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AUER 2.0: THE DISUNIFORM APPLICATION OF *AUER* DEFERENCE AFTER *KISOR V. WILKIE*

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This Note examines how lower courts have applied Auer *deference after the U.S. Supreme Court's decision in* Kisor v. Wilkie*. The Court granted certiorari in* Kisor *to answer one question: whether to overturn the deference regimes created by* Bowles v. Seminole Rock & Sand Co. *and* Auer v. Robbins*. The Court upheld the doctrines and clarified their reach, limits, and proper application. This Note focuses on* Kisor*'s holding regarding the extent judges must scrutinize a regulation before concluding it is ambiguous. Despite the Court's attempt to explicate a standard, lower courts have demonstrated stark differences in regulatory interpretation before concluding a regulation is ambiguous for the purposes of Auer deference. This Note highlights that disuniformity, explains its cause, and offers its own interpretation of* Kisor v. Wilkie*.*

This Note also identifies two causes of the disuniform application of Kisor*. First, different judges have different ideas of what "ambiguity" means. A regulation that is 75 percent clear may be ambiguous to some judges but unambiguous to others. Without resolving this problem, the Court used conclusory terms to characterize the level of regulatory interpretation lower courts should engage in. Those terms include "rigorous" and "exhaustive." Two courts can engage in the same "rigorous" or "exhaustive" regulatory interpretation but disagree on whether the result of that process means a regulation is "ambiguous."*

Second, the Court raised two competing values but did not clarify how to resolve them. Competing with the requirement of "exhaustive" regulatory interpretation is the idea that a deference regime facilitates the judiciary's respect for an agency's policy discretion. But how does a court exhaustively interpret a regulation and simultaneously defer to an agency's policy discretion? While the Court raised these two competing factors, it never clarified how they precisely interact.

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INTRODUCTION

Imagine this: you join the military at nineteen years old. Three years later, you are stationed in Vietnam.[1] You participate in Operation Harvest Moon.[2]

1. Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019).
2. *Id.*

At twenty-two years of age, you kill two enemy combatants.[3] A friend dies.[4] The memory of both torments you.[5] Seventeen years later, at a time of limited understanding of post-traumatic stress disorder,[6] the Veterans Administration (VA) denies your disability benefits.[7] Twenty-five years later, the VA recognizes your disability upon your submission for reconsideration.[8] However, the VA refuses to apply your disability benefits retroactively based on the meaning of the word "relevant" in a complex regulatory scheme.[9] You appeal to federal court, equipped with your best arguments to convince an independent judge. However, you learn you have an uphill battle. The judge defers to the VA's interpretation of the regulation unless it is "plainly erroneous or inconsistent with the regulation."[10] The court of appeals does not disagree with your interpretation or even try to analyze what the regulation means.[11] Instead, the court holds that the "Board's interpretation does not strike [it] as either plainly erroneous or inconsistent with the VA's regulatory framework."[12] You lose.[13]

Against this factual background, the U.S. Supreme Court considered overturning the deference regimes created by *Auer v. Robbins*[14] and *Bowles v. Seminole Rock & Sand Co.*,[15] under which courts defer to an agency's interpretation of its own ambiguous regulations.[16] The Court unanimously vacated the Federal Circuit's decision but split 5-4 on whether to overturn *Auer* deference.[17] Justice Kagan, writing for the majority, refashioned *Auer* deference by articulating new limits and tests for lower courts to apply.[18] But in doing so, a plurality of the Court reaffirmed the merits of *Auer* deference as a matter of policy.[19] Notably, the Court justified *Auer* deference on separation of powers grounds.[20] Because Congress vests policy discretion in agencies, and because resolving ambiguities in regulations often entails policy discretion, a deference regime respects the policy choices Congress delegates to the executive branch.[21]

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3. Brief for Petitioner at 14, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15), 2019 WL 338890, at *17.
4. *Id.*
5. *Id.*
6. *Id.* at 15.
7. *Id.* at 17.
8. *Id.*
9. *Id.* at 19.
10. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).
11. Kisor v. Shulkin, 869 F.3d 1360, 1368 (Fed. Cir. 2017), *vacated sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
12. *Id.*
13. *Id.*
14. 519 U.S. 452 (1997).
15. 325 U.S. 410 (1945).
16. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019).
17. *Id.*
18. *See id.* at 2414.
19. *Id.*
20. *See id.* at 2415.
21. *Id.*

In refashioning *Auer* deference, the Court also limited the circumstances where agencies deserve deference.[22] One such requirement, which this Note focuses on, is that a regulation be "genuinely ambiguous" before a court accepts an agency's interpretation.[23] However, this Note shows that lower courts, in interpreting *Kisor*, have vastly different ideas regarding the meaning of genuine ambiguity.[24]

These two issues—respect for the executive branch's policy discretion and the meaning of genuine ambiguity—are central to this Note. While the Court in *Kisor* cautioned lower courts to respect an agency's policy discretion, it also commanded lower courts to rigorously interpret regulations to avoid the overapplication of deference.[25] *Kisor*, therefore, has two competing values: respect for the executive branch and the power of the judiciary to determine issues of law.[26] This Note addresses how lower courts have and should toe that delicate balance when deciding to apply *Auer* deference.

Part I first gives the legal background for *Auer* and *Seminole Rock* deference. Part II closely analyzes the majority and concurring opinions in *Kisor*. Part III analyzes four lower court opinions that applied *Kisor* to demonstrate its inconsistent application. Finally, Part IV weighs in on each lower court opinion, explains their divergent outcomes, and offers an explanation for the best reading of *Kisor*.

I. BACKGROUND OF *AUER* DEFERENCE

Part I.A explains the basic concept of *Auer* deference by analyzing three cases that helped create the doctrine. Part I.B turns to how the Court limited the application of the doctrine it created. Part I.C explains arguments against *Auer* deference, and Part I.D highlights how judges openly called for the Court to overturn *Auer* long before *Kisor*.

A. Auer *Deference Defined*

Few legal topics engender divisive scholarship like judicial deference to an agency's interpretation of a statute or its own regulations. Even the majority opinion in *Kisor* and the principal concurrence disagree on the doctrine's origins.[27] Therefore, rather than trying to unearth the history of *Auer* deference, this Note instead explains foundational cases that morphed the doctrine into its present state before *Kisor*.[28]

22. *Id.*
23. *Id.* at 2416.
24. *See infra* Part III (showing how lower courts interpret *Kisor* differently, in part because each court has different ideas about the meaning of ambiguity).
25. *Kisor*, 139 S. Ct. at 2410.
26. *Id.*
27. *Id.* at 2411, 2426.
28. For a historical perspective, see Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015).

Understanding the deference regime created by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[29] is a useful starting point.[30] There, the Court famously articulated the deference that courts should give to an agency's interpretation of its enabling statute.[31] The basis for *Chevron* deference is that Congress delegates power to agencies, not courts, to fill "gaps" left in a statute.[32] And agencies, rather than courts, are politically capable of resolving policy issues.[33] Therefore, agencies have the most discretion when an interpretation of statute involves weighing competing policy values.[34] However, deference is only appropriate if Congress does not directly speak on the matter in question.[35] And in making that judgment, courts should "utilize the traditional tools of statutory interpretation" to ascertain Congress's intent.[36] If Congress speaks clearly on the matter, then agencies do not deserve deference.[37]

Auer deference occurs when a court defers to an agency's interpretation of its own ambiguous regulation, as opposed to its interpretation of a statute.[38] Like *Chevron* deference, *Auer* deference is premised on the idea that the interpretation of a regulation involves "judgment grounded in policy concerns"[39] and a "sensitivity to the proper roles of the political and judicial branches."[40] Because Congress delegates lawmaking authority to agencies, courts infer that Congress also delegates the power to agencies to resolve ambiguities in the laws it promulgates.[41] One unique feature of *Auer* deference is the presumption that the agency will have greater knowledge and understanding of its own regulatory text than the courts.[42]

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29. 467 U.S. 837 (1984).

