

***Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400 (2019)**

BY ANNA G. PHILLIPS

James Kisor, a Korean War Veteran, asked the Supreme Court to overrule a longstanding presumption that courts defer to an executive agency's reasonable interpretation of its own regulation, a principle known as *Auer* deference. The Court relied on *stare decisis*, among other principles, to uphold the *Auer* rule, ultimately vacating the judgment of the Federal Circuit and remanding for further proceedings.

Mr. Kisor sought retroactive disability benefits from the Department of Veterans Affairs (VA) for post-traumatic stress disorder (PTSD) incurred in 1982 due to his military service. Mr. Kisor had applied for disability benefits in 1982, but was denied based on a psychiatric evaluation finding he did not suffer from PTSD. In 2006, Mr. Kisor moved to reopen his claim, and a new psychiatric report found that he suffered from PTSD. Mr. Kisor was awarded benefits as of 2006, not the date of his original application in 1982. The Board of Veterans' Appeals ("Board") agreed that Mr. Kisor's benefits could not be awarded retroactively based on its interpretation of an agency rule that retroactive benefits could not be granted unless the veteran produced "relevant official service department records" that were not considered in the initial denial. While Mr. Kisor produced two new service records, the Board determined they were not "relevant" because they did not relate to the reason for the denial—Mr. Kisor's lack of PTSD. Mr. Kisor appealed the decision. The Federal Circuit affirmed based on *Auer* deference and the Board's interpretation of the VA rule. The Supreme Court granted certiorari.

Justice Kagan delivered the Court's judgment and opinion, in which Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor joined. Justice Gorsuch, writing separately, concurred in the judgment, with Justices Thomas, Alito, and Kavanaugh joining in certain portions of the Gorsuch concurrence.

First, the Court explained when *Auer* deference applies. The presumption applies only when the regulation-at-issue is "genuinely ambiguous." If a court, having exhausted all "traditional tools" of interpretation, such as examining the text, structure, history, and purpose of a regulation, cannot determine the meaning of the regulation, then deference to the agency's interpretation may come in to play. If there is no uncertainty as to the regulation's meaning, then there is no reason to apply *Auer* deference. Further, the agency's interpretation must be (1) reasonable; (2) the official position of the agency; (3) within the agency's substantive expertise; and (4) reflect "fair and considered judgment." Courts must make an independent inquiry into the reasonableness of the agency's reading before affording the agency's interpretation weight. Part of that inquiry rests on whether the position offered by the agency is one derived from those who are "understood to make authoritative policy in the relevant context," and whether the interpretation creates "unfair surprise" or is a "convenient litigating position," both of which are unacceptable.

Second, and perhaps most importantly, the Court concludes that *stare decisis* "cuts strongly" against overruling *Auer*. *Auer* deference has a long history, going back 75 years or more. Traditionally, courts follow precedent, and any departure requires "special justification." Yet, none of Mr. Kisor's arguments present the special circumstances required to stray from longstanding precedent. Moreover, the notion an agency receives deference in interpreting

its own rules is a premise that pervades administrative law. To overturn *Auer* would create too much uncertainty in many areas of law, including the “settled” rules of interpreting agency regulations.

Finally, the Court addressed the circumstances of Mr. Kisor’s case. Mr. Kisor’s case rested on the Board’s interpretation of “relevant” records, who interpreted “relevant” to mean new records pertaining to the basis of the VA’s initial denial of benefits. The Federal Circuit affirmed based on *Auer* deference. The Court criticized the appeals court, determining the Federal Circuit erred by declaring the regulation ambiguous without making an effort to independently interpret the regulation, and by assuming that *Auer* deference should apply. Instead, the Federal Circuit should have considered whether the Board’s interpretation was reasonable and officially reflected the VA’s view on the matter. Accordingly, the Court vacated and remanded.

Justice Gorsuch wrote separately to express his opinion that *Auer* deference should be overruled. Highly critical of the majority opinion, Justice Gorsuch expressed all the reasons why the doctrine should not stand. First, he pronounced that the limits the majority placed on the *Auer* rule kept it on “life support” and there was little difference between the limits constraining its application and “overruling it entirely.” In practice, these limits reduce the *Auer* rule to nothing more than the *Skidmore* rule, which allocates weight to the agency’s interpretation to the extent it is reasonable and persuasive. Second, Justice Gorsuch expressed that *Auer* deference evolved from dicta and was never meant to become a presumption forcing judges to “subordinate their own views about what the law means” to those of a political agency. Third, he declared that the rule is squarely in contradiction with the Administrative Procedure Act, which requires courts to resolve any disputes over interpretation of an agency rule; if the court adopts an agency’s interpretation out of deference, the court is not deciding the meaning of the regulation. Fourth, the *Auer* doctrine defies the separation of powers because it necessarily requires the judicial branch to share power with executive agencies. Finally, Justice Gorsuch questions whether *stare decisis* even applies given the narrow holding in *Auer v. Rollins*, the case for which the *Auer* doctrine is named, because the case is limited to emergency price controls during wartime. He further remarked that the way the majority “remodeled” the *Auer* rule seemingly ignores the principles of *stare decisis*.

Kisor could be seen as limiting the power of *Chevron* deference, a parallel doctrine to the *Auer* rule that dictates the level of judicial deference given to agency interpretations of statutes. Yet, Chief Justice Roberts and Justice Kavanaugh each wrote separately to clarify that the Court’s decision to uphold *Auer* has no bearing on *Chevron* deference. Thus, the holding in *Kisor* is limited only to the level of judicial deference given to agency readings of its own regulations.

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