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Kisor Deference: The New Judicially-Driven *Auer* Deference

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A divided Supreme Court changed the landscape of administrative law in a recent decision, *Kisor v. Wilkie*.[1] In *Kisor*, a slim majority declined to overrule *Bowles v. Seminole Rock & Sand Co.*, *Auer v. Robbins* and related cases, a body of law instructing federal courts to defer to an agency's interpretation of its own regulation if that regulation is ambiguous and the interpretation is reasonable. This doctrine, known as "*Auer* deference," constitutes a set of rules specifying how and when a judicial court must defer to an administrative agency's interpretation of the law.

But in an opinion by Justice Elena Kagan, the Court made clear that *Auer* deference has limits and will not apply in every scenario where an agency interprets its own rules. That assurance was not enough, however, for Justice Neil Gorsuch, who argued that the ruling leaves *Auer* deference a "paper tiger" and warned that the Court would almost certainly have to address the issue again soon.[2]

I. *Kisor* and the Restructuring of *Auer* Deference

The doctrine of *Auer* deference—named after the 1997 case *Auer v. Robbins* (sometimes also referred to as *Seminole Rock* deference, after the 1945 case *Bowles v. Seminole Rock & Sand Co.*)—rests on the idea that agencies are better suited to interpret both gaps in a federal law and their own regulations because they have greater substantive expertise of the area governed by a law than the courts. Prior to *Kisor*, courts generally understood *Auer* deference to require that "when the meaning of a regulation is in doubt, the agency's interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[3] In practice, courts largely deferred to an agency's interpretation of its own regulation.

Supporters have argued that the doctrine provides consistency and predictability: Because judges only have to determine whether the agency's interpretation is reasonable, and not whether it is the best interpretation, courts are more likely to uphold regulations. But opposition to the doctrine has been fierce; critics have argued that *Auer* deference encroaches on the judiciary's core power "to say what the law is."[4]

In *Kisor*, the Supreme Court granted certiorari to decide whether to overrule *Auer* and *Seminole Rock*. The Court declined to overrule *Auer* outright. Instead, to mitigate the concern that *Auer* deference facilitated the executive branch's encroachment on the judiciary's core powers, the Court instituted an extensive multistep framework describing when a federal court should apply *Auer* deference. Thus, "*Kisor* deference"—the new

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1 *Kisor v. Wilkie*, 2019 US LEXIS 4397 (2019).

2 *Id.* at *53 (Gorsuch, J., concurring in judgment).

3 *Id.* at *16 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 US 410, 414 (1945)).

4 *Id.* at *75 (Gorsuch, J., concurring in judgment) (citing *Marbury v. Madison*, 5 US 137, 177 (1803)).

framework for applying *Auer* deference—seemingly pushes back against any tendency of the federal judiciary to rubberstamp an agency's reasonable interpretation of its own ambiguous regulation.

II. *Kisor* Deference: The New Framework for Applying *Auer* Deference

Pursuant to *Kisor*, a federal court must defer to an agency's interpretation of its own regulation only after a federal court has determined that (1) the regulation is genuinely ambiguous, (2) the agency's interpretation of the regulation is reasonable, and (3) the agency's interpretation meets minimum thresholds to warrant *Auer* deference.

1. **The regulation interpreted by the agency is "genuinely ambiguous."** To begin, the Court noted that "the possibility of [*Auer*] deference can arise only if a regulation is genuinely ambiguous."[5] Genuine ambiguity occurs only if the regulation is still ambiguous after a court has "exhaust[ed] all the traditional tools of construction."[6] Therefore, all federal courts, in reviewing an agency's interpretation of the agency's own regulation, must now first independently interpret the regulation under the rules of construction for a singular best interpretation. For this inquiry, courts will likely be guided by the extensive case law on *Chevron* deference, which directs courts to first interpret the statute interpreted by the agency.[7] If a court resolves the meaning of the regulation through traditional interpretation, then "there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law."[8]

2. **The agency's interpretation of the regulation must be reasonable.** If a genuine ambiguity still exists after a court's independent interpretive analysis, then the court must determine whether the agency's reading of the regulation is reasonable, *i.e.* within "the zone of ambiguity the court has identified after employing all its interpretive tools."[9] Thus, post-*Kisor*, the reach of *Auer* deference is considerably narrowed, and the majority made clear that courts should apply the same level of scrutiny in the *Auer* context as they would when applying *Chevron* deference.[10]