30. The Court in *Kisor* borrowed language from *Chevron* in refashioning *Auer* deference, namely that lower courts must "exhaust the traditional tools of statutory interpretation" before deciding an agency's interpretation deserves deference. *Kisor*, 139 S. Ct. at 2416. It is worth considering if the Court's reference to *Chevron* signaled a merger between the two doctrines.

31. This is commonly understood as a two-step approach. Courts must first determine if Congress has spoken directly on the issue and, if Congress has not, courts only determine if the agency based its interpretation on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843.

32. *Id.* at 843–44.

33. *Id.*

34. *Id.* at 844.

35. *Id.*

36. *Id.* at 833 n.9.

37. *Id.* at 833.

38. Kisor v. Wilkie, 139 S. Ct. 2400, 2410 (2019).

39. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

40. *Id.*

41. *Kisor*, 139 S. Ct. at 2412; *see also* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1999) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated law making powers."). Solicitor General Noel Francisco, at oral argument for *Kisor*, called *Martin*'s statement about congressional intent the strongest ideological basis for *Auer* deference. *See* Transcript of Oral Argument at 59, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

42. *See Kisor*, 139 S. Ct. at 2412 (stating that agencies are in a better position than courts to "reconstruct" the meaning of a regulation).

The first collectively agreed reference to judicial deference to an agency's regulations comes from dictum in *Bowles v. Seminole Rock & Sand Co*.[43] Seminole Rock was a manufacturer of crushed stone, which was a regulated commodity under the Emergency Price Control Act of 1942.[44] In October of 1941, Seminole Rock contracted to sell crushed stone at $0.60 per ton, and they delivered the stone in March of 1942.[45] After the delivery, Seminole Rock wanted to charge the same buyer an increased price on a subsequent sale, but the administrator for the Office of Price Administration enjoined the sale.[46] Maximum Price Regulation No. 188 provided that manufacturers of crushed stone could only make sales in March of 1942 at the same or a lower price as prior sales in the same month.[47]

The government argued that, because Seminole Rock delivered the crushed stone at $0.60 per ton in March of 1942, the subsequent sale was subject to the regulation.[48] Seminole Rock argued that the regulation only applied if the sheet rock was charged and delivered in March of 1942. Since Seminole Rock charged the contractor almost a full year in advance, it argued the regulation should not apply.[49]

The Supreme Court held that the *delivery* of crushed stone, as opposed to contract formation or when the charge occurred, triggered the regulation's effect.[50] The definition of "highest price charged during March, 1942" meant "the highest price which the seller charged to a purchaser . . . for delivery of the same class of material during March, 1942."[51] The definition made the delivery of the regulated commodity sufficient to trigger the regulation's effects since it explicitly referred to delivery.[52]

Prior to the Court's textual analysis, the Court issued its famous dictum about the proper procedure to interpret an agency's regulation, which became the basis for *Auer* deference:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation*.[53]

43. 325 U.S. 410 (1945).
44. *Id.* at 412.
45. *Id.*
46. *Id.*
47. *Id.* at 414.
48. *Id.*
49. *Id.* at 415.
50. *Id.*
51. *Id.* at 414.
52. *Id.*
53. *Id.* at 413–14 (emphasis added).

Despite the Court's dictum, the Court independently analyzed the regulation and concluded the agency's position was correct.[54] In fact, the Court stated the agency's interpretation was "consistent" with its own independent analysis, which suggests that reference to the agency's interpretation was simply a way to buttress the Court's position.[55] Nevertheless, this dictum is the first clear iteration of the modern *Auer* doctrine that the Court considered overturning in *Kisor*.

The most significant case after *Seminole Rock* is *Auer v. Robbins*[56] itself. The plaintiffs, members of a police force, argued that the City of St. Louis improperly withheld overtime pay in violation of the Fair Labor Standards Act of 1938 (FLSA).[57] The FLSA required overtime pay unless an employee received a salary, and his employer could not deduct his pay based on variances in quality and quantity of work.[58] The plaintiffs claimed they were subject to disciplinary procedures related to the "quality or quantity" of their work.[59]

The secretary of labor submitted an amicus brief, in which he distinguished between disciplinary reductions in pay and disciplinary adjustments, where an official is reassigned, terminated, or demoted after a disciplinary proceeding.[60] The secretary believed that an employee must be subject to discipline resulting in reductions in pay in the normal course of business, not just as a response to a singular instance of misconduct.[61] The secretary believed the plaintiffs did not meet that standard because police officers normally face discipline because of "one-time incident[s]."[62]

The Court, unlike in *Seminole Rock*, deferred to the secretary's interpretation before performing its own textual analysis.[63] Instead of analyzing the regulation, the Court simply stated that the secretary permissibly interpreted the regulation.[64] The Court never considered another

54. *See* Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 550 (2018) (arguing that the Court "obviously would have reached the same result in *Seminole Rock* with or without deference"). Cass further argues that *Seminole Rock* is the most compelling case for administrative deference because the interpretation (1) was during wartime about a wartime matter, (2) was made when the agency promulgated the regulation and therefore the agency was positioned to reconstruct the regulation's meaning, (3) was widespread, and (4) was consistently applied. *See id.* In that context, Cass argues that it is hard to imagine the broad dictum in *Seminole Rock* was meant to justify the modern form of deference that exists today. *See id.* at 534.

55. *Seminole Rock*, 325 U.S. at 417.

56. 519 U.S. 452 (1997). There is a lot of intervening history that is disputed but, for the purposes of this Note, it is not relevant.

57. *Id.* at 455.

58. *Id.*

59. *Id.*

60. *Id.* at 461.

61. *Id.*

62. *Id.* at 460.

63. *See id.* at 462 (holding that the secretary's interpretation deserved deference because it was a reasonable interpretation). The Court did not determine if the secretary's reading was the "best" reading, like it did in *Seminole Rock*. *See* Cass, *supra* note 54, at 547 (arguing that the Court in *Auer* relied on a deference regime instead of its own regulatory interpretation).

64. *Auer*, 519 U.S. at 461.

interpretative argument.[65] This method of applying deference dramatically differed from what happened in *Seminole Rock*, but it became the foundation for regulatory deference moving forward.[66]

As case law developed, the Court's formulation of *Auer* deference sharpened. At its height, the Court used the doctrine to avoid getting in the weeds of regulatory interpretation.[67] In *Decker v. Northwest Environmental Defense Center*,[68] the Court stated that an agency's interpretation of a regulation deserves deference, even if inferior to its adversary's interpretation.[69] That iteration of deference toward agencies is a far cry from the application of deference in *Seminole Rock*.[70] This Note addresses, in part, how *Kisor*'s formulation of *Auer* deference represents a shift from the Court's prior iterations of *Auer* in *Decker*.[71]

B. Limitations on the Application of Auer *Deference*

While *Auer* deference became a powerful tool, the Court has imposed judicially created limits on its application.[72] First, *Auer* deference is not warranted if the agency's ambiguous regulation is just a restatement of the statute creating the agency or granting it powers.[73] Second, *Auer* deference is inappropriate when an interpretation of a regulation does not reflect the agency's fair and considered judgment.[74] An interpretation that conflicts

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65. *Id.*

66. *See* Cass, *supra* note 54, at 548–49. Specifically, the Court stated that the secretary's view "cannot be said to be unreasonable." *Auer*, 519 U.S. at 459. Unlike in *Seminole Rock*, where the agency's interpretation was "consistent" with the Court's reasoning, the Court in *Auer* cloaked the secretary of labor's interpretation as "reasonable" according to a nonexistent underlying standard. *Id.* That is, no underlying regulatory analysis defined the bounds of reasonableness. *Id.* This method of applying *Auer* deference justifies deference to an agency's interpretation of a regulation by nothing more than the ipse dixit of the court. According to the Federal Rules of Evidence, an expert cannot draw conclusions based on data without explaining his reasoning; in other words, courts will not accept conclusions "only by the *ipse dixit* of the expert." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Similarly, courts should explain why a regulation is ambiguous and why an agency's interpretation is reasonably within the zone of ambiguity.

67. *See* United States v. Larionoff, 431 U.S. 864, 872 (1977) (deferring to the government because of the existence of regulations without engaging in interpretation).

