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A New *Auer*: Overview and Analysis of the Supreme Court's Decision in *Kisor v. Wilkie*

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— Comment —

A NEW *AUER*: OVERVIEW AND ANALYSIS OF THE SUPREME COURT'S DECISION IN *KISOR V. WILKIE*

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INTRODUCTION

James Kisor is a Vietnam War veteran who served on active duty in the Marine Corps from 1962 to 1966.[1] During his years of service, Mr. Kisor experienced several contacts with snipers, occasional mortar rounds, and enemy attacks while on search operations.[2] As a result of the trauma of combat, Mr. Kisor suffers from post-traumatic stress disorder ("PTSD"), as do eleven percent of male Vietnam War veterans.[3] Although PTSD's symptoms have been described under different names for hundreds of years, Mr. Kisor and his fellow Vietnam veterans were the first American veterans to be diagnosed with this condition.[4] But despite returning home from Vietnam in 1966, Mr. Kisor's PTSD did not qualify him for disability benefits through the Department of

1. Kisor v. Shulkin, 869 F.3d 1360, 1361 (2017), *vacated sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

2. *Id.*

3. *PTSD and Vietnam Veterans: A Lasting Issue 40 Years Later*, U.S. DEP'T OF VETERANS AFFAIRS: AGENT ORANGE NEWSLETTER (Summer 2015), https://www.publichealth.va.gov/exposures/publications/agent-orange/agent-orange-summer-2015/nvvls.asp [https://perma.cc/63AF-SJ6K] (last updated June 22, 2016). Seven percent of female Vietnam War veterans likewise suffer from PTSD. *Id.*

4. *Id.*

Veterans Affairs until 2007, more than forty years after he returned from the war.[5]

As much as Mr. Kisor's story tells of the challenges that veterans face when attempting to secure benefits for PTSD and other psychological conditions, his story also brought to the Supreme Court of the United States a long-awaited challenge to the Court's increas–ingly deferential treatment of administrative decisions. Specifically, Mr. Kisor's story gave rise to the appropriate context in which the Court could definitively affirm or overrule the long-standing judicial-deference rule under which courts must defer to an agency's interpretation of the agency's own ambiguous regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation"[6]—also known as *Seminole Rock* or *Auer* deference.[7] The Supreme Court took up Mr. Kisor's challenge to this rule in *Kisor v. Wilkie*[8] after the Federal Circuit applied the deference rule in a way that denied Mr. Kisor the earliest possible effective date for his PTSD-related disability benefits.[9]

The extent to which courts defer to agency interpretations of their own regulations bears on our daily lives more than one might expect. Regulations often have a more direct role in defining our legal rights than statutes passed by Congress.[10] Take Mr. Kisor for instance. An agency's interpretation of its own regulation, not a Congressional act, was the dispositive factor in determining whether he was entitled to disability benefits for his PTSD.

The beginning of the twentieth century brought into being the current order of administrative law, known as the "appellate review model."[11] Under the appellate review model, federal courts review an agency's decisions as an appellate court would review a trial court's decisions.[12] By 1945, it was a "'common sense' idea" that an agency occupied a superior position, compared to a court, to determine what

5. Kisor v. McDonald, No. 14-2811, 2016 WL 337517, at *1 (Vet. App., Jan. 27, 2016).

6. Bowles v. Seminole Rock & Co., 325 U.S. 410, 414 (1945).

7. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

8. *Id.*

9. *See generally* Kisor v. Shulkin, 869 F.3d 1360 (Fed. Cir. 2017), *vacated sub nom. Kisor*, 139 S. Ct. 2400 (finding no error in the Board's interpretation of 38 C.F.R. § 3.156(c)(1)).

10. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996).

11. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 965 (2011).

12. *Id.* at 940, 953.

it meant when it promulgated a rule, and how it could best effectuate its purposes under a given rule.[13] The Court first expressed that position in *Bowles v. Seminole Rock & Co.*[14] and confirmed it fifty years later in *Auer v. Robbins.*[15]

In *Seminole Rock*, a crushed-stone manufacturer challenged a regulation promulgated by the Administrator of the Office of Price Administration under the Emergency Price Control Act of 1942.[16] The regulation imposed a wartime "price 'freeze,'" restricting the price sellers could charge to the prices that they charged in March 1942.[17] This general regulation was modified by more specific "refinements and modifications."[18] One of these refinements was Maximum Price Regulation No. 188, which covered the crushed stone at issue.[19] The question before the Court was whether the manufacturer was charging higher prices for its stone than it did in March 1942.[20] The Court began its analysis by setting forth the proper standard of review. Because the Court was reviewing a regulation, it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[21] The Court then noted that although congressional intent or constitutional principles may be relevant when choosing between multiple interpretations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[22] As a result, a court's "only tools" in interpreting a regulation "are the plain words of the regulation and any relevant interpretations of the [agency]."[23] After determining that the regulation at issue was susceptible to three different interpretations, the Court turned to an agency bulletin that the Administrator issued to wholesalers and retailers, which explained how the highest price should be determined.[24] The

13. Manning, *supra* note 10, at 614.

14. 325 U.S. 410 (1945).

15. 519 U.S. 452 (1997).

16. 325 U.S. at 411–12.

17. *Id.* at 413.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 413–14.

22. *Id.* at 414.

23. *Id.*

24. *Id.* at 417.

