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US Supreme Court to Reconsider Key Agency Deference Standard

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Often called the fourth branch of government, administrative agencies implement the labyrinth of federal regulations governing people and companies in the United States. Administrative agencies play a particularly important role in regulating environmental, health, and safety in the United States. Those administrative agencies may soon face greater scrutiny from federal courts in their interpretation of their own regulations. This development could give businesses—particularly those in highly regulated industries—more opportunities to challenge, limit, or at least better anticipate their regulatory burden.

This term in *Kisor v. Wilkie*, the US Supreme Court will consider whether to overturn *Auer* deference; the rule that courts must defer to an agency's construction of its own regulation unless that interpretation "is plainly erroneous or inconsistent with the regulation." This development fits with the broader trend that we identified last year—the Court's growing skepticism about deferring to legal determinations made by administrative agencies. Last year, we explained the Court's hostility to *Auer* deference's controversial cousin, the *Chevron* doctrine, which requires courts to defer to an agency's reasonable interpretation of a statute.

What is *Kisor* about?

Though it implicates the core operations of the administrative state, *Kisor* involves a prosaic dispute. James Kisor, a Vietnam War veteran, seeks disability benefits dating back to 1983 based on service records he contends the agency overlooked. The lower court deferred to the Department of Veterans Affairs' interpretation that "relevant" means only information "noncumulative and pertinent" to the matter. Siding with the agency, the lower court rejected Mr. Kisor's more commonsense interpretation that "relevance" means any fact with "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." (Mr. Kisor's proposed definition tracks the Federal Rules of Evidence.)

Notably, the agency only rendered its claim-defeating interpretation when it denied Mr. Kisor relief. In other words, the agency "interpreted" its own regulation to ensure that Mr. Kisor lost *after* Mr. Kisor initiated his challenge and in the context of his particular dispute. Neither Mr. Kisor nor any other veteran received advance warning that the Department of Veteran Affairs might adopt a stilted reading of "relevant" until it did. Despite that, and consistent with the lenient *Auer* deference standard, the lower court deferred to the agency's interpretation of "relevant" and declined to give the word its more natural meaning.

Why does *Auer* deference matter?

As Mr. Kisor's case illustrates, *Auer* deference guides how agencies regulate the individuals and businesses subject to their jurisdiction. Particularly for companies competing in heavily regulated markets, *Auer* deference often means that regulated companies receive no notice about how an agency will interpret and implement its own regulations. And, in turn, without notice, companies cannot comment on or oppose the agency's regulatory guidance.

Notably too, *Auer* deference allows agencies to make substantive policy changes without complying with the notice-and-comment requirements of federal administrative law. Agencies, particularly in the environmental,

health, and safety context, often make substantive policy changes through nonbinding guidance. As one example, in 2013 the US Supreme Court deferred to guidance regulating water runoff for logging companies even though the US EPA promulgated that guidance mid-litigation. As that case and Mr. Kisor's illustrate, *Auer* deference often increases regulatory uncertainty and burden, while insulating agencies from challenge or correction through the federal courts.

Proponents of *Auer* deference contend that it improves agencies' operations because it gives agencies the flexibility to implement their own vague regulatory guidance—insulated from second-guessing by non-expert federal judges. They argue that the doctrine helps ensure the smooth operation of administrative agencies.

Either way, the Court's decision in *Kisor* may mean significant changes in the ways administrative agencies go about their work.

What happens next?

The Court in *Kisor* agreed to hear the case *only* to address whether it should overrule *Auer* deference. It follows that the Court will likely address *Auer*'s continued viability this term. If, as some anticipate, the Court overrules *Auer* deference, it may reflect just an initial step in a fundamental change about how the fourth branch of government operates.