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CLIENT ALERT

Supreme Court Reaffirms Deference to Regulatory Agency Interpretations

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On June 26, 2019, the U.S. Supreme Court issued a 5-4 decision reaffirming that reviewing courts must defer to an agency's reasonable interpretation of its own ambiguous regulation. *Kisor v. Wilkie*, No. 18-15 (U.S. June 6, 2019). The Court also "reinforce[d] the limits" of that longstanding principle—known as *Auer* deference—by refining its application while affirming its core tenets.

Auer deference (named after the Court's 1997 decision in *Auer v. Robbins*) has been a staple of administrative law for many years. As the Court explained in Wednesday's decision, "the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over." In that situation, the doctrine "gives an agency significant leeway to say what its own rules mean."

The question in *Kisor* was whether the Court should strike down the *Auer* doctrine. The vehicle for that question was James Kisor's application for benefits to the Department of Veterans Affairs. The Board of Veterans' Appeals partially denied Kisor's application based on the Board's interpretation of a VA regulation. Kisor appealed, and the Court of Appeals for the Federal Circuit gave *Auer* deference to the Board's interpretation of the regulation.

On Wednesday, the Court upheld the *Auer* doctrine while clarifying its framework. Writing for a five-justice majority, Justice Kagan explained that agencies and regulated persons have relied on *Auer* deference for 75 years; upending that regulatory scheme would cause widespread uncertainty.

Although Chief Justice Roberts did not endorse the merits of *Auer*, he joined the five-justice majority to clarify the limits of *Auer* deference. Justice Kagan explained in her majority opinion that courts should not "reflexively" defer to an agency's interpretation of its own regulation. Instead, the Court set forth three requirements for applying *Auer* deference.

First, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." To make that determination, "a court must exhaust all the 'traditional tools' of construction," evaluating the regulation's "text, structure, history, and purpose." And complexity does not equal ambiguity: "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read."

Second, the agency's interpretation of the regulation must be reasonable. "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools."

Third, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." The Court identified several factors relevant to that inquiry:

- whether the interpretation is the agency's "authoritative" or "official position," rather than an "ad hoc statement not reflecting the agency's views";
- whether the interpretation implicates the agency's "substantive expertise";
- whether the interpretation is the agency's "fair and considered judgment," rather than an after-the-fact rationalization or a position advanced for the first time in legal briefs; and
- whether the interpretation creates an "unfair surprise" to regulated parties—including when an agency reverses its prior interpretation of a regulation.

Kisor had argued that Court should strike down *Auer* deference because it violates the Administrative Procedure Act and conflicts with constitutional separation of powers. Because Chief Justice Roberts abstained on these issues, the Court could not form a majority to resolve them. Justice Kagan, Justice Ginsberg, Justice Breyer, and Justice Sotomayor would have held that *Auer* accords with both the APA and the Constitution.

Justice Gorsuch, in a dissenting opinion joined in part by Justice Thomas, Justice Alito, and Justice Kavanaugh, endorsed Kisor's arguments. The thrust of Justice Gorsuch's dissent was that *Auer* deference prevents courts from adopting the "best or fairest reading of the regulation." And Justice Gorsuch would not allow *stare decisis* to save the *Auer* doctrine; that doctrine, he wrote, has proven inconsistent, unworkable, and unwise in light of the "explosive growth of the administrative state over the last half-century."

Chief Justice Roberts wrote a brief concurrence. He explained that because of the Court's freshly articulated restrictions on the *Auer* doctrine, courts will rarely be forced to defer to an agency's inferior interpretation of its own regulation.

Justice Kavanaugh wrote a concurrence that expanded on Chief Justice Roberts' concurrence. If courts follow the requirements in *Kisor*, Justice Kavanaugh wrote, then courts "will have no need to adopt or defer to an agency's contrary interpretation."

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