3. **The agency's interpretation meets the minimum threshold to warrant *Auer* deference.** Even if the regulation is "genuinely ambiguous" and the court finds the agency's interpretation reasonable, *Auer* deference may still not apply. "[W]hen the reasons for that presumption [of deferring to an agency's interpretation] do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the 'power to persuade.'"[11] Thus, at this step, a court should still "independent[ly] inquir[e] into whether the character and context of the agency interpretation entitles it to controlling weight."[12] The majority noted that there is no "exhaustive test" to determine when *Auer* deference is otherwise inapplicable but did provide "markers" for the doctrine's limits.[13] Particularly, *Auer* deference is unwarranted when "an interpretation does not reflect an agency's authoritative, expertise-based, fair or considered judgment."[14]

    a. **The agency's interpretation must be authoritative and official.** First, the agency should produce its interpretation of the regulation through an authoritative means and formally adopt the interpretation as its official position. The majority stated that "a court should decline deference to a merely 'convenient litigating position' or a post hoc rationalization."[15] To be "authoritative and official" so as to warrant *Auer* deference, "[t]he interpretation must, at the least, emanate from [agency heads and staff] using those vehicles understood to make authoritative policy in the relevant context."[16] The majority explained that "official staff memoranda" not signed by the

5 *Id.* at *23.

6 *Id.* at *25

7 *Id.* at *25-26 (citing *Chevron USA. Inc. v. Natural Resources Defense Council*, 467 US 837, 843, n.9 (1984)).

8 *Id.* at *25.

9 *Id.* at *26.

10 *Id.*

11 *Id.* at *23.

12 *Id.* at *27.

13 *Id.* at *28.

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

15 *Id*.

16 *Id.* at 29.

agency head comports with this standard whereas speeches from mid-level agency officials, informal memorandums or regulatory guides the agency previously disclaimed as authoritative do not warrant *Auer* deference.[17]

b. ***The agency's interpretation should implicate its substantive expertise.*** Second, "the agency's interpretation must in some way implicate its substantive expertise."[18] For the majority, "[a]dministrative knowledge and experience largely account for the presumption that Congress delegates interpretative lawmaking power to the agency," and thus, supports the deference the judiciary should accord to an agency's interpretation of its own regulation where the agency has "comparative expertise" to the judiciary.[19] The majority explained that an implication of substantive expertise occurs when the regulation is technical or policy based.[20]

c. ***The agency's interpretation should be fair and considered.*** Third, the agency's reading of the regulation should reflect its "fair and considered judgment," and courts should not defer to new agency interpretations that would be "an unfair surprise" upon regulated parties.[21] "[A] court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack."[22] The majority also underscored that *Auer* deference will only rarely be given to an agency construction that conflicts with a prior interpretation.[23]

III. A Divided Court

Despite creating a framework for applying *Auer* deference, the Supreme Court could not come to a consensus on the doctrine's origin or purpose. Chief Justice Roberts joined the plurality opinion establishing the new framework, creating a five-justice majority. He also joined the section of the opinion concluding that "stare decisis cuts strongly against [abrogating *Auer* deference.]"[24] To the majority, *Auer* deference should only be abrogated if it is truly "unworkable," which the majority did not find the doctrine to be.[25]

However, Chief Justice Roberts did not join the plurality's explanation of *Auer* deference's origin nor its policy justifications for the doctrine's existence, even in its new form.

Justice Gorsuch wrote separately, in an opinion joined by Justices Thomas, Alito and Kavanaugh. Justice Gorsuch disagreed with the new deference framework, and instead argued that *Auer* deference should be abrogated altogether. He noted that its creation was a judicial accident and has never been meaningfully reconciled with either the Administrative Procedure Act or the Constitution.[26] He also asserted that *Auer* is unworkable (contra the majority) and that the new framework designed to cabin *Auer* deference broke from the principles of stare decisis because it was itself something wholly new and different.

Take for example, the first step of *Kisor* deference. Justice Gorsuch emphasized that searching for a "genuine ambiguity" is futile because judges use their "traditional interpretative toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law."[27] Thus, to Justice Gorsuch and the others who joined him, the new framework is paradoxical as a federal court, using all the tools of construction could always resolve the ambiguity at the first step, and thus, would never need to defer to the agency's interpretation.[28]

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17 *Id.*

18 *Id.*

19 *Id.* at *30.

20 *Id.*

21 *Id.* at *31.

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

23 *Id.*

24 *Id.* at *42.

25 *Id.* at *45.