Court consequently adopted the interpretation most consistent with the Administration's guidance.[25]

Half a decade later, in *Auer v. Robbins*,[26] Justice Scalia wrote the opinion for a unanimous Court re-affirming the rule of *Seminole Rock*. The *Auer* Court deferred to the Secretary of Labor's interpretation of his own regulations regarding whether employees were entitled to overtime pay under the Fair Labor Standards Act of 1938 (FLSA). Because the Secretary interpreted his own regulation, the Court focused its analysis on whether the interpretation was "plainly erroneous or inconsistent with the regulation."[27] Directly at issue was whether the employees were paid on a "salary basis" or were considered "'bona fide executive, administrative, or professional' employees" within the meaning of the regulation.[28] Satisfying these requirements would disentitle the employees to overtime pay under the FLSA. Under the FLSA and the Secretary's regulations, however, employees who were otherwise paid on a salary basis were still entitled to overtime pay if their compensation was subject to a reduction based on the quality or quantity of their work.[29] But pay deductions for disciplinary reasons was an exception to this exception. The respondent-employees argued that the Secretary's application of this disciplinary exception was an "unreasonable interpretation of the statutory exemption" because public-sector employees have fewer alternatives for discipline.[30] The Secretary, on the other hand, argued that employees subject to pay adjustments for disciplinary reasons "do not deserve exempt status" because they are not "true 'executive, administrative, or professional' employees."[31] According to the Secretary, true executive, administrative, and professional employees are not disciplined by "piecemeal deductions" in pay.[32]

The Court began its analysis by first citing to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[33] in which the Court had recently held that courts must defer to an agency's permissible

25. *Id.* at 418–19.

26. 519 U.S. 452 (1997).

27. *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

28. *Id.* at 455.

29. *Id.* at 456.

30. *Id.* at 457.

31. *Id.* at 456.

32. *Id.*

33. 467 U.S. 837 (1984).

interpretation of an ambiguous statute.[34] Specifically, the Court stated, "[b]ecause Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'"[35] Although the respondent-employees advanced an interpretation different from that of the Secretary, the Court concluded that the language of the regulation did not compel the respondent-employees' interpretation.[36] The Court deferred to the Secretary's interpretation because the salary-basis test was "a creature of the Secretary's own regulations," and consequently, the Secretary's interpretation was "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[37] The Secretary's interpretation "easily met" the "plainly erroneous" standard because the regulation comfortably bore the meaning the Secretary assigned to it.[38]

The respondent-employees made one last attempt to strike down the Secretary's interpretation, arguing that it was not subject to deference because it was advanced in a legal brief.[39] The Court swiftly rejected this argument, however, emphasizing that "[t]he Secretary's interpretation is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[40] There was "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment."[41] And lastly, the Court rejected the respondents' argument that the Secretary's regulation should be construed narrowly against the employer. According to the Court, that rule of construction governed only judicial interpretations of statutes and regulations, and should not be applied as a "limitation on the Secretary's power to resolve ambiguities in his own regulations."[42] Because the Secretary is subject only to the limits prescribed by statute, he can write regulations "as broadly as he wishes," and "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense."[43]

34. *Auer*, 519 U.S. at 457.

35. *Id.* (quoting *Chevron*, 467 U.S. at 842–43).

36. *Id.* at 457–58.

37. *Id.* at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

38. *Id.*

39. *Id.* at 462.

40. *Id.* (first alteration added) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

41. *Id.*

42. *Id.* at 463.

43. *Id.*

After delivering the unanimous *Auer* opinion, however, Scalia himself sought to limit the breadth of discretion this rule granted to agencies.[44] And over the coming years, the criticisms continued to accumulate, pushing against the increased discretion agencies gained under federal courts' application of *Auer*.[45] Indeed, legislators, commentators, and Supreme Court justices have mounted a number of challenges to *Auer* deference.[46] One of those challenges is that the doctrine creates the opportunity for agencies to expand their own authority by intentionally promulgating ambiguous regulations, granting themselves greater leeway in the permissible range of meanings the language of the regulation can bear.[47] Others suggest that deferring to an agency's interpretation that it advances for the first time during litigation implicates due-process concerns because litigants do not have a fair warning of the agency's position.[48] And even still, some argue that *Auer* permits agencies to both create and interpret the law, implicating separation-of-power principles.[49]

44. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (expressing interest in revisiting *Auer*).

45. Gillian E. Metzger, *The Supreme Court 2016 Term: Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24–26 (2017); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring) ("[T]he explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief."); Paul J. Larkin Jr. and Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 629–30 (2019) (noting "considerable pushback" against the administrative state and the delegation of "law-interpreting power" to administrative agencies).

46. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring) (inviting the opportunity to reconsider *Auer*'s underlying precedent because it "may be incorrect"); Decker v. Northwest Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring) (noting an interest in reconsidering *Auer* and *Seminole Rock* deference in a future case); *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J., concurring) (same); Johnathan H. Adler, *Challenging Administrative Power:* Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 14 (2018) (arguing that *Auer* violates separation-of-power principles); Ronald A. Cass, Auer *Deference: Doubling Down on Delegations' Defects*, 87 FORDHAM L. REV. 531, 535 (2018) (arguing that *Auer* deference allows agencies to expand their authority by promulgating ambiguous regulations).

47. Cass, *supra* note 46, at 535–36.

48. *See, e.g.*, *id.* at 535; *see also* Matthew C. Stephenson & Miri Polgoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (noting that deference to informally adopted interpretive rules allows "agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny.").