68. 568 U.S. 597 (2013).

69. *See id.* at 613 ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.").

70. *See* Cass, *supra* note 54, at 561.

71. There are several iterations of the *Auer* rule that the Court proffered before *Kisor* which excuse courts from difficult regulatory interpretation. *See, e.g.*, Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 274–75 (2009) ("The agency's interpretation is not 'plainly erroneous or inconsistent with the regulation'; and so we accept it as correct." (quoting *Auer*, 519 U.S. at 461)). The Court "accepted" the interpretation as correct rather than, as the Court did in *Seminole Rock*, conclude the agency's interpretation was "consistent" with its own independent interpretation. *See supra* note 55 and accompanying text.

72. Most, if not all, of these limitations are difficult to apply universally because the exceptions raise more questions than they answer. *See* Kristin E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. 103, 105–06 (2019).

73. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (holding that a regulation that "parrots" a statute is undeserving of *Auer* deference).

74. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012).

with a prior interpretation, or is merely a "convenient litigating position," will not receive *Auer* deference.[75] Third, *Auer* deference is inappropriate if the agency's interpretation amounts to an "unfair surprise" which disrupts the regulated parties' expectations about the law.[76] Lastly, since *Auer* deference is premised on an agency's superior expertise, it may be inappropriate when the regulations involve legal concepts rather than a choice between competing policy values.[77]

C. Arguments Against Auer *Deference*

Since *Kisor* squarely confronted the question of whether to overturn *Auer* deference, it is worth considering the general arguments against it.[78] Arguments against *Auer* deference track three lines: (1) statutory, (2) constitutional, and (3) policy.

First, deference to administrative agencies may conflict with the Administrative Procedure Act. 5 U.S.C. § 706 directs the judiciary to "decide all relevant questions of law."[79] Despite that directive, *Auer* deference holds that agencies, not courts, authoritatively resolve ambiguities in their regulations.[80]

Second, when the executive branch weighs in on the interpretative process, it invades the judiciary's power to say what the law is.[81] In a normal case or controversy, a judge independently adjudicates a dispute between two litigants.[82] But when an agency seeks deference, a judge delegates his Article III power to one of the parties,[83] and one of those parties is often the executive branch.[84] This amounts to a violation of separation of powers.[85]

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75. *Id.*

76. Romero v. Barr, 937 F.3d 292, 295 (4th Cir. 2019) (refusing to apply *Auer* deference for that reason).

77. Kisor v. Wilkie, 139 S. Ct. 2400, 2442–43 (2019) (Gorsuch, J., concurring) (explaining that agency expertise is not a talisman for applying *Auer* deference because a court should consider the agency's expertise in *Skidmore* deference). Moreover, Justice Gorsuch argued that judges are capable of sifting through complicated regulatory schemes and issues without reflexively relying on deference as a substitute for thoughtful analysis. *See id.* at 2443.

78. For arguments supporting *Auer* deference, see *infra* Part II.B.

79. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 621 (1996).

80. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 110 (2015) (Scalia, J., concurring). Moreover, Justice Antonin Scalia argued that deference regimes skirt the notice-and-comment requirements for informal rulemaking because agencies can pass binding rules under *Auer* deference instead. *See id.* (noting that agencies are supposed to use notice-and-comment rulemaking to pass binding rules).

81. *See id.* at 124 (Thomas, J., concurring).

82. *Id.*

83. Justice Kagan rejected the argument that *Auer* deference violated separation of powers principles because the limits she imposed on the doctrine retained for the judiciary a proper interpretive role. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2421 (2019).

84. Judicial deference can arise in a case between two private litigants when an agency files an amicus brief.

85. *Accord* Gutierrez-Brizuela v. Lynch, 834 F.3d. 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (stating that *Auer* deference "certainly seems to have added prodigious new powers to an already titanic administrative state"); *see* Manning, *supra* note 79, at 682 ("The concerns about unchecked power that animate the separation norm surely have no less, and

Moreover, unlike the judiciary, the executive branch lacks the structural protections afforded by Article III to federal judges, such as salary protection or lifetime tenure, which subjects the executive branch to shifting political motivations.[86]

Third, *Auer* deference may be unwarranted because the political elements of administrative agencies shift from administration to administration.[87] A core basis for *Auer* deference is that an agency is better situated to resolve an ambiguity than the judiciary because of its expertise.[88] However, agency personnel changes frequently, and an agency's focus in implementing the law changes as presidential administrations change.[89] Just as a later Congress's actions have no bearing on what an enacting Congress meant or intended in a statute, an agency's postenactment interpretation of a regulation does not offer insight to the enacting agency's intent.[90]

D. Open Calls to Overturn Auer *Deference*

Doubts about *Auer* surfaced in various opinions leading to *Kisor*. Justice Antonin Scalia, who wrote the unanimous opinion in *Auer*, directly called for overturning the doctrine in a 2012 concurrence.[91] Three justices in *Perez v. Mortgage Bankers Ass'n*[92] openly called for a future case that presented the question of whether to overrule *Auer* deference.[93] In 2016, Justice Thomas dissented from a denial of a writ of certiorari and explicitly asked the Court to consider overruling *Auer* deference.[94] Similarly, in 2016, then Judge Gorsuch concurred in a Tenth Circuit opinion, suggesting that the Court overturn *Auer* and *Chevron* deference.[95] He echoed many of the arguments made by Justice Scalia and foreshadowed the arguments in his *Kisor*

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perhaps far more, purchase in a complex twentieth-century society whose government pervades our daily lives in a way that few could have imagined in 1787."); *see also* Phillip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986).

86. *See Mortg. Bankers Ass'n*, 575 U.S. at 124 (Thomas, J., concurring).

87. *See Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring).

88. *See id.* at 2412 (majority opinion).

89. *See id.* at 2441 (Gorsuch, J., concurring).

90. *See* Johnson v. Transp. Agency, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (criticizing the premise "that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant"). Justice Scalia pointed out that legislative deals rely on quid pro quos, so the judiciary cannot look in isolation as to what a certain majority "wants" because the majority must always give and take certain provisions or aspects of a new law to get it passed. *See id.*

91. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616 (2012) (Scalia, J., dissenting).

92. 575 U.S. 92 (2015).

93. Justices Scalia and Thomas called for *Auer* to be overturned, while Justice Alito did not pass judgment but "await[ed] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 108 (2015) (Alito, J., concurring).

94. *See* United Student Air Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting) (collecting opinions arguing to overturn *Auer* deference).

95. Gutierrez-Bruizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

concurrence.[96] Most recently, federal appellate judges called for the Court to overturn *Auer* deference while *Kisor* was pending on appeal.[97] Rancor from lower courts and even the Court itself set the stage for a case like *Kisor* to be decided.

II. THE SUPREME COURT'S DECISION IN *KISOR V. WILKIE*: *AUER* TESTED AT THE SUPREME COURT

A. The Majority and Plurality Opinions

Justice Kagan authored a four-part opinion.[98] After recounting the factual background of the case, the Court explained *Auer* deference and justified the doctrine on ideological grounds.[99] The Court then acknowledged the various circumstances in which *Auer* deference is unwarranted.[100] Chief Justice Roberts, who concurred and was the fifth vote to uphold the doctrine, joined in the part of the Court's opinion that limited *Auer* deference but did not join in the part of the Court's opinion that justified *Auer* deference on ideological grounds.[101]

After justifying *Auer* deference, the Court rejected Kisor's arguments on statutory, policy, and constitutional grounds.[102] A plurality of the Court upheld *Auer* deference for several reasons, but a majority, created by Chief Justice Roberts, upheld it only on stare decisis grounds.[103] Therefore, a majority of the Court agreed only on the limitations on the application of *Auer* deference and on its survival based on stare decisis.[104]

B. Justifying Auer *Deference*

Justice Kagan, for the plurality, identified the context where *Auer* deference thrives: where a regulation is genuinely ambiguous and the resolution of that ambiguity requires policy decision-making rather than textual or statutory interpretation.[105] One of the four examples she cited involved a regulation that required arenas to ensure the disabled had comparable lines of sight to the general public.[106] The issue presented was whether arenas, in ensuring "lines of sight comparable" for the disabled, had

96. *Compare id.* at 1153 ("[T]he problem remains that *courts* are not fulfilling their duty to interpret the law . . . ."), *with* Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (Gorsuch, J., concurring) (finding that *Auer* deference "compromise[s] our judicial independence").

