AUER DEFERENCE LIVES ON, 'ZOMBIFIED' BUT RESILIENT

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In *The Federal Lawyer's* May/June issue, we discussed the Supreme Court's grant of certiorari in *Kisor v. Wilkie*,[1] a case involving the *Auer* deference doctrine and how it fits into the traditional canons of regulatory interpretation. The Court issued its decision in *Kisor* on June 26, 2019. Here's a quick breakdown on what the Court did, and did not, decide, and what practitioners need to know.

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 agency's interpretation reflects its "fair and considered judgment," and (6) the agency must account for reliance interests and avoid unfair surprise in making its interpretation. And all nine justices agreed that the lower court's decision should be vacated and remanded. But that's about the only thing they did agree on.

Justice Elena Kagan, writing for the majority, explained that *Auer* deference served an important role in interpreting agency action by preventing courts from substituting their uninformed judgment for expert agency judgment. But the majority reined in *Auer*, holding that it only applied when "genuine ambiguity" exists. "If uncertainty does not exist," Justice Kagan wrote, "there is no plausible reason for deference."[2] Reviewing courts are to decide if "genuine ambiguity" exists by exhausting all the traditional tools of construction, such as "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[3]

And when "genuine ambiguity" does exist? In those cases, Justice Kagan wrote, *Auer* shouldn't be mechanically applied. Instead, courts are to look to (1) whether the regulatory interpretation was "actually made by the agency," meaning it has to be the "authoritative" or "official" interpretation of the agency; (2) whether the interpretation implicates the agency's "substantive expertise"; and (3) whether 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.[4]

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."[5]

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."[6] 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."[7] 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

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maimed and enfeebled—in truth, zombified."[8] 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."[9] 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."[10])

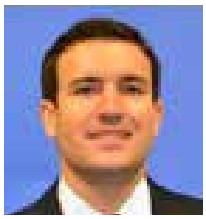
Finally, Justice Gorsuch forecast a wave of litigation in the wake of the Court's decision as a result of in *Kisor* calling into question lower courts' application of *Auer* deference: "Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*."[11]

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.[12] 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."[13]

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. ⊙



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Endnotes

[1]*Kisor v. Wilkie,* 588 U.S. ___ 139 S. Ct. 2400 (2019).
[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.
[10]*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[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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