It wasn't supposed to be this was for Justice Kavanaugh.

He joined the Court with high and oft-reported aspirations of gutting the entire rubric of judicial deference to agency action. From the Hobbs Act to *Chevron* deference, his ascension to the Supreme legal perch in the land was supposed to herald the beginning of the end for Article I agencies dictating the scope of their own administrative power. Yet just last week the Supreme Court punted on the issue of—with an eye toward upholding—judicial deference to agency action under the Hobbs Act. And just today the Supreme Court affirmatively upheld arguably the crown jewel judicial deference doctrine—so-called *Auer* deference. In
doing so the Supreme Court underscores all of the good reasons why courts have
taught themselves to defer to agency rulings in the first place.

While the Supreme Court’s newest Justice is likely a bit hot under the collar
following today’s ruling in Kisor v. Wilkie—found here— the decision is outstanding for
TCPA litigants hoping to convince a court to stay cases pending the FCC’s upcoming
ruling on the pending TCPA Public Notice proceeding.

Before we get to why the decision matters, let’s talk through what Auer deference is
to begin with. My two favorite philosophers (Rousseau and Nietzsche- always in that
order) agree on very little save this—words are imprecise approximations built,
largely, to allow human beings to deceive one another. As such all words and
phrases are imbued with ambiguity and limitation, some more than others. And while
the legal profession continues to believe in the illusion of “unambiguous” statutes
and regulations, the (metaphysical) truth is that every phrase ever uttered is merely
an approximation for the intended meaning of the speaker.

So Courts are (very) often called upon to interpret vague regulations in the context
of the concrete factual scenarios before them. But how should it go about
interpreting those words to give them their proper and intended effect? As the
Supreme Court in Kisor explains, rather than interpret those words for itself, Article
III courts have long deferred to the interpretations intended by the author. Most of
the time this means looking at the intent of Congress or whatever legislature wrote
the act being applied. Thus “legislative history” is commonly reviewed when an
“ambiguous” statute is at issue. But what if the rule of law being applied isn’t a
statute but, rather, a regulation promulgated by an agency? Well in this setting too
the Courts have long deferred to the intentions of the author—here the agency
promulgating the rule. That deference is called Auer deference.

Recognizing that the party writing a statute, or rule of law, is likely a pretty good
source to turn to on questions of interpretation it may seem like deferring to agency
interpretation in this context is no big deal. Maybe. But here’s the issue—unlike
Congress or other flat-footed legislative bodies, agencies can both promulgate
rules and enforce them. That means Auer deference allows an agency to pursue an
enforcement action under a “reasonable” interpretation of a vague statute that had
never been expressly spelled out by the agency, and yet have its just-made-up (but
reasonable ) interpretation of the regulation deemed binding in an enforcement
action. That’s a little like the police being able to tell you what the “reasonable”
speed limit was only after issuing you a ticket.

There’s another downside to Auer deference as well—it encourages agencies to draft
statutes that are nice and broad and vague. The wider the swatch of conduct
potentially covered, the greater the agency’s power to enforce the regulation—and
who doesn’t like power? By creating vague regulations the agency gives itself the
widest possible range of motion to pursue “violators” and determine later what the
regulation actually covers in specific circumstances. (Notably the majority opinion
in Kisor rips this notion as factually unsupportable, but the notion still has visceral
impact and, therefore, will be accepted as true by at least half of Americans—
including four members of the US Supreme Court.)

Ok, so now you’re probably wondering whether Auer deference is a good idea after
all. Well—and this is the point—a bare majority of the Supreme Court does, and in defending the doctrine the *Kisor* ruling gives a large number of important reasons why courts should defer to agency action. And that is why *Kisor* is so important for litigators in TCPA cases hoping to one day feast on manna from the FCC heavens.

As Justice Kagan explains, writing for the majority, there are four major reasons to apply *Auer* deference: i) the agency knows what it meant when it wrote the regulation; ii) the agency is imbued by Congress with power to make policy decisions; iii) the agency has high-specialization, expertise, and fact-finding capability that far outpace the courts; and iv) the need for a uniform application of the agency’s regulations. But wait a second folks. As readers already know, that is the exact doctrinal foundation for the primary jurisdiction doctrine. Specifically, the primary jurisdiction doctrine—which require courts to stay cases to await the outcome of agency action—likewise looks at the agency’s expertise, fact-finding capability, policy-making authority and ability to promulgate uniform regulations. In other words, the Supreme Court just re-emphasized the need for courts to defer to agency action—including re-approving and underscoring all the good reasons that courts must stay cases pending agency action.

Cool.

Then again the Court does apply a few limits to *Auer* deference that ought to be kept in mind. First, the regulation must really be “genuinely” ambiguous—whatever that means. (See what I did there?) Second, the agency’s regulation must be genuinely reasonable. (Stop me if you’ve heard this one before…) Third, the ruling must apply the agency’s substantive expertise in some manner. Fourth, the agency’s interpretation must be a “fair and considered” judgment on the issue and not just a “convenient litigating position.” I love this last one—it allows courts to probe whether an agency has really thought its position through or is just making stuff up as it goes along. That should go well.

Read together, *Kisor* and *PDR Resources* demonstrate that the more things change the more they stay the same. And, for now at least, that means the FCC’s official TCPA rulings are likely entitled to a great deal of deference. So, let’s get back to seeking primary jurisdiction stays already.

Then again, this:

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). I do not regard the Court’s decision today to touch upon the latter question.

-Chief Justice Roberts, Concurring in *Kisor*

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