Justice Kagan’s Majority Opinion

First, the holding. The majority held 5-4 that Auer (and its less discussed predecessor Seminole Rock) shouldn’t be overruled, but did warrant clarification. Drawing on several of its decisions applying Auer deference, the majority clarified that Auer deference only applies when (1) “genuine ambiguity” persists after exhausting traditional tools of interpretation, (2) the agency’s interpretation is a reasonable reading of the regulation, (3) the interpretation was “actually made by the agency,” (4) the interpretation implicates the agency’s “substantive expertise,” (5) the interpretation reflects the agency’s “fair and considered judgment,” i.e., the interpretation can’t be a post hoc rationalization for past agency conduct. Finally, in making its interpretation, an agency should account for reliance interests and avoid unfair surprise to litigants. But practitioners should note that these factors are “especially important” but nonexhaustive.

The Court’s clarification of Auer deference brings a host of new factors into play that will likely take time to sort out among the lower courts. But Justice Kagan was very clear on Auer’s continued viability, explaining that, after Kisor, Auer deference “emerges … not quite so tame as some might hope, but not nearly so menacing as they might fear.”

Chief Justice Roberts’ Concurrence

Chief Justice John Roberts was the deciding vote to retain Auer. In his view, the differences between the majority’s clarification of Auer and Justice Neil Gorsuch’s overruling of it amount to “variations in verbal formulation.” In his view, the debate is largely academic because “the cases in which Auer deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency’s interpretation of its own regulation.” Finally, he explained that he didn’t view Kisor as providing any guidance regarding judicial review of agency interpretation of a statute (as opposed to an agency’s interpretation of its own regulation).

Justice Gorsuch’s Concurrence

Concurring in the judgment but disagreeing with the majority’s reasoning was Justice Gorsuch, who authored a biting critique of the majority opinion. He was joined in large part by Justices Clarence Thomas, Brett Kavanaugh, and Samuel Alito. Justice Gorsuch wrote that, despite the majority’s refining of Auer, “the doctrine emerges continued on page 33
Auer Deference continued from page 29

He made it clear that he believes Auer deference will shortly be before the Court again. And when that day comes, he hopes the Court “will find the nerve it lacks today and inter Auer at last.” Instead, Justice Gorsuch advocated for the overruling of Auer deference and its formal replacement with Skidmore deference. (As a quick refresher, Skidmore essentially allows courts to interpret regulatory ambiguity with their informed judgment and requires them to “follow [the] agency’s [view] only to the extent it is persuasive.”)

Finally, Justice Gorsuch forecast a wave of litigation in the wake of the Court’s decision as a result of Kisor calling into question lower courts’ application of Auer deference: “Today’s ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from Auer.”

Justice Kavanaugh’s Concurrence

Justice Kavanaugh joined Justice Gorsuch’s concurrence, but wrote separately (and was joined in doing so by Justice Alito) to make two points. First, he echoed the chief justice’s thoughts regarding how Kisor would be applied. In his view, “rigorously applying” the majority’s reasoning “should lead in most cases to the same general destination” as a formal overruling of Auer would have. Second, he, like the chief justice, felt that Kisor’s holding had no bearing on “judicial deference to agency interpretations of statutes enacted by Congress,” only “judicial deference to agency interpretations of their own regulations.”

Conclusion

It remains to be seen what Kisor’s impact will be. What is clear is that Auer deference is here to stay, outliving many of its harshest critics. The doctrine lives on, “zombified,” but resilient.

Endnotes

2. Id. at *2415.
3. Id. (citation omitted).
4. Id. at *2416.
5. Id. at *2418.
6. Id. at *2424 (Roberts, C.J., concurring in part).
7. Id. at 2424-25.
8. Id. at *2425 (Gorsuch, J., concurring in the judgment).
9. Id. at 2426.
11. Kisor, 588 U.S. at ___, S. Ct. at 2447 (Gorsuch, J., concurring in the judgment).
12. Id. at *2448 (Kavanaugh, J., concurring in the judgment).
13. Id. at 2449.

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