97. *See* Forrest Gen. Hosp. v. Azar, 926 F.3d 221, 228 (5th Cir. 2019); United States v. Havis, 907 F.3d 439, 441 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382 (6th Cir. 2019).

98. *Kisor*, 139 S. Ct. at 2408.

99. *Id.* at 2410.

100. *Id.* at 2414.

101. *Id.* at 2424 (Roberts, C.J., concurring).

102. *Id.* at 2421–22 (majority opinion).

103. *Id.*

104. *Id.*

105. *Id.* at 2410.

106. *Id.*

to consider standing spectators.[107] Because the text of the regulation did not answer this problem and the resolution of the ambiguity required policy considerations, this situation exemplified appropriate deference to an agency's policy discretion.[108]

Next, Justice Kagan affirmed the presumption that Congress wants agencies, not courts, to resolve ambiguities in regulations.[109] She acknowledged that Congress never explicitly assigned that responsibility to agencies.[110] But since Congress delegated lawmaking authority to the agencies, the Court inferred that Congress also wanted agencies to resolve ambiguities in the regulations they promulgate.[111]

The Court then explained the ideological justification for that presumption.[112] Agencies are better positioned than courts to "reconstruct" a regulation's original meaning.[113] The agency's insight can provide clarity on the rule's original intent.[114] If an interpretive question presents a new problem that the agency could not have predicted, then the agency's specific intention is still useful to consider the similar issues the drafters faced.[115]

More importantly for the purposes of this Note, the Court stressed that *Auer* deference is grounded on the premise that resolving regulatory ambiguity involves judgment of policy considerations.[116] In reference back to the sports arena example, Justice Kagan noted the cost-benefit calculation an agency would consider to resolve the question.[117] An agency would have to consider the cost to arenas of creating comparable lines of sight for the disabled that take into account standing spectators and then compare that to the goal of equal treatment for the disabled.[118] The cost-benefit analysis "sound[ed] more in policy than in law."[119]

Judges might also have no familiarity or experience in the policy considerations agencies must consider to resolve a regulatory ambiguity.[120] Agencies often have greater expertise than judges, either because of scientific

107. *Id.*

108. *Id*. For example, an agency had to consider the purpose of the regulation (to benefit the disabled) in conjunction with the financial considerations of the arenas (how much it would cost the arenas to consider standing spectators). *Id.* To the plurality, the answer to that consideration "sounded more in policy than law." *Id.*

109. *Id.* at 2412.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 2413.

117. *Id.*

118. *Id.*

119. *Id.* The difficulty in applying Justice Kagan's opinion is figuring out which interpretative problems "sound more in policy than in law." *See infra* Part IV.E.

120. *Kisor*, 139 S. Ct. at 2413.

or technical knowledge.[121] Congress tasks agencies to use their expertise to fill in statutory gaps, and a deference regime effectuates that intent.[122]

Justice Kagan closed out this section with a policy argument. *Auer* deference allows uniformity in the interpretation of regulations.[123] Judges are likely to interpret regulations differently because of their lay perspective, whereas an agency speaks with one voice.[124] In *Auer* itself, the circuit courts of appeals came to divergent conclusions regarding whether police officers deserved overtime pay.[125] Therefore, *Auer* deference serves an import role in the uniformity of federal regulatory law.[126]

C. Limitations on Auer *Deference*

The Court, now with a majority of justices, provided a five-part test that a regulation must pass to warrant the application of *Auer* deference.[127] This Note focuses only on the first two parts of the test. Before giving the test, the Court noted that, in the past, it applied *Auer* deference reflexively, without any interpretive analysis of the underlying regulation.[128] This practice gave Kisor "a bit of grist for his claim" that *Auer* deference grants agencies too much authority.[129] After that acknowledgement, Justice Kagan assured that the subsequent limitations on *Auer* deference avoided the problems Kisor raised.[130]

First, a regulation must be genuinely ambiguous.[131] To determine whether a regulation is ambiguous, courts should "exhaust all the traditional tools of statutory interpretation."[132] A court cannot conclude that a regulation is ambiguous unless it empties its "legal toolkit" and there is still no correct interpretive answer.[133] The "legal toolkit" involves considering a regulation's text, structure, and history.[134] A regulation is not ambiguous merely because its resolution requires difficult interpretative analysis since

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121. *Id.*
122. *See id.*
123. *Id.* at 2414.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* For *Auer* deference, the five-part test requires that (1) a regulation is genuinely ambiguous, (2) the agency's interpretation is within the "zone of ambiguity," (3) the agency's interpretation is its official position, (4) the agency's interpretation implicates its expertise, and (5) the agency's interpretation reflects its "fair and considered" judgment. *See id.* at 2415–17.
128. *Id.* at 2414. One example of this practice is from *Auer* itself. *See supra* note 68 and accompanying text.
129. *Kisor*, 139 S. Ct. at 2414.
130. *Id.* at 2415. It is a fair inference that, if the Court acknowledged that a method of applying *Auer* deference justified arguments that *Auer* deference is unconstitutional, then the Court probably did not endorse that method of *Auer*'s application. Therefore, *Kisor* should be read to repudiate the application of *Auer* deference without a court's independent analysis of the underlying regulation. *See infra* note 135 and accompanying text.
131. *Kisor*, 139 S. Ct. at 2415.
132. *See id.*
133. *Id.*
134. *Id.*

thorough analysis can resolve purported ambiguities.[135] However, Justice Kagan never clarified what "ambiguous" means or how ambiguous a regulation must be to proceed to the next step of analysis.[136]

But in engaging in genuine regulatory interpretation, courts should not invade an agency's policy discretion.[137] Here, Justice Kagan differentiated between "law" and "policy" without defining either term.[138] When a court fully utilizes its legal toolkit and has cannot come to an interpretative answer, "the law runs out, and policy-laden choice is what is left over."[139] This implies that courts should not declare that a regulation is ambiguous until they analyze the underlying regulation.[140] Courts are to determine legal questions relating to regulations, but agencies have discretion to administer policy. Simply put, if a court cannot come to an interpretative answer, the problem sounds in policy rather than law.[141] But the Court ultimately gave no guidance about the precise contours of "policy" and "legal" questions, so lower courts have to determine which questions are more appropriately answered by agencies and which questions the judiciary retains power to adjudicate.

If a court decides that a regulation is ambiguous, even after it has emptied its legal toolkit, it must be satisfied that the agency's interpretation is within the "zone of ambiguity."[142] This is because, although a regulation might be ambiguous, the agency's interpretive choice might be an unreasonable conclusion despite the ambiguity.[143] The interpretive analysis in step one creates the outer limits of reasonability in step two.[144] And the Court ensured that this is a step an agency can fail.[145]

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135. *See id.* ("A regulation is not ambiguous merely because 'discerning the only possible interpretation requires a taxing inquiry.' To make that effort, a court 'must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.'" (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting))). This excerpt strongly suggests that lower courts should perform an interpretive analysis before and independent of any *Auer* analysis.

136. This is problematic because judges will disagree about whether to apply *Auer* deference because they have different understandings of the meaning of "ambiguity." A regulation could be ambiguous if it is 90 percent clear, 75 percent clear, or 50 percent clear, depending on the personal opinion of the adjudicator. *See generally* Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010).

137. *Kisor*, 139 S. Ct. at 2415.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Justice Gorsuch argues that a judge will always come to an answer for any interpretative problem, no matter how difficult the process is or if one interpretation is narrowly better than another. *See id.* at 2429–30 (Gorsuch, J., concurring) (arguing that legal arguments are never in equipoise).

142. *Id.* at 2416 (majority opinion).