26 *Id.* at *50 (Gorsuch, J., concurring in judgment).

27 *Id.* at *61 (Gorsuch, J., concurring in judgment).

28 *Id.*

Justice Kavanaugh, joined by Justice Alito, wrote a separate concurrence to further emphasize that most challenges to an agency's interpretation of its own regulation would be solved by the courts at *Kisor*'s first step. Chief Justice Roberts also concurred. In doing so, he noted that the framework handed down by the majority and the abrogation of *Auer* deference advocated by Justice Gorsuch were pragmatically very similar.

Nevertheless, the Supreme Court did not resolve whether the *Auer* deference comports with the Administrative Procedure Act or the Constitution. Four justices (Kagan, Ginsburg, Breyer and Sotomayor) believe that it does. Four others (Justices Thomas, Alito, Gorsuch and Kavanaugh) believe that it does not. However, Chief Justice Roberts joined neither opinion, leaving a 4-4 divide on the legality of *Auer* deference. It remains to be seen whether the new framework will be challenged anew, and, if it is, which faction the Chief Justice will give his deciding vote.

IV. Implications of *Kisor*

Although nominally retaining *Auer* deference, *Kisor v. Wilkie* places the mandatory deference to agency interpretation behind a multistep framework skewed towards independent judicial interpretation. *Kisor* deference requires the judiciary to first attempt resolving the ambiguity using the traditional tools of construction, then perform an independent analysis on the reasonableness of the agency's interpretation, and finally conduct another analysis on the authority and propriety of the agency interpretation before deference is granted. Thus, the new framework places agencies, and their administrative boards, under increased judicial scrutiny.

Potential implications of this increased judicial oversight include clearer administrative regulations, smaller swings in regulatory interpretations with administration changes and increased formality in regulatory interpretations. Because *Kisor* reestablishes federal courts at the center of interpreting regulations during judicial challenges, it should incentivize agencies to promulgate regulations in the clearest language possible rather than implementing relatively ambiguous regulations accompanied by subsequent interpretations. Although not addressed explicitly, *Kisor*, in its emphasis that an agency's interpretation be of the agency's "fair and considered judgment," underscores the importance of prior practice and long-standing interpretations.[29] In doing so, *Kisor* may discourage agencies from issuing new or revised interpretations that conflict or depart from prior practice. Post-*Kisor*, such interpretations would be harder to defend in federal court.

However, agencies operate in highly technical and policy-based spheres, and the regulations they issue often benefit from certain ambiguities that can be clarified only after the passage of time. Thus, agency interpretations of regulations are both useful and needed. In the wake of *Kisor*, agencies may resort to greater formality in the framing and delivery of their interpretations to ensure that their interpretations fall well within the markers provided by the Supreme Court. Whether this increased formality produces better results remains to be seen.

V. Potential Effects of *Kisor* on Relations Between the Federal Circuit and USPTO

The two main day-to-day actors shaping patent law are the USPTO and the Federal Circuit, with both institutions regularly interpreting the Patent Act and USPTO regulations. And, with decisions from the Patent Trial and Appeal Board (PTAB) appealed directly to the Federal Circuit, the Federal Circuit is regularly confronted with situations implicating *Auer* deference analysis. Thus, "*Kisor* deference" will impact these institutional actors in several ways.

First, under the new framework, *Auer* deference now applies only when the regulation is genuinely ambiguous, demanding that courts "exhaust all the traditional tools of construction," and analyze "the text, structure, history and purpose of a regulation."[30]

Second, even if a court determines a regulation is genuinely ambiguous, the court must still be convinced that the agency interpretation is "reasonable." In this way, courts like the Federal Circuit can review the USPTO's interpretations of its own rules with the same judicial scrutiny as they do when considering the USPTO's interpretation of the Patent Act.

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29 *Id.* at *31.

30 *Id.* at *26.

Third, the USPTO interpretation must be "authoritative" or an "official position" as opposed to an *ad hoc* interpretation. Thus, for example, PTAB decisions that rest on its discretion to efficiently administrate the Office or timely complete proceedings may be given little weight under *Kisor*.

Finally, interpretation of a regulation must in some way implicate the USPTO's substantive expertise and reflect the Office's "fair and considered judgment." Returning to the same example above, the USPTO's substantive expertise is likely not how to efficiently administer its Office or timely complete proceedings, as those are issues not unique to the USPTO but implicate agency theory more generally.