49. *See, e.g.*, Adler, *supra* note 46, at 14; Cass, *supra* note 46, at 536; Manning, *supra* note 10, at 631–654; *see also* Jeffrey A. Pojanowski,

But in June 2019, the Supreme Court addressed these concerns in *Kisor v. Wilkie*, choosing to re-affirm *Auer* while at the same time purporting to limit its scope. This Comment addresses the Court's reformulation of *Auer* and anticipates its implications for the future of administrative law. Part I sets forth the facts of Mr. Kisor's story and the underlying legal proceedings. Part II addresses the Court's reformulation of *Auer* in *Kisor v. Wilkie*. And Part III analyzes what this decision means for the future of judicial deference to agencies' interpretations of regulations. Specifically, Part III argues that although the Court re-affirmed *Auer*, its re-formulation of the doctrine may still lead to the demise of judicial deference to agency interpretations of regulations.

I. THE UNDERLYING PROCEEDINGS

In December of 1982, Mr. Kisor first filed a claim with the Department of Veterans Affairs Regional Office in Portland, Oregon for disability compensation benefits for PTSD.[50] Despite receiving a PTSD diagnosis from a counselor at the local veterans center, the regional office denied his claim for benefits after an examiner diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder rather than PTSD.[51] Mr. Kisor initiated an appeal but failed to perfect it, and the Regional Office's decision became final.[52]

On June 5, 2006, Mr. Kisor submitted a request to reopen his previously denied claim for PTSD. This time, an examiner diagnosed Mr. Kisor with PTSD.[53] While his request was pending, he submitted new evidence, including a 2007 psychiatric report diagnosing him with PTSD, a copy of his Department of Defense Form 214, a Combat History, Expeditions, and Awards Record, and the February 1983 letter from the Portland regional office.[54] The regional office granted Mr. Kisor's compensation for PTSD and assigned a fifty-percent disability rating, effective as of June 5, 2006, the date he reopened his request.[55] Mr. Kisor filed a notice of disagreement, challenging both the disability

Challenging Administrative Power: Revisiting Seminole Rock, 16 GEO. J. L. & PUB. POL'Y 87, 90–91 (2018) (noting various criticisms of *Auer* deference).

50. Kisor v. McDonald, No. 14-2811, 2016 WL 337517, at *1 (Vet. App., Jan. 27, 2016).

51. Kisor v. Shulkin, 869 F.3d 1360, 1361–62 (Fed. Cir. 2017), *vacated sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

52. *Id.* at 1362.

53. *Id.*

54. *Id.*

55. *Id.*

rating and its effective date.[56] While he was successful at increasing his disability rating to seventy percent, the regional office refused to designate an earlier effective date.[57] Mr. Kisor then appealed to the Board of Veterans' Appeals (the "Board"), arguing that he was entitled to an effective date that was the same as the date of his initial claim that was denied in May 1983.[58] Mr. Kisor also argued that the new evidence he provided demonstrated that the 1983 decision was the result of clear and unmistakable error.[59] The Board rejected Mr. Kisor's arguments on the basis that the 1983 decision was rendered final when he failed to perfect his appeal.[60] The Board also held that the new evidence did not demonstrate clear and unmistakable error.[61]

Mr. Kisor then appealed the Board's decision to the United States Court of Appeals for Veterans Claims.[62] Mr. Kisor argued that the Board misapplied 38 C.F.R. § 3.156(c) when considering whether his new evidence demonstrated clear and unmistakable error in the 1983 decision.[63] This regulation governs the ability of a veteran to "reopen a finally adjudicated claim by submitting new and material evidence."[64] Mr. Kisor sought to reopen his initial claim by submitting service department records in accordance with § 3.156(c), the regulation's subdivision addressing service department records.[65] Section 3.156(c) provides that the Department of Veterans Affairs may reconsider a previously adjudicated claim upon the receipt of "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim."[66] Generally, when a previously denied claim is reopened and granted based on new evidence, the effective date of the benefits will be either the date the claimant filed the application to reopen the claim or the date the entitlement arose, whichever is later.[67] But when a previously denied claim is reopened and granted based on newly discovered service

56. *Id.*

57. *Id.* at 1362–63.

58. *Id.* at 1363.

59. *Id.*

60. *Id.*

61. Kisor v. McDonald, No. 14-2811, 2016 WL 337517, at *1 (Vet. App., Jan. 27, 2016).

62. *See generally id.*

63. *Id.* at *1.

64. 38 C.F.R. § 3.156(a) (2019).

65. *Kisor*, 2016 WL 337517, at *3; *see also* 38 C.F.R. § 3.156(c) (2019).

66. 38 C.F.R. § 3.156(c)(1) (2019).

67. *Kisor*, 2016 WL 337517, at *2.

department records, the effective date may be as early as the date of the original claim.[68] Mr. Kisor believed he was entitled to the 1982 effective date because his new evidence constituted newly discovered service records.[69]

Even though Mr. Kisor submitted new service department records, the Board did not apply § 3.156(c) because it determined that the new records were not relevant within the meaning of the regulation.[70] According to the Board's position, the service department records could be relevant only if they "would suggest or better yet establish that [Mr. Kisor] has PTSD as a current disability."[71] Because the new service records established only that Mr. Kisor experienced a traumatic event during service and did not establish that he had PTSD, the "documents were not outcome determinative in that they [did] not manifestly change [the] outcome of the decision."[72] The crux of the 1983 decision was whether Mr. Kisor warranted a diagnosis of PTSD, not whether he engaged in combat during service.[73] As a result, the court affirmed the Board's decision.[74]

Mr. Kisor then appealed to the Court of Appeals for the Federal Circuit, arguing that the Veterans Court misinterpreted the term "relevant" in § 3.156(c)(1).[75] The court began its analysis by identifying the grounds upon which it may "set aside an interpretation of a regulation": when the interpretation is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law."[76]

The court first considered Mr. Kisor's interpretation. Mr. Kisor argued that to be relevant under the regulation, a service department record need only have "any tendency to make the existence *of any fact that is of consequence to the determination of the action* more probable

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at *3.

