24 *Kisor*, 2019 WL 2605554, at *10.

25 *Id*. at *13.

26 *Id*.

27 *Id*.

28 *Id*. at *14.

29 *Id*.

30 *Id*. at *20 (Gorsuch, J., concurring).

amending regulations; and the congressional intent for the APA.[31] Justice Gorsuch also argued that *Auer* deference violates Article III § 1 of the Constitution, which provides that only the judicial branch has the power to interpret and apply laws in cases brought before the courts.[32] The only kind of deference to an agency interpretation of its own regulation that Justice Gorsuch would have permitted is so-called *Skidmore* deference. Under *Skidmore* deference, the force of an agency's interpretation is only as strong as its power to persuade. The fact that an agency, as opposed to another entity, is offering the interpretation has no bearing on the Court under *Skidmore* deference.

Notably, in his critical concurring opinion, Chief Justice Roberts – who made the majority, wrote that in his view, "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[33]

B. But is it *Auer* deference?

In one of the portions of her opinion commanding a majority, Justice Kagan devoted considerable discussion to reinforcing the limits of *Auer* deference. Justice Kagan noted that *Auer* deference was "far from" "the answer to every question of interpreting an agency's rules" and that in past decisions the Court had applied *Auer* deference without careful attention to whether it was warranted.[34]

The Court identified two preconditions for applying *Auer* deference that are likely to present substantial obstacles to any party arguing in favor of *Auer* deference:

First, courts should not afford *Auer* deference unless the regulation in question is "genuinely ambiguous."[35] The Court emphasized that for a court to conclude that a regulation is "genuinely ambiguous," it must exhaust all of the "traditional tools" of construction such as analyzing the text, structure, history, and purpose of a regulation.[36] It is only if, after examining all of those sources, the meaning of a regulation is still ambiguous, that the courts may even consider deferring to a regulatory interpretation. The Court stressed that the examination of a regulation's meaning using these tools may be "taxing" and requires "careful[]" consideration and that "hard interpretative conundrums, even relating to complex rules, can often be solved."[37]

Second, the Court held that deference to an agency's interpretation of its own genuinely ambiguous regulation is still not permissible if the agency's reading of that regulation is not reasonable. The Court stated that this standard is different from the "plainly erroneous" standard invoked in *Seminole Rock* and is a "requirement an agency can fail."[38] The agency reading must "fall 'within the bounds of reasonable interpretation.'"[39] The reviewing court also "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[40]

In elaborating these requirements, the Court identified several circumstances where even a reasonable interpretation of a genuinely ambiguous regulation might not command *Auer* deference:[41]

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31 *Id*. at *20, *22, *23 (Gorsuch, J., concurring).

32 *Id*. at *22 (Gorsuch, J., concurring).

33 *Id*. at *15 (Roberts, C.J., concurring).

34 *Kisor*, 2019 WL 2605554, at *7, *8 (*citing United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 276, nn.22-23 (1969)).

35 *Id*. at *8.

36 *Id*. (adopting the same standard as *Chevron*, 467 U. S. at 843, n.9).

37 *Id*.

38 *Id*. (internal quotation marks omitted).

39 *Id*. (*quoting City of Arlington, Tex., v. FCC*, 569 U.S. 290, 296 (2013)).

40 *Id*. at *9 (*citing Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *United States v. Mead Corp.*, 533 U.S. 218, 229-31, 236-37 (2001)).

41 *Id*.; *see also id*. at *9 ("context-specific factors may show that Congress would not have intended the agency to

- Interpretations that are not "authoritative" or the "official position" of the agency.[42]

- Agency interpretations that do not reflect the substantive expertise of the agency.[43]

- Agency interpretations that do not reflect "fair and considered judgment."[44] This includes interpretations that are "convenient litigation position[s]" and "*post hoc* rationalization[s] advanced to defend past agency action."[45]

- New interpretations that create "unfair surprise" to regulated parties or upset reliance interests.[46] The Court noted that it had rarely given deference to an agency construction conflicting with a prior one and that lack of fair warning can outweigh the reasons to apply *Auer*.[47]

In the end, reviewing the decision of the Federal Circuit, the Supreme Court held that the circuit court failed those standards. It did not "bring all its interpretative tools to bear before finding" that the regulation at issue was ambiguous, relying instead on the fact that each party had interpretations that were reasonable.[48] The Court commanded that on remand the Federal Circuit "must make a conscientious effort to determine based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning."[49] Second, the Court questioned whether the ruling of the VA Board was really the type of interpretation to which Congress would want to afford deference, noting that the decisions of the VA Board are non-precedential and might not "reflect[] the considered judgment of the agency as a whole."[50]