VI. *In re Lovin*: A Case Study

To see how *Kisor* deference may work in practice, consider the following Federal Circuit case, *In re Lovin*, in which the Federal Circuit, under the guidance of *Auer*, deferred to the USPTO's interpretation of its own regulation regarding waiver of dependent claim validity arguments when appealing a patent examiner's denial of claims to the Board of Patent Appeals and Interferences.[31]

- The challenged agency interpretation was the Board of Patent Appeals and Interferences' interpretation of USPTO Rule 41.37(c)(1)(vii), which stated at the time:

  > Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately. Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.[32]

- An inventor, Lovin, applied for a patent with both independent and dependent claims. The patent examiner found the claims to be obvious over the prior art. In his appeal to the Board of Patent Appeals and Interferences, Lovin argued that the independent claims were non obvious. For the dependent claims, Lovin provided separate arguments for each individual dependent claim under a different subheading. His argument for each dependent claim, however, only stated its corresponding independent claim along with the additional claim limitation with a statement that this additional claim limitation was not taught or suggested in the prior art.[33]

- The Board interpreted Rule 41.37 as requiring more substantive arguments in an appeal brief than simply reciting the dependent claim elements and a naked assertion that the corresponding elements were not found in the prior art.[34] Thus, the Board concluded that the sentences were "statement[s] which merely point[ed] out what [the] claim[s] recit[ed]," and thus a waiver of any argument for the dependent claims upon appeal.[35]

- In *In re Lovin*, the Federal Circuit interpreted *Auer* deference in view of Supreme Court precedent *National Cable & Telecommunications Assn. v. Brand X Internet Services*, which "forbid[s] a court from ever determining the meaning of a regulation with the force that normally attaches to precedent."[36] The Federal Circuit extended *National Cable* from *Chevron* deference analysis to also encompass *Auer* deference analysis.[37] Thus, to the Federal Circuit, its own construction of the USPTO's regulations only foreclose the USPTO from re-interpreting the Federal Circuit's judicial precedent if the Federal Circuit's construction "unambiguously foreclose[s] the agency's interpretation, and therefore contain[s] no gap for the [USPTO] to fill."[38]

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31 *In re Lovin*, 652 F.3d 1349, 1354 (Fed. Cir. 2011).

32 37 C.F.R. § 41.37(c)(1)(vii) (2011) (emphasis added).

33 *In re Lovin*, 652 F.3d at 1351.

34 *Id.* at 1352.

35 *Id*.

36 *Kisor* at *67 (Gorsuch, J., concurring in judgment).

37 *Id.*

38 *In re Lovin*, 652 F.3d 1349, 1354 (Fed. Cir. 2011) (citing *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 US 967, 982 (2005)).

- In *In re Lovin*, the Federal Circuit held that its own judicial precedent did not foreclose the USPTO's interpretation of Rule 41.37, so the USPTO and Board were free to fill the gap with their own interpretation. The Federal Circuit described *Auer* as requiring deference to "the Board's interpretation of PTO regulations unless that interpretation [was] 'plainly erroneous or inconsistent with the regulation.'"[39] Thus, under *Auer* deference, the Federal Circuit first reviewed the Board's interpretation of Rule 41.37 for error and then reasonableness. The Federal Circuit found the Board's interpretation of Rule 41.37 "not manifestly unreasonable," so the court deferred to the Board's prior interpretation and affirmed its holding.[40]

Post-*Kisor*, the Federal Circuit's analysis would be much different and the court would have possibly arrived at a different result. The Federal Circuit in a post-*Kisor Auer* analysis would have spent time interpreting for itself whether the appellant's statements under the subheadings "merely point[ed] out what [the] claim[s] recite" instead of first looking at the Board's conclusion to determine if it was a reasonable interpretation of the regulation's language.

Thus, another outcome of *Kisor* is that Federal Circuit judicial precedent would be more likely to "stick" as the USPTO would not as easily be able to promulgate new interpretations "in the gaps" of prior precedent and expect deference so long as the interpretation is reasonable. Instead, the USPTO would have to go through the formal rule making process of notice and comments to reset the judicial interpretation, similarly to how Congress must amend a statute when it disagrees with the judiciary's prior interpretation. Thus, *Kisor* places agencies and their administrative judicial boards under the increased oversight of the judiciary. The agencies no longer have as much free reign to play legislator, enforcer and judge against their regulated populace.

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39 *In re Lovin*, 652 F.3d at 1356 (citing *In re Sullivan*, 362 F.3d 1324, 1326 (Fed. Cir. 2004)).

40 *Id.* at 1356-57.