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Auer deference, courts deferring to agencies' reasonable interpretations of their ambiguous regulations, is alive following the Supreme Court's decision in Kisor v. Wilkie. But, in the opinion of a few Justices, it is only on life support.

The State and Local Legal Center (SLLC) filed an amicus brief in this case asking the Supreme Court to overturn Auer v. Robbins (1997). In that case the Supreme Court reaffirmed its holding in Bowles v. Seminole Rock & Sand Co. (1945), that courts must defer to an agency's interpretation of its own regulations.

As discussed in the SLLC amicus brief, states and local governments object to Auer deference because it gives agencies a lot of power. They both write regulations and may interpret them as they like without significant court scrutiny. Agencies aren't required to receive notice-and-comment related to their interpretations of regulations. New administrations may change the interpretations at their whim. And agencies may purposely write ambiguous regulations knowing courts will defer to their interpretations of them. If Auer deference wasn't available, courts would interpret regulations without deferring to agency interpretations of them.

In part of the opinion joined by five Justices, the Supreme Court "reinforced" the limits of the Auer doctrine. Writing for herself, Justices Ginsburg, Breyer, Sotomayor, and Chief Justice Roberts, Justice Kagan explained exactly when Auer deference applies. First, a regulation must be "genuinely" ambiguous, meaning a court must exhaust all the "traditional tools" of constructing it including carefully considering its “text, structure, history, and purpose.” Second, an agency’s reading of the regulation must still be “reasonable,” meaning “it must come within the zone of ambiguity the court has identified after employing all its interpretive tools.” Third, Auer deference is only available after a court makes an “independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.”

According to the majority of the Court an agency interpretation of a regulation lacks “controlling weight” and should not be given Auer deference unless the interpretation is “authoritative” or its “official position.” The interpretation must also “in some way implicate” the agency’s “substantive expertise.” Finally, to receive Auer deference an agency’s reading of a rule must reflect “fair and considered judgment” instead of a “convenient litigating position” or “post hoc rationalization advanced” to “defend past agency action against attack.”

According to Justice Kagan for the Court to abandon Auer deference it has to be wrong. The Chief Justice didn't join the part of her opinion explaining why Auer deference isn't wrong. But he did join the part of her opinion explaining that numerous stare decisis (let the decision stand) factors weigh in favor of keeping Auer.

The Court's inability to “muster even five votes to say that Auer is lawful or wise” is the reason Justice Gorsuch, joined by Justices Thomas, Alito, and Kavanaugh, describe the majority opinion as “more a stay of execution than an exoneration.”

Allyson N. Ho, Kathryn Cherry, and Elizabeth A. Kiernan of Gibson, Dunn & Crutcher wrote the SLLC amicus brief which the following organizations joined: the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the United States Conference of Mayors, the International City/County Management Association, and International Municipal Lawyers Association, the Government Finance Officers Association, and the National School Boards Association.

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