143. *Id.*

144. *Id.* The inescapable conclusion, therefore, is that lower courts should perform an interpretive analysis even if they decide that a regulation is ambiguous. The interpretive analysis is necessary to determine if an agency's interpretation of its regulation is within the zone of ambiguity.

145. *See id.*

Justice Gorsuch, joined by Justices Thomas, Kavanaugh, and Alito concurred in the judgment but supported overturning *Auer* deference.[146] While Justice Gorsuch made several arguments—ranging from statutory to constitutional to policy—this section focuses on his arguments related to the first two steps of the test to apply *Auer* deference.

Justice Gorsuch argued that the first requirement of *Auer* deference, that a regulation be genuinely ambiguous, is an amorphous concept incapable of consistent application.[147] The Court has never defined what "ambiguity" means and how ambiguous a regulation must be to go to the next step.[148] Justice Gorsuch cited to a book review written by then Judge Kavanaugh in 2016.[149] In it, Kavanaugh argued that judges have different thresholds of ambiguity.[150] If he concluded a statute was 65 percent clear, he would conclude the regulation is clear, but other judges might conclude that it was ambiguous.[151] And no case or doctrine indicates which conclusion is correct.[152] To Justice Gorsuch, this confusion invariably causes disuniform application of *Auer* deference.[153]

Justice Gorsuch also highlighted that *Auer* deference is only meaningful if it compels a court to defer to an agency's interpretation and the agency's interpretation is otherwise incorrect.[154] Since step one of *Kisor* requires rigorous statutory interpretation, a court should be able to determine the superior interpretation.[155] But if a court decides in step one that the agency interpreted the regulation correctly, *Auer* deference is not applied.[156] It is only applied if the agency's interpretation is incorrect and the regulation is ambiguous enough to warrant deference nonetheless.[157] This, to Justice Gorsuch, violates constitutional precepts of separation of powers.[158]

Meanwhile, Chief Justice Roberts provided the key fifth vote to uphold *Auer* deference.[159] However, he did not envision that *Auer* deference could

146. *Id.* at 2425 (Gorsuch, J., concurring).
147. *Id.*
148. *Id.* at 2430.
149. *See id.* at 2430 n.34 (citing Brett Kavanaugh, *Fixing Statutory Interpretation,* 129 HARV. L. REV. 2116 (2016) (book review)); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (stating that the fundamental flaw in deference regimes is that there is no definition of ambiguity).
150. Brett Kavanaugh, *Fixing Statutory Interpretation,* 129 HARV. L. REV. 2116, 2134–44 (2016) (book review).
151. *Id.*
152. *Id.*
153. *Kisor*, 139 S. Ct. at 2430 (Gorsuch, J., concurring).
154. *Id.* at 2429. Justice Gorsuch does not believe legal arguments are ever in "true equipoise," and a court can always use interpretive tools to come to an answer, even if the right interpretation comes after a difficult interpretive inquiry. *See id.*
155. *Id.* This is because courts across the country, across a host of legal issues, manage to come to answers every day on difficult legal issues. *Id.* There is no reason why regulatory interpretation is any different. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 2424 (Roberts, C.J., concurring).

be used to save a failing agency interpretation.[160] He stated that the distance between Justice Kagan's and Justice Gorsuch's opinions was "not as great as it may initially appear," even though one opinion called for upholding the doctrine and one called for overturning it.[161] This is because, while Justice Gorsuch concluded that agency expertise should merely have persuasive power, the limits on *Auer*'s scope reduced it to situations where the agency's interpretation would be persuasive and it would be unreasonable for a court to conclude otherwise.[162] But, as Justice Gorsuch pointed out, this interpretation of *Kisor* would render *Auer* deference meaningless because it would only apply when a judge is otherwise persuaded of the agency's interpretation.[163] It would be pointless to have such a deference regime.[164]

Justice Kavanaugh concurred, making one relevant criticism of Justice Kagan's distinction between law and policy.[165] Regulations that require policy analysis use terms like "reasonable," "appropriate," "feasible," or "practical."[166] He agreed that analysis of those regulations requires a court to consider policy.[167] But courts should not resolve those policy questions under the auspice of *Auer* deference.[168] *Auer* deference should be restricted to legal interpretation, not considerations of policy.[169] Using that distinction, he concluded that a judge can simultaneously engage in "rigorous scrutiny" of an ambiguous regulation under *Auer* deference, while deferring to an agency's policy choices using the standard of review in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*.[170]

III. APPLICATION OF *KISOR* IN THE LOWER COURTS

Application of *Kisor* in the lower courts, regardless of the disposition, can be categorized into three groups of reasoning[171]: (1) decisions that do not engage in rigorous regulatory analysis before concluding that the regulation is ambiguous for the purposes of *Auer* deference; (2) decisions that engage in rigorous statutory interpretation of regulations that use policy-laden terms like "appropriate" or "necessary" before deciding whether to apply *Auer* deference; and (3) decisions that engage in statutory interpretation of regulations that do not use policy-laden terms.

160. *See id.*
161. *Id.*
162. *Id.* at 2424–25.
163. *See id.* at 2425 (Gorsuch, J., concurring).
164. *Id.*
165. *See id.* at 2448 (Kavanaugh, J., concurring).
166. *Id.* at 2448–49.
167. *Id.* at 2449.
168. *See id.* (stating that policy review of an agency's actions is governed by *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29 (1983)). This is commonly known as *State Farm* review.
169. *Id.*
170. *Id.*
171. These are categories this Note creates.

A. Decisions That Do Not Rigorously Analyze a Regulation Before Applying Auer *Deference*

1. *Trawler Carolina Lady, Inc. v. Ross*

Courts sometimes recognize a difficult conflict between two competing interpretations and conclude that the regulation is ambiguous because of that conflict. One example of this practice, in *Trawler Carolina Lady, Inc. v. Ross*,[172] involved sea scallop regulation in North Carolina.[173] The plaintiff challenged the denial of his application to transfer scallop fishing permits.[174] Congress empowered the National Marine Fisheries Service (NMFS) to regulate overfishing.[175] For scallop fishing, the NMFS instituted a "limited access" system, which drastically reduced the amount of new vessels permitted to fish scallops.[176] The limited permit included a "days at sea" limitation (DAS), which was defined as "each 24-hour period of time during which a fishing vessel is absent from port for purposes of scallop fishing."[177]

In this case, the plaintiff sold a vessel to another company, whose president appeared to have familial or personal ties to the plaintiff.[178] The plaintiff, however, retained the vessel's permit and DAS allocation and fished for scallops with another vessel using that permit.[179] The buyer used his own permit and DAS allocation for the vessel he bought from the plaintiff.[180] Then, the plaintiff transferred the permit he had retained to another vessel he owned that was damaged the previous year.[181] After the plaintiff repurchased the vessel he originally sold, he attempted to transfer the permit back to that vessel.[182]

The agency denied the transfer because of "the apparent lack of full consideration" and "the historical pattern of maneuvering permits" between the two companies.[183] Specifically, the agency pointed to 50 C.F.R. § 648.14(i)(2)(iv)(B), which makes it unlawful for "any one person" to "combine, transfer, or consolidate DAS allocations."[184]

The parties disputed what "any one person" meant.[185] The plaintiff relied on a 1994 opinion letter from the agency that drew a distinction between a "person" consolidating a DAS allocation and a "vessel" consolidating a DAS

172. No. 4:19-CV-19, 2019 WL 3213537 (E.D.N.C. July 16, 2019).
173. *See generally id.*
174. *Id.* at *1.
175. *Id.* at *3.
176. *Id.*
177. *Id.*
178. *Id.* at *4.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. In a July 2018 decision letter, the agency interpreted "any one person" to include transfers between vessels. *Id.* at *5.
185. *Id.*

allocation.[186] Using that distinction, the plaintiff argued that the regulation only prohibited consolidating multiple DAS allocations in one vessel.[187] It did not prohibit a vessel from fishing under two different DAS allocations after the first was expended.[188] Therefore, the sole question was whether the regulation prohibited a vessel from fishing under different DAS allocations or whether it only prohibited consolidating multiple DAS allocations in one vessel.[189]