4. Implications of *Kisor*

Kisor offers new weapons to the arsenal of a lawyer challenging a federal agency's interpretation of its own regulation. As Justices Gorsuch and Kavanaugh pointed out in their separate opinions, the circumstances in which a court will find that a regulation is genuinely ambiguous after considering all of the Supreme Court's interpretive tools are limited. Even if the plain language of a regulation does not answer an interpretative question, the structure, text, and purpose (considered collectively or individually) frequently will. In that instance, the reviewing court will not even get to the second step of considering whether the agency interpretation is reasonable and of the type that Congress intended to receive deference.

Second, the Court noted that the reasonableness requirement is a test that an agency can fail. In the future, conscientious counsel challenging an agency can be expected to use all the same interpretative tools to argue that the agency interpretation is not reasonable and should not command deference.

Finally, by cataloging all of those contexts in which even a reasonable interpretation of a genuinely ambiguous regulation should not receive deference, the Court's opinion provides a handy list for all lawyers challenging agency opinions. In the future, it will no longer be sufficient for a court just to ask whether the agency interpretation is reasonable. Rather, counsel

resolve some ambiguity") (*quoting Arlington*, 569 U. S. at 309-10 (Breyer, J., concurring)).

42 *Kisor*, 2019 WL 2605554, at *9.

43 *Id*.

44 *Id*. at *10 (*citing Christopher*, 567 U.S. at 155) (internal quotation marks omitted).

45 *Id*. It is notable that, although the Court has subsequently been highly critical of agency interpretations offered for the first time in litigation, the Department of Labor's interpretation in *Auer* itself was offered for the first time in an amicus brief.

46 *Id*. at *10 (*quoting Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

47 *Id*. (*citing Thomas Jefferson Univ. v. Shalala*, 512 U. S. 504, 515 (1994)).

48 *Id*. at *14.

49 *Id*.

50 *Id*. at *15 (internal quotation marks omitted).

should examine what language is being interpreted and whether that language really calls on the substantive expertise of the agency or raises the type of interpretative question more readily and appropriately entrusted to the courts; the context in which the interpretation was made, who made it and whether it really reflects a fair or considered judgment of the agency; and finally how the interpretation relates to prior interpretations by the same agency or otherwise creates unfair surprise or did not present fair warning.

While *Kisor* reinforces that an agency's interpretation of its own regulations *may* be entitled to deference in appropriate circumstances, such circumstances may turn out to be quite rare. Justice Gorsuch suggested in his concurrence that the majority has effectively "neuter[ed]" and "zombified" *Auer* deference through the number of "limitations" it has placed on *Auer* deference.[51] Because issuing – as well as repealing and re-issuing – interpretative guidance is considerably easier for agencies than adopting new rules, *Kisor* leaves open the possibility that agencies may issue broad regulations and delineate their metes and bounds through interpretive guidance that is not subject to notice-and-comment rulemaking.[52] While *Kisor* narrows the scope for doing so – particularly on a *post-hoc* basis, or when litigation is pending – the Court declined the opportunity to put an end to the practice altogether.

Finally the concurrences by Chief Justice Roberts and Justices Gorsuch and Kavanaugh leave a path open for the Court to overrule *Chevron* in the future should it choose to do so. Unlike *Auer* deference, which concerns agencies' interpretations of their own regulations, *Chevron* deference concerns agencies' interpretations of federal statutes. Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh did not consider the majority's decision to touch upon the merits of *Chevron* deference.[53] The current composition of the Court may question *Chevron* deference for reasons similar to those raised as to *Auer*, including whether agencies are institutionally, statutorily, and Constitutionally more competent than courts to resolve genuine ambiguities in statutes. It will be interesting to see whether and, if so, to what extent *stare decisis* considerations will play a role in assessing *Chevron*'s continuing vitality.

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[51] *See id*. at *16 (Gorsuch, J., concurring).

[52] New regulations are typically adopted or modified through informal rule making procedures (*i.e.*, notice and comment rulemaking) pursuant to § 553 of the APA. Formal rulemaking pursuant to §§ 556 and 557 of the APA is even more onerous than informal, or notice and comment, rulemaking.

[53] *See Kisor*, 2019 WL 2605554, at *15 (Roberts, C.J., concurring), *30 n.103 and *32 n.114 (Gorsuch, J., concurring), *34 (Kavanaugh, J., concurring).

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