75. Kisor v. Shulkin, 869 F.3d 1360, 1365 (Fed. Cir. 2017), *vacated sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

76. *Id.* (citing 38 U.S.C. § 7292(d)(1)(A)–(D) (2012); Sursely v. Peake, 551 F.3d 1351, 1354 (Fed. Cir. 2009)).

or less probable than it would be without the evidence."[77] According to Mr. Kisor's position, his service department records were relevant because they demonstrated that he experienced "the trauma of combat" and was exposed "to an in-service stressor."[78] The government, on the other hand, maintained that the Board and the Veterans Court interpreted the regulation correctly. According to the government, whether a service department record is relevant under the regulation "depends upon the particular claim and the other evidence of record."[79] The government further proffered that "if a record is one that the VA had no obligation to consider because it would not have mattered in light of the other evidence, then it cannot trigger reconsideration."[80] Even more, the government insisted that whether Mr. Kisor experienced an in-service stressor was not at issue in the 1983 decision; rather, the basis for the denial was that he did not have a diagnosis of PTSD.[81]

The Federal Circuit ultimately affirmed the Veterans Court's decision, holding that it did not misinterpret the regulation.[82] The court justified its conclusion with a string of cases espousing the rule of *Auer* deference. Specifically, the court stated, "[a]s a general rule, we defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'"[83] In applying this rule, the court first concluded that the regulation was ambiguous because "the regulation is vague as to the scope of the word, and canons of construction do not reveal its meaning."[84] The court also noted that "[t]he varying, alternative definitions of the word 'relevant' offered by the parties further underscore[d] [the regulation's] ambiguity."[85] After finding the regulation ambiguous, the court's "only remaining question" was whether the Board's interpretation was "'plainly erroneous or inconsistent' with the VA's regulatory framework."[86] On this point, the court briefly asserted that "[t]he Board's interpretation does not strike

77. *Id.* at 1366 (quoting Claimant-Appellant's Brief at 9–10, *Kisor*, 869 F.3d 1360 (Fed. Cir. 2017) (No. 16-1929)).

78. *Id.*

79. *Id.*

80. *Id.* (quoting Brief for Respondent-Appellee at 15, *Kisor*, 869 F.3d 1360 (Fed. Cir. 2017) (No. 16-1929)).

81. *Id.*

82. *Id.* at 1367.

83. *Id.* (quoting Gose v. U.S. Postal Serv., 451 F.3d 831, 836 (Fed. Cir. 2006)).

84. *Id.*

85. *Id.*

86. *Id.* at 1368 (quoting Long Island Care at Home v. Coke, 551 U.S. 158, 171 (2007)).

us as either plainly erroneous or inconsistent with the VA's regulatory framework."[87] But Mr. Kisor's interpretation, on the other hand, was not probative as to the issue of whether he had a PTSD diagnosis in 1982, and as such, the court saw "no plain error in the Board's con–clusion that the records were not 'relevant' for the purposes of § 3.156(c)(1)."[88] Because it saw "no error" in the Board's interpretation, the court affirmed.[89]

Mr. Kisor petitioned for a panel rehearing and a rehearing *en banc*, both of which the Federal Circuit denied.[90] Three Federal Circuit judges dissented, however, taking issue with the fact that the court resolved the case based on *Auer* "despite the Supreme Court's repeated reminder that statutes concerning veterans are to be construed liberally in favor of the veteran."[91] Admitting that the Federal Circuit was in no position to overrule *Auer*, the dissent insisted that where *Auer* conflicts with a substantive canon of construction, such as the one in Mr. Kisor's case, *Auer* must give way.[92] Concluding that "[g]ranting *Auer* deference to VA regulations conflicts directly with the moral principles underlying the veterans benefit system," the dissent suggested that were it not for *Auer*, the regulation's ambiguity would have been resolved in Mr. Kisor's favor.[93]

Mr. Kisor then filed a petition for a writ of certiorari on June 29, 2018, asking the Supreme Court to overturn *Auer* and *Seminole Rock*, or alternatively, to hold that *Auer* deference should yield to a substantive canon of construction.[94] Mr. Kisor contended that his case presented the appropriate vehicle for the Court to review *Auer* deference because the Federal Circuit's application of *Auer* was outcome-determinative in his case.[95] He further posited that criticisms of *Auer* coming from current Supreme Court justices, as well as several Supreme Court decisions narrowing *Auer*'s scope, had led to substantial confusion in the lower courts, and that the Court should decide, once and for all, if courts must defer to an agency's interpretation of its own

87. *Id.*

88. *Id.*

89. *Id.* at 1369.

90. Kisor v. Shulkin, 880 F.3d 1378, 1378–79 (Fed. Cir. 2018).

91. *Id.* at 1379 (O'Malley, J., dissenting).

92. *Id.*

93. *Id.* at 1382.