The plaintiff cited two different regulations to support his argument.[190] The regulations provided that an owner who is issued a permit is limited to one replacement vessel per year and that permits are presumed to transfer vessels whenever they are bought and sold.[191] Those two regulations implied that a vessel may fish under two different DAS allocations at different times and thus the agency improperly denied the plaintiff's DAS transfer.[192]

The court, however, deferred to the agency's interpretation of the regulation.[193] The court cited the two conflicting principles from *Kisor*.[194] While courts presume that Congress intends for agencies to resolve their ambiguities, they cannot ignore the plain language of a regulation.[195] The court stated it did not need to apply *Auer* deference to determine that the agency had the authority to deny the plaintiff's application.[196] But it did apply *Auer* deference in response to the conflict created by the two regulations that the plaintiff cited.[197]

The court held the regulations cited by the plaintiff did not "unambiguously require a different result" but created, at best, a "genuine ambiguity" calling for *Auer* deference.[198] The two regulations did not cross-reference the general prohibition on DAS allocations so the structure of the regulatory scheme was ambiguous.[199] Although the two regulations cited by the plaintiff suggested a vessel could have multiple permits, they did not clearly limit the scope of the general prohibition against DAS allocation.[200] And without that clear interaction, the effect of the general prohibition on DAS allocation was ambiguous. The court did not undertake an independent

186. *Id.*
187. *Id.* at *12.
188. *Id.*
189. *Id.*
190. *See id.* at *13.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* The Western District of Virginia imposed a similar burden in *Spencer v. Macado's, Inc.*, 399 F. Supp. 3d 545, 552 (W.D. Va. 2019). There, the court held that a regulation was genuinely ambiguous because the regulation did not "unambiguously" define a word in the regulation. *Id.*
199. *Trawler*, 2019 WL 3213537, at *13.
200. *Id.*

analysis of the regulatory structure before its application of *Auer* deference.[201]

In the next paragraph, the court held that the regulation's text, structure, and context supported the agency's reading.[202] But it held that only after stating the plaintiff's arguments did not "unambiguously foreclose" the agency's position.[203] Therefore, it is unclear whether the court independently analyzed the regulation or analyzed it only to the extent necessary to determine whether to apply *Auer* deference.[204] Even if the court made those conclusions independent of *Auer* deference, it never resolved how the regulations that plaintiff cited influenced the meaning of the general prohibition on DAS allocations.[205]

2. *Wolfington v. Reconstructive Orthopaedic Associates II PC*

The Third Circuit in *Wolfington v. Reconstructive Orthopaedic Associates II PC*[206] deferred to an agency's interpretation of a regulation without interpreting the underlying regulation itself.[207] In this case, the plaintiff alleged a violation of the Truth in Lending Act of 1968 by failing to provide certain disclosures before lending the plaintiff credit.[208] The plaintiff underwent surgery and, prior to the surgery, he signed an agreement that stated he would pay his deductible before the operation.[209] The day before his surgery, he told his doctor that he could not pay.[210] Both parties agreed orally that the plaintiff would pay his deductible through a payment plan of $100 per month after a $200 down payment.[211] Although it was an oral agreement, the defendant sent a confirmation e-mail to the plaintiff.[212]

The pertinent regulation ("Regulation Z") required a "creditor" to make certain disclosures before the "consummation" of a credit transaction but only if the parties used a "written agreement."[213] The parties disputed the meaning of "written agreement."[214] The plaintiff argued that "emails either constitute a writing for purposes of [the regulation] or are indicative of a separate written agreement between the parties."[215] The Federal Reserve Board (the "Board") believed that a written credit agreement requires more

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. 935 F.3d 187 (3d Cir. 2019).
207. *See generally id.*
208. *Id.* at 193.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 196.
214. *Id.*
215. *Id.* at 203.

than an "informal workout arrangement" of a debt, which cannot include "a letter that merely confirms an oral agreement."[216]

The court first discussed the Board's longstanding interpretation of the requirements of a written agreement.[217] Namely, the Board always required a level of formality and for the agreement to be "executed by the customer."[218] The email confirmation sent to the plaintiff was not "formal" and the plaintiff did not execute or sign the agreement.[219] Rather, his father negotiated the payment plan.[220] Therefore, if the court deferred to the agency, the plaintiff would lose.[221]

Without independently interpreting the regulation, the court concluded that the Board's interpretation of Regulation Z deserved deference.[222] The court began by citing *Kisor* for the proposition that Congress wants agencies to play the primary role in interpreting ambiguous regulations.[223] It also characterized *Auer* deference as a "presumption" that must be rebutted by the party arguing against an agency's interpretation.[224] It then listed the formal five-part test that *Kisor* created to determine whether or not to apply *Auer* deference to an ambiguous regulation.[225]

The court first determined whether the regulation was genuinely ambiguous.[226] The statute did not define a "written agreement."[227] The court considered two conflicting arguments: (1) the plain language of the regulation suggested that parties must fully integrate the extension of credit in writing and (2) background principles of contract law only require the essential terms of the agreement to be in writing.[228] Based solely on those two arguments, the court concluded that, "in light of those conflicting principles—the plain text of the regulation and the background of state law—the term 'written agreement' is ambiguous."[229] The court did not independently analyze the regulation because, at first glance, it was ambiguous enough to warrant deference.[230] This method of applying deference resembles *Auer* more than *Seminole Rock*.[231]

After the court determined that the regulation was genuinely ambiguous, it had to determine whether the agency's interpretation fell within the zone of ambiguity referenced in *Kisor*.[232] The court held the Board's

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 204.
223. *Id.*
224. *See id.* at 204 n.104.
225. *Id.* at 204–05.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *See supra* Part I.A.
232. *Wolfington*, 935 F.3d at 205.

interpretation was reasonable because the Board relied on the regulation's plain language.[233] The plaintiff argued that the interpretation was unreasonable because it incentivized creditors to merely send confirmation e-mails or letters, thereby subverting the protections in the statute.[234] But the court rejected this argument because (1) the plaintiff had no evidence that this occurred and (2) the "zone of ambiguity" from *Kisor* was broad enough, regardless, to include the Board's interpretation.[235]

B. Rigorous Statutory Interpretation of Regulations Using Policy-Laden Terms

On the other end of the spectrum of *Kisor*'s application are decisions that engage in thorough interpretation, even for terms like "appropriate" or "necessary." In *Romero v. Barr*,[236] the Fourth Circuit considered whether the attorney general misread pertinent regulations in ruling that immigration judges (IJs) cannot administratively close cases, a practice dating back to the 1980s.[237]

The plaintiff, an undocumented immigrant, faced removal proceedings by the Department of Homeland Security (DHS) in 2013.[238] The plaintiff moved for the IJ to administratively close his case so that he could seek alternative immigration remedies (e.g., a provisional unlawful presence waiver).[239] The IJ denied his motion.[240] The Board of Immigration Appeals (BIA) reversed and then administratively closed his case.[241] The DHS moved for reconsideration and, in the interim, the attorney general in 2017 issued a precedential decision stating that no regulation grants IJs or the BIA authority to administratively close cases.[242] Following this, the BIA granted the motion for reconsideration, dismissed the plaintiff's appeal, and ordered his deportation.[243] The Fourth Circuit reviewed whether the attorney general properly read the pertinent regulations.[244]

Before the attorney general's decision, IJs and the BIA administratively closed cases pursuant to two broad regulations.[245] 8 C.F.R. § 1003.10(b) allows IJs to take "any action consistent with their authority" that is

233. *Id.*
234. *Id.*
235. *Id.* at 205–06, 206 n.116.
236. 937 F.3d 282 (4th Cir. 2019).
237. Administrative closure refers to when an IJ "temporarily removes a case from the active docket as a matter of 'administrative convenience.'" *Id.* at 287. The closure "temporarily pause[s] removal proceedings and places the case on hold, generally because there is an alternate form of case resolution pending, or because the case may be affected by events outside of the control of either party or that may not occur for some time." *Id.*
238. *Id.* at 286.
239. *Id.* at 287.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 288.