94. Petition for a Writ of Certiorari at 2, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15).

95. *Id.* at 3.

regulation.[96] After all, as Mr. Kisor admitted, the rule is important[97]: with the administrative state "touch[ing] almost every aspect of daily life,"[98] "[t]he growth of the administrative state has compounded *Auer*'s practical implications."[99]

Mr. Kisor further distinguished his case from other previous petitions challenging *Auer*. For one thing, the outcome of his case depended entirely on the Federal Circuit's application of *Auer*.[100] For another, the Department of Veterans Affairs was actually a party to the litigation, directly implicating the criticism that an agency should not be able to invoke *Auer* to resolve a dispute in its own favor.[101] No recent policy decisions had rendered the underlying issue moot, and Mr. Kisor posited that he was substantially likely to prevail on remand should the Federal Circuit apply a *de novo* standard of review.[102] Finding Mr. Kisor's petition compelling, the Court granted review as to Mr. Kisor's first question: whether the Court should overturn *Auer*.[103]

II. THE NEW *AUER*

Although not convinced by Mr. Kisor's calls to abandon the doctrine entirely, the Court vacated and remanded the Federal Circuit's decision to be reconsidered under a newly clarified and limited *Auer*. While unanimous in the judgment, the Court was far from unified on its underlying rationale. Justice Kagan delivered the opinion of the Court, which Justices Ginsburg, Breyer, and Sotomayor joined in full.[104] Chief Justice Roberts concurred in part.[105] Justice Gorsuch concurred in the judgment only, challenging every element of Kagan's analysis.[106] Justice Thomas joined Gorsuch's concurrence in full; Justices Kavanaugh and Alito joined Gorsuch's concurrence in part.[107] And even still,

96. *Id.* at 10–14.

97. *Id.* at 13.

98. *Id.* at 14 (quoting Free Enter. Fund v. Public Co. Accounting Oversight Bd., 462 U.S. 477, 499 (2010)).

99. *Id.* at 13.

100. *Id.* at 19.

101. *Id.*

102. *Id.* at 20.

103. Kisor v. Wilkie, 139 S. Ct. 657 (2018).

104. Kisor v. Wilkie, 139 S. Ct. 2400, 2407 (2019).

105. *Id.* at 2424 (Roberts, C.J., concurring).

106. *See id.* at 2425–48 (Gorsuch, J., concurring).

107. *Id.* at 2425.

Kavanaugh wrote his own opinion concurring in the judgment, which Alito joined.[108]

Justice Kagan's opinion proceeds in four main parts, including a Part I, Part II-A, Part II-B, Part III-A, Part III-B, and Part IV.[109] Only Parts I, II-B, III-B, and IV had a majority vote, and thus, the remaining parts may not properly be considered the opinion of the Court.[110] Not surprisingly, the Parts receiving the majority vote are the least contentious.[111] In response, Gorsuch devoted twenty-three pages to challenging *Auer* on multiple grounds, including arguing that it violates the Administrative Procedure Act and separation-of-power principles.[112] He also argued that the Court did not in fact adhere to the doctrine of *stare decisis* in the way it "reshap[ed]" *Auer* in "new and experimental ways."[113] Because the competing arguments for and against overturning *Auer* deference are outside the scope of this Comment, the following subsections address only those portions of the opinion that set forth the new limits imposed on *Auer* deference.

A. The Opinion of the Court

The Court's recitation of Mr. Kisor's case does not differ materially from how it was summarized above.[114] Indeed, the particular facts of Mr. Kisor's story have little, if any, bearing on the way in which the Court formed its articulation of *Auer*. Part II-B of the Court's opinion, however, provides specific directions for how courts should apply *Auer* going forward.[115] In fact, within two months of the Court issuing its opinion, lower courts had already cited to Part II-B in at least fifteen cases.[116] Ultimately, a majority of five justices agreed that *Auer*'s scope

108. *Id.* at 2448 (Kavanaugh, J., concurring).

109. *Id.* at 2407 (majority opinion).

110. *Id.*

111. Part I merely recites the facts and procedural history of Mr. Kisor's case. *Id.* at 2408–10. Part II-B sets forth limitations on *Auer*'s scope and application. *Id.* at 2414–18. Part III-B applies the doctrine of *stare decisis*, under which the Court prefers to adhere to precedent in the absence of a special justification. *Id.* at 2422–23. And Part IV concludes that the Federal Circuit failed to properly apply *Auer*, and thus its decision should be vacated and remanded for reconsideration in light of the Court's opinion. *Id.* at 2423–24. Parts II-A and III-A, on the other hand, frame *Auer* deference as a principle of legislative intent and argue that *Auer* was properly decided in the first place. *See id.* at 2410–14, 2418–22.

112. *See id.* at 2425–48 (Gorsuch, J., concurring).

113. *Id.* at 2443–44.

114. *See id.* at 2408–09 (majority opinion).

115. *See id.* at 2414–18.

116. *See, e.g.*, Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019); Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019);

required limitation. Justice Kagan implemented those limitations by articulating *Auer* as a three-step process. First, courts must determine whether the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools' of construction."[117] Kagan encouraged courts to tackle the "hard interpretive conundrums" of complex rules, and to cease only when the "legal toolkit is empty."[118] She instructed courts to "'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways [they] would if [they] had no agency to fall back on."[119] If courts try this hard, she suggested, they may "resolve many seeming ambiguities" without resorting to *Auer* deference.[120]

Second, if a court concludes that the regulation is "genuinely ambiguous," it must determine whether the agency's interpretation falls within "the zone of ambiguity the court has identified after employing all its interpretive tools."[121] The court's previous ambiguity inquiry should guide its analysis under this second step in that "[t]he text, structure, history, and so forth . . . establish the outer bounds of permissible interpretation."[122]

And under the third step, Kagan emphasizes that not all agency interpretations surviving to this point should receive *Auer* deference.

Laturner v. United States, 933 F.3d 1354, 1362 (Fed. Cir. 2019); Howell v. Advantage RN, LLC, No. 17-CV-883 JLS (BLM), 2019 WL 3858896, at *8 (S.D. Ca. Aug. 16, 2019); Belt v. P.F. Chang's China Bistro, Inc., No. 18-3831, 2019 WL 3829459, at *11–13, *15–16 (E.D. Pa. Aug. 15, 2019); United States v. Brace, No. 1:17-cv-00006 (BR), 2019 WL 3778394, at *20–21 (W.D. Pa. Aug. 12, 2019); Mayo Clinic v. United States, No. 16-cv-03113 (ECT/KMM), 2019 WL 3574709, at *4 (Dist. Minn. Aug. 6, 2019); Ctr. for Biological Diversity v. United States Fish & Wildlife Serv., Nos. CV-17-00475-TUC-JAS (L), CV-17-00576-TUC-JAS (C), CV-18-00189-TUC-JAS (C), 2019 WL 3503330, at *9 (Dist. Ariz. July 31, 2019); East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 939 (N.D. Ca. 2019); Braeburn Inc. v. United States FDA, 389 F. Supp. 3d 1, 19–20, 23 (Dist. D.C. 2019); Trawler Carolina Lady, Inc. v. Ross, No. 4:19-CV-19-FL, 2019 WL 3213537, at *13 (E.D.N.C. July 16, 2019); Sagarwala v. Cissna, 387 F. Supp. 3d. 56, 67 (Dist. D.C. 2019); Hyland v. Navient Corp., No. 18cv9031(DLC), 2019 WL 2918238, at *7 (S.D.N.Y. July 8, 2019); Spencer v. Macado's, Inc., No. 6:18-cv-00005, 2019 WL 2931304, at *5–6 (W.D. Va. July 8, 2019); May v. Azar, Nos. 2180004, 2180033, 2019 WL 3521136, at *11 (Ala. App. Aug. 2, 2019); E. Or. Mining Ass'n v. Dep't of Envtl. Quality, 365 Or. 313, 347, 352–53, 363–66 (Or. 2019).

117. *Kisor*, 139 S. Ct. at 2415 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

118. *Id.*

119. *Id.* (first alteration in original) (quoting Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

120. *Id.*

121. *Id.* at 2415–16.

122. *Id.* at 2416.

Rather, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[123] Declining to set forth an exhaustive test for when deference is appropriate, the Court provides three "markers" for identifying when an agency's permissible interpretation of a genuinely ambiguous regulation warrants deference. First, the interpretation must represent the agency's "authoritative" or "official" position rather than an "ad hoc statement not reflecting the agency's views."[124] The Court clarifies, though, that the interpretation must not necessarily flow directly from the Secretary or his or her chief advisors; rather, it "must at least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."[125] Examples of interpretations failing this requirement include a speech by a mid-level official, an informal memorandum recounting a conversation, or regulatory guides that an agency has directly rejected as authoritative.[126] Second, the interpretation must implicate the agency's expertise.[127] This marker is based on the assumption that agencies have a more "nuanced understanding of the regulations they administer."[128] And if an agency "has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority."[129] And third, the agency's interpretation must reflect "fair and considered judgment."[130] Thus, "convenient litigating position[s]" and "*post hoc* rationalizatio[ns]" are not entitled to deference under *Auer*.[131] Additionally, *Auer* deference is not warranted when the agency advances a new interpretation that would create "unfair surprise" to affected parties.[132]

In sum, an agency interpretation deserves *Auer* deference when (1) it is genuinely ambiguous; (2) it falls within the "zone of ambiguity"; and (3) the interpretation reflects the agency's fair and considered judgment. With this new formulation in mind, the Court determined

123. *Id.*

124. *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 257 (Scalia, J., dissenting)).

125. *Id.* at 2417.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012).

131. *Id.* (quoting *Christopher*, 567 U.S. at 155).

132. *Id.* at 2417–18 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2006).

that the doctrine of *stare decisis* "cuts strongly against" overturning *Auer* and its "long line of precedents."[133] It was not enough that "[t]he administrative state has evolved substantially since 1945," as Mr. Kisor argued.[134] And consequently, the most the Court was willing to do, as Kagan put it, was "reinforce the limits of *Auer*."[135]

Finally, the Court applied the newly limited *Auer* to Mr. Kisor's case, holding that the Federal Circuit must reconsider its application of *Auer* in light of the Court's opinion.[136] Not only did the Federal Circuit fail to exhaust every interpretive tool in finding the regulation ambiguous, it did not determine whether the agency's interpretation was of the kind that Congress intended courts to defer to.[137] On remand, the Federal Circuit is to "make a conscientious effort to determine," based on the regulation's "text, structure, history, and purpose," whether it truly "has more than one reasonable meaning."[138] If it does, the court must then determine whether the Board of Veterans' Appeals' interpretation "reflects the considered judgment of the agency as a whole."[139] Only then will Mr. Kisor have a final determination as to the effective date of his disability benefits.

B. Gorsuch's Concurrence

According to Justice Gorsuch, "[i]t should have been easy for the Court to say goodbye to *Auer v. Robbins*."[140] In his view, the Court created a new "zombified" version of *Auer* deference when it should have overruled the doctrine altogether.[141] He disputed that *stare decisis* should apply to *Auer* at all because *Auer* "prescribe[s] an interpretive methodology governing every future dispute over the meaning of every regulation."[142] He then pointed out that the majority does not even retain *Auer* in its original form, but instead rejects the lower court's faithful application of the doctrine.[143] To Gorsuch, the majority's "refinement" of *Auer* fails to gives lower courts a more "workable

133. *Kisor*, 139 S. Ct. at 2422 (quoting Michigan v. Bay Mills, 572 U.S. 782, 798 (2014)).

134. *Id.* at 2423.

135. *Id.*

136. *Id.* at 2424.

137. *Id.* at 2423–24.

138. *Id.* at 2424.

139. *Id.*

140. *Id.* at 2425 (Gorsuch, J., concurring).

141. *Id.*

142. *Id.* at 2444.

143. *Id.* at 2445.

standard."[144] He attacked the "newly mandated inquiry into the 'character and context of the agency interpretation'" as "destined only to compound the confusion."[145] But Gorsuch did identify a "silver lining" in the majority's reformulation. The requirement that courts "exhaust all the 'traditional tools' of construction" prior to considering whether to defer to the agency may absolve lower courts from ever having to defer under *Auer*.[146] He further suggested that the lack of guidance under the final inquiry into the "character and context" of the interpretation grants courts sufficient leeway to avoid deferring to an agency interpretation that differs from what the court believes to be the best interpretation.[147]

C. Roberts's Concurrence in Part

Chief Justice Roberts joined the majority opinion, but declined to join Parts II-A and III-A, which discuss *Auer*'s background and whether *Auer* was correctly decided in the first place.[148] Agreeing that *Auer* should not be overruled but merely limited, Roberts wrote separately to "suggest that the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[149] He compared the majority's limitations on *Auer* deference—that "the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise"—to his proffered reasons why a court might defer to an agency's interpretation: that "[t]he agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements."[150] But Roberts was careful to distinguish *Auer* deference from deference under *Skidmore v. Swift & Co.*,[151] according to which a court defers to an agency's interpretation that lacks the force and effect of law to the extent that the interpretation is persuasive.[152]

144. *Id.*

145. *Id.* at 2446.

146. *Id.* at 2448.

147. *Id.* at 2446.

148. *Id.* at 2424 (Roberts, C.J., concurring).

149. *Id.*

150. *Id.*

151. 323 U.S. 134 (1944).

152. *Id.* at 139–40.

D. Kavanaugh's Concurrence

Agreeing with Justice Gorsuch that *Auer* should be overruled, Justice Kavanaugh wrote separately to advance two additional points. Kavanaugh addressed the majority's insistence that courts employ "all the 'traditional tools' of construction" in determining whether a regulation is genuinely ambiguous.[153] According to Kavan–augh, courts "will almost always reach a conclusion about the best interpretation of the regulation at issue," and as such, will have no need to defer to the agency under *Auer*.[154] Because the only regulations to receive *Auer* deference will be those that employ broad terms such as "reasonable" or "practicable," the result is a rule that resembles the one espoused in *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*,[155] under which an agency must provide a reasoned analysis when changing a rule.[156]

III. GOING FORWARD

Before determining what *Kisor v. Wilkie* means for the future of *Auer* deference, a brief reminder of how the Court articulated *Auer* deference prior to *Kisor* is necessary. To recap, in *Seminole Rock*, the Court held that "the ultimate criterion" for determining the proper interpretation of an ambiguous regulation "is the administrative inter–pretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[157] Then, the *Auer* Court held that courts should defer to the agency's interpretation of the ambiguous regulation "so long as it is 'based on a permissible construction of the statute.'"[158] Thus, the agency's interpretation of an ambiguous regulation is binding as long as it is a reasonable interpretation of the regulation, even if the agency's interpretation is not the best or most natural interpretation.[159] Now, after *Kisor*, courts should afford *Auer* deference to an agency's interpretation of a "genuinely ambiguous" regulation when the agency's interpretation "fall[s] within the bounds of reasonable interpretation" and when "the

153. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring).

154. *Id.*

155. 463 U.S. 29 (1983).

156. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh J., concurring); *State Farm*, 463 U.S. at 42.

157. Bowels v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

158. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

159. *See* Manning, *supra* note 10, at 627–28.

character and context of the agency interpretation entitles it to controlling weight."[160]

According to empirical studies, when courts apply *Auer*, they defer to agencies between seventy-four and ninety-one percent of the time.[161] Deference is likely to become far less frequent as courts have more opportunities to apply *Kisor* because fewer agency interpretations will receive deference under *Auer*. Each step of the reformulated *Auer* analysis provides courts with an opportunity to deny deference to the agency interpretation. And so Justices Gorsuch and Kavanaugh may be correct in their predictions that *Kisor* may be an end to judicial deference towards agency interpretations of regulations after all.

First and foremost, not every ambiguous regulation is entitled to *Auer* deference, as fewer ambiguous regulations will survive the initial "genuine ambiguity" inquiry. Indeed, Justice Kagan and the majority sought to limit *Auer*'s scope by formulating the initial ambiguity inquiry as one in search of "genuine ambiguity."[162] As Justice Kavanaugh predicts, the new *Auer* will likely reduce the frequency with which courts defer to agency interpretations because they will decide on the "best interpretation" of the regulation after employing all the traditional tools of construction.[163] Indeed, district courts have already denied agency interpretations *Auer* deference on the basis that the regulation at issue was not genuinely ambiguous.[164] In *Laturner v. United States*,[165] the Federal Circuit was tasked with interpreting tax regulations governing U.S. savings bonds.[166] The Federal Circuit

160. *Kisor*, 139 S. Ct. at 2415–16.

161. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008) (analyzing Supreme Court opinions that apply *Auer* deference from 1984–2004 and finding that the Court deferred to the agency 91% of the time); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519–20 (2011) (analyzing 219 district and circuit court cases from 1999–2001 and 2005–2007 in which the courts applied *Auer*, finding that courts deferred to the agency 76% of the time); William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 GEO. L.J. 515, 517, 519 (2018) (analyzing circuit court opinions applying *Auer* deference from 1993–2013, finding that courts deferred to the agency 74% of the time).

162. *Kisor*, 139 S. Ct. at 2415.

163. *Id.* at 2448.

164. *See, e.g.*, Laturner v. United States, 933 F.3d 1354, 1362 (Fed. Cir. 2019); North Carolina Div. of Servs. for the Blind v. Dep't of Educ., No. 1:17-cv-1058, 2019 WL 3997009, at *13 (M.D.N.C. Aug. 23, 2019).

165. 933 F.3d 1354 (Fed. Cir. 2019).

166. *Id.* at 1357–58.

concluded, after using "the 'traditional tools' of construction," that the regulation was not genuinely ambiguous.[167] The *Laturner* court relied mostly on the regulation's plain language, recognizing that the Treasury's proffered interpretation conflicted with exclusions elsewhere in the regulation.[168] Likewise, the Ninth Circuit has already denied deference to an interpretation of an ambiguous regulation on the basis that the regulation was not *genuinely* ambiguous.[169]

The initial ambiguity inquiry also now requires the court to determine whether both competing interpretations are reasonable. As Kagan posits, there is no reason to defer when there is only one reasonable construction of the regulation.[170] She instructs courts to "'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[171] And whether a regulation is clear or ambiguous (or even genuinely ambiguous) can be entirely subjective depending upon what the judge determines constitutes "'enough' ambiguity."[172] As Justices Gorsuch and Kavanaugh predict, a rigorous application of the ambiguity inquiry may preclude deference in most circumstances.

Also likely to limit the frequency with which courts defer to agencies under *Auer* is the requirement that the interpretation's "character and context" entitles it to deference. Because the new *Auer* leaves the lower courts with only "markers" for determining when deference is appropriate, lower courts may take it upon themselves to identify additional reasons not to defer to an agency's interpretation. District courts have already declined to defer to an agency's interpretation of a genuinely ambiguous regulation based on the character and context of the interpretation.[173] For example, in *United States Commodity Futures Trading Commission (CFTC) v. Byrnes*,[174] the district court judge explained that he could not defer to the CFTC's new interpretation of

167. *Id.* at 1362 (quoting *Kisor*, 139 S. Ct. at 2415).

168. *Id.* at 1363.

169. Amazon.com, Inc. v. Comm'r, 934 F.3d 976, 992–93 (9th Cir. 2019).

170. *Kisor*, 139 S. Ct. at 2415.

171. *Id.* (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991)).

172. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

173. *See, e.g.*, United States CFTC v. Byrnes, No. 13-CV-1174 (VSB), 2019 WL 4515209, at *5 (S.D.N.Y. Sept. 19, 2019); Belt v. P.F. Chang's China Bistro, Inc., No. 18-3831, 2019 WL 3829459, at *16–17 (E.D. Pa. Aug. 15, 2019); Spencer v. Macado's Inc., No. 6:18-CV-00005, 2019 WL 2931304, at *6 (W.D. Va. July 8, 2019); Romer v. Barr, 937 F.3d 282, 293–94 (4th Cir. 2019); Sierra Club v. Trump, 929 F.3d 670, 693, 700 (9th Cir. 2019).

174. No. 13-CV-1174 (VSB), 2019 WL 4515209.

a regulation because people in the industry had been relying on the previous interpretation for over twenty years.[175] In *Belt v. P.F. Chang's China Bistro*,[176] the Eastern District of Pennsylvania held that the Department of Labor's interpretation of a genuinely ambiguous regulation did not warrant deference because the interpretation was unreasonable and did not reflect the agency's fair and considered judgment because the agency reversed a long-standing previous interpretation.[177]

And lastly, in granting certiorari to only Mr. Kisor's first question, the Court did not address whether another substantive canon of construction should override *Auer* deference.[178] This leaves room for the lower courts to avoid applying *Auer* deference by employing other substantive canons of construction to resolve an apparent ambiguity when exhausting all the traditional tools of construction. Nothing in the Court's *Kisor* opinion appears to prevent the lower courts from doing so. Justice Kavanaugh alludes to this in his concurrence, suggesting that the only regulations to receive *Auer* deference going forward will be those with broad and inherently ambiguous terms such as "reasonable" or "practicable."[179] As such, lower court judges who still have a fundamental disagreement with *Auer* deference can avoid applying the doctrine as much as possible by engaging in a rigorous application of Justice Kagan's first step and consulting other substantive canons of construction to resolve ambiguities.

IV. CONCLUSION

Although the Court declined to abandon the *Auer* doctrine, *Kisor v. Wilkie* may prove a useful tool for judges and litigators to reduce the frequency with which courts defer to agencies. Indeed, multiple federal courts have already denied deference to agency interpretations of regulations in the wake of *Kisor*, even denying *Chevron* deference to an agency interpretation of a statute because the statute was not "genuinely ambiguous."[180] *Auer* may well be litigated into extinction, bringing an end to this long-contested, yet long-standing, doctrine.

175. *Id.* at *6.

176. No. 18-3831, 2019 WL 3829459.

177. *Id.* at *15.

178. *See* Petition for Writ of Certiorari at i, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15).

179. *Kisor*, 139 S. Ct. at 2448–49 (Kavanaugh J., concurring).

180. *See* Mayo Clinic v. United States, No. 16-CV-03113, 2019 WL 3574709, at *9, *12 (D. Minn. Aug. 6, 2019) (denying *Chevron* deference because the statute was not genuinely ambiguous).

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