"appropriate and necessary for the disposition of such cases."[246] 8 C.F.R. § 1003.1(d)(1)(ii) allows the BIA to take "*any action* consistent with their authorities under the Act and the regulations that is *appropriate and necessary* for the disposition of such cases."[247]

In his precedential opinion, the attorney general held that neither of those regulations confer power upon IJs to administratively close cases.[248] The attorney general concluded that the indefinite suspension of a case is not an action that is "appropriate and necessary for the disposition" of such a case.[249] Moreover, the attorney general found that administrative closures dramatically increased between 2011 and 2017, eclipsing closures in the time period between 1980 and 2011.[250] Lastly, the attorney general held that administrative closures are contrary to the public interest because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."[251]

The Fourth Circuit read sections 1003.10(b) and 1003.1(d)(1)(ii) as expansively as the plain language allowed by using the traditional tools of statutory interpretation.[252] The court interpreted "any action" in the regulations to include docket management, which included administrative closure.[253] Therefore, since IJs and the BIA could take "any action," the only question was whether the attorney general erred by concluding that administrative closure is never appropriate or necessary.[254]

The court then considered whether to defer to the attorney general's interpretation.[255] The court cited *Kisor* only for the proposition that courts have the duty to independently analyze regulations before applying *Auer* deference.[256] Rejecting the attorney general's interpretation and not applying *Auer* deference, the court interpreted "appropriate and necessary" through a textual lens.[257] The court noted that "appropriate and necessary" were terms that require a context-specific inquiry.[258] If the court could find one situation where administrative closure was "appropriate" or "necessary," in the court's judgment, then administrative closure fit within text of the regulations.[259] It then identified one context in which administrative closure could be appropriate or necessary and cited one case to illustrate its point.[260]

246. *Id.*
247. *Id.*
248. *See generally In re* Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018).
249. *Id.* at 284 ("Administrative closure in fact is the antithesis of a final disposition.").
250. *Id.* at 273.
251. *See id.* at 288–89 (quoting INS v. Doherty, 502 U.S. 314, 323 (1992)).
252. *Romero*, 937 F.3d at 292.
253. *Id.*
254. *Id.*
255. *Id.* at 291–92.
256. *Id.*
257. *Id.*
258. *See id.* at 293 (stating that words like "appropriate" and "necessary" are capacious).
259. *Id.*
260. *See id.* (citing *In re* Avetisyan, 25 I. & N. Dec. 688 (B.I.A. 2012)); *see also id.* at 294 ("As *Avetisyan* illustrates, administrative closure may—contrary to the Attorney General's argument . . . in fact facilitate the timely resolution of an issue or case.").

In that case, a woman facing removal proceedings married a long-term permanent resident.[261] Her husband applied for an adjustment to her residency status to the U.S. Citizenship and Immigration Services (USCIS) and asked the IJ to stay the removal proceedings.[262] The IJ granted continuances but each time she had to appear in front of the IJ, the USCIS had to delay the adjudication.[263] Eventually, to expedite the process, the IJ administratively closed the case.[264] Because administrative closure was appropriate and necessary in that case, the Fourth Circuit rejected the attorney general's argument that administrative closure was not appropriate or necessary.[265]

C. Thorough Statutory Interpretation of Regulations That Do Not Use Policy Terms

One decision interpreting *Kisor* thoroughly engaged in an interpretation of a regulation that did not involve policy considerations. The Eleventh Circuit in *Callahan v. United States Department of Health and Human Services*[266] dealt with a regulatory ambiguity related to the requirements for altering the procedure for receiving livers for transplant.[267] The court recognized that the "the nation's policy for allocating donated livers hangs in the balance."[268]

In short, the National Organ Transplant Act of 1984 requires the Department of Health and Human Services (HHS) to regulate the Organ Procurement and Transplant Network (OPTN),[269] run by the United Network for Organ Sharing (UNOS), a private nonprofit responsible for the coordination of America's organ transplant system.[270] The HHS had promulgated regulations regarding the process the OPTN must follow to change the procedures for receiving a liver for transplant.[271]

The current liver-allocation policy distributes livers based on two regions—eleven groups of states and "Donation Service Areas" (DSAs), which are fifty-eight irregular geographical locations.[272] Because of criticisms from the DSAs, UNOS ventured to change the procedure for liver donations.[273] A specialized committee within the UNOS presented two options for allocating livers and the UNOS board selected one of those

261. *Id.* at 293.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*; *see also id.* at 294 (citing *In re* Rajah, 25 I. & N. Dec. 127, 135 n.10 (B.I.A. 2009) for the proposition that administrative closure is appropriate in a removal proceeding when the undocumented immigrant seeks visa approval).
266. 939 F.3d 1251 (11th Cir. 2019).
267. *Id.* at 1253.
268. *Id.* at 1257. The court certainly recognized the policy implications of its decision and the policy decisions that go into rules for liver transplants. *Id.*
269. *Id.* at 1254.
270. *Id.*
271. *Id.*
272. *Id.* at 1255.
273. *Id.*

options.[274] The proposed changed retained the use of DSAs but limited their effect on liver allocation.[275]

Disappointed with the result, detractors of the new policy asked the HHS secretary to suspend it and instruct the UNOS to reconsider.[276] The secretary then instructed the UNOS to adopt a policy that eliminated the use of DSAs.[277]

The UNOS then proposed two new policies.[278] Its advisory committee supported one policy and the board chose to implement the other.[279] Again, detractors of the new policy asked the secretary to suspend the new policy.[280] The secretary refused, and hospitals and individuals waiting for liver transplants filed suit, principally arguing that the secretary violated pertinent regulations.[281]

The regulation has two subsections that impose procedural requirements.[282] Because the regulations are complicated and central to the case, they are reproduced here, as written in *Callahan*:

> (b) The [OPTN] Board of Directors shall:
>
> > (1) Provide opportunity for the OPTN membership and other interested parties to comment on proposed policies and shall take into account the comments received in developing and adopting policies for implementation by the OPTN; and
> >
> > (2) Provide to the Secretary, at least 60 days prior to their proposed implementation, proposed policies it recommends to be enforceable under *§ 121.10* (including allocation policies). These policies will not be enforceable until approved by the Secretary. The Board of Directors shall also provide to the Secretary, at least 60 days prior to their proposed implementation, proposed policies on such other matters as the Secretary directs. *The Secretary will refer significant proposed policies to the Advisory Committee on Organ Transplantation established under § 121.12, and publish them in the Federal Register for public comment.* The Secretary also may seek the advice of the Advisory Committee on Organ Transplantation established under § 121.12 on other proposed policies, and publish them in the Federal Register for public comment. . . .[283]

The plaintiffs argued that the secretary violated the regulations because he did not refer this "significant proposed policy" to the advisory committee and publish the policy in the Federal Register.[284] The plaintiff believed that a

274. *Id.*
275. *Id.*
276. *See id.* (stating that the plaintiffs disfavored the rule because they wanted the UNOS to eliminate a DSA-based system).
277. *Id.* at 1256.
278. *Id.*
279. *Id.*
280. *Id.*
281. *See id.* at 1258.
282. *Id.*
283. *See id.*
284. *Id.*

policy which fundamentally transforms procedures for liver transplants is clearly "significant."[285]

The HHS did not disagree.[286] Instead, it argued that the "significant review" requirement is only triggered (1) when the OPTN recommends that the policy should be enforceable or (2) when the policy relates to "such other matters as the Secretary directs."[287] Therefore, the sole interpretive question was this: does the secretary need to refer *all* significant proposed policies to the Federal Register or only those that (1) the OPTN board recommends to be enforceable or (2) pertain to a matter the secretary directed?[288]

The court cited *Kisor* for the proposition that agencies deserve deference only after courts "exhaust" the tools of statutory interpretation.[289] Because the agency's reading was the better one, it did not apply *Auer* deference.[290] It first analyzed the structure of the regulations.[291] Based on the "scope-of-subparts"[292] canon, the court held that the "significant proposed policy" requirement triggers only when the circumstances in the same subsection occur.[293]

After analyzing the regulation's structure, the court focused on the text of subpart (2).[294] The court held the subsection "acted like a funnel."[295] The first two sentences described two contexts, and the "significant proposed policy" requirement could only be triggered in those contexts.[296] Therefore, the court concluded that the regulation was not ambiguous and held that the secretary did not need to refer the policy to the Federal Register. In doing so, the court also raised and rejected the arguments the plaintiffs made, unlike the courts in *Trawler* and *Wolfington*.[297]

IV. RESOLUTION OF DIVERGENT INTERPRETATIONS OF *KISOR*

In this Part, this Note explains how the courts in *Trawler*, *Wolfington*, and *Romero* misapplied *Kisor* in different ways. The courts in *Trawler* and

285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 1259.
290. *Id.*
291. *Id.*
292. *See id.* at 1260 (The canon states that "material within an indented subpart relates only to that subpart." (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 156 (2012))).
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *See id.* at 1261 (rejecting the plaintiffs' argument that the significant proposed policy clause, when read in isolation, supports their proposition because regulations are to be read in context). The court also rejected the defendant's argument regarding the "presumption of consistent usage." *Id.* at 1262. The plaintiffs argued the defendant's construction gave "significant proposed policies" a narrower meaning than in the rest of the regulations. *Id.* But the court held that the canon must "yield[] to context" and, in this context, the opening sentences of the regulation narrowed the scope of its effect. *See id.*

Wolfington underanalyzed the respective regulations and, by doing so, ignored Justice Kagan's prescription that courts must engage in thorough analysis before concluding that a regulation is genuinely ambiguous. Then, this Note explains why the Eleventh Circuit's decision in *Callahan* is a model for how lower courts should interpret *Kisor*. This Note explains why lower courts still employ a disuniform application of *Auer* deference, even though the Supreme Court attempted to clarify the doctrine in *Kisor.* Finally, this Note offers its own interpretation for the best reading of *Kisor*.

A. The Eastern District of North Carolina and the Third Circuit Improperly Underanalyzed the Respective Regulations

1. The Eastern District of North Carolina

The court's primary error in *Trawler* was that it required the plaintiff to "unambiguously foreclose" the agency's interpretation of its own regulation.[298] *Kisor* held that, to determine whether a regulation is genuinely ambiguous, courts must rigorously interpret the regulation as if there is no deference regime to rely on.[299] For a normal interpretative question, one side does not need to convince the judge that their interpretation is "unambiguously" correct but only that it is more favorable, no matter how slightly.[300] Therefore, the existence of the deference regime influenced how the court performed its regulatory analysis.

Moreover, the court at best modestly engaged in regulatory interpretation.[301] The court rejected the plaintiff's argument in one sentence, simply because the regulations did not cross-reference the regulations that the agency cited.[302] The court did not analyze the regulation's text, structure, or history and did not use any other interpretive canon.[303] It did not try to analyze the regulation cited by the agency in conjunction with those cited by the plaintiff because even doing so would not "unambiguously foreclose" the agency's position.[304]

But, as stated, *Kisor* requires judges to get into the weeds of regulatory interpretation if doing so would reveal a legal answer to an interpretive problem.[305] The *Trawler* court's unwillingness to do so suggests it misunderstood the new requirements that *Kisor* set forth to find that a regulation is genuinely ambiguous.

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298. *See supra* Part III.A.1.
299. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).
300. *Id.* at 2429–30 (Gorsuch, J., concurring).
301. *See* Trawler Carolina Lady, Inc. v. Ross, No. 4:19-CV-19, 2019 WL 3213537, at *13 (E.D.N.C. July 16, 2019).
302. *See supra* Part III.A.1.
303. *See supra* Part III.A.1.
304. *See supra* Part III.A.1.
305. *Kisor*, 139 S. Ct. at 2415.

2. The Third Circuit

The Third Circuit similarly failed to analyze Regulation Z.[306] First, it concluded that the agency's interpretation of the regulation deserved deference before it ever analyzed the regulation itself.[307] As in *Trawler*, this ignores the responsibility of lower courts to interpret the regulation as if no deference regime existed.[308]

But even worse, the Third Circuit did not attempt to interpret the regulation.[309] It simply concluded that the regulation was ambiguous because the statute did not define a "written agreement" and there were two competing presumptions raised by the litigants.[310] In *Kisor*, Justice Kagan acknowledged that the practice of deferring to the agency's position without an independent analysis of the regulation's meaning justified Kisor's gripe with *Auer* deference.[311] Yet, that is the exact practice the Third Circuit employed in this case.[312] Surely, the practice that *Kisor* identified as justifying recalcitrance to *Auer* deference cannot be the practice that *Kisor* endorsed. The Third Circuit did not analyze the regulation "as if it had no agency to rely on."[313]

That practice can be characterized as "front-end ambiguity."[314] This occurs when a court determines, just by comparing the competing regulatory interpretations advanced by the litigants, a regulation is ambiguous.[315] In this scenario, the hypothetical court does not embark on an interpretive journey because the mere existence of two different arguments suffices to create the ambiguity required for *Auer* deference. This normally occurs because a court anticipates a difficult interpretive problem. This is distinct from "back-end ambiguity,"[316] where a court concludes a regulation is ambiguous only after it attempts to interpret the regulation and it cannot come

306. Wolfington v. Reconstructive Orthopaedic Assocs. II PC, 935 F.3d 187, 204 (3d Cir. 2019).
307. *Id.*
308. *See supra* note 142.
309. *Wolfington*, 935 F.3d at 205.
310. *Id.*
311. *Kisor*, 139 S. Ct. at 2415.
312. *Wolfington*, 935 F.3d at 206.
313. *See supra* note 135 and accompanying text.
314. This Note proposes this term.
315. A useful analogy is to *contra proferentem* in contract interpretation. *See* Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 771 (2015). *Contra proferentem* is an interpretive rule stating that ambiguities will be read against the drafter. Despite the seemingly simple rule, there are ambiguities as to *when* to apply the rule. *Id.* at 782. It can be applied (1) to resolve the contractual ambiguity by itself, (2) as a tiebreaker, or (3) as one of the last interpretive factors the court considers *after* it has already tried to otherwise resolve the ambiguity. *Id.* Similarly, *Auer* deference can apply (1) before analyzing the regulation at all, (2) as a tiebreaker, or (3) after a court has tried to interpret a regulation but cannot come to the answer. Considering the idea of a "tie" in legal interpretation is wishful at best, *see supra* note 154 and accompanying text, and because *Kisor* repudiated applying *Auer* deference without analyzing the underlying regulation, *see supra* note 135, courts should only use *Auer* deference as a last resort after an independent analysis of the regulation.
316. This Note proposes this term.

to a definite answer about the regulation's meaning. Justice Kagan repudiated front-end ambiguity and instead held that a regulation can only be genuinely ambiguous after the court tries to interpret the regulation but cannot come to an answer.[317] Yet, the Third Circuit erroneously adopted the front-end model.

The Third Circuit also held that the agency's interpretation of the regulation satisfied step two of the *Kisor* test because the agency's interpretation was in the "zone of ambiguity."[318] But Justice Kagan made clear that independent regulatory interpretation defines the contours of the "zone of ambiguity" in step one.[319] Because the court made no independent step-one analysis, it improperly analyzed the agency's interpretation in step two.

When courts defer to an agency without performing independent regulatory analysis, they relinquish judicial power to the executive branch.[320] Justice Kagan held that *Auer* does not violate separation of powers principles because the limits she placed on *Auer* deference empower courts to "retain a firm grip on the interpretive function."[321] But it is hard to imagine how courts retain that firm grip when they, like the Third Circuit, choose to defer to an agency without independently analyzing the regulation.

Even so, the Third Circuit did correctly interpret *Kisor* to require respect for an agency's policy discretion.[322] In *Kisor*, Justice Kagan justified *Auer* on those precise grounds.[323] But *Kisor* limits the situations where agencies receive deference, and the Third Circuit did not faithfully consider whether the first test was met—whether the regulation was genuinely ambiguous.[324]

B. The Fourth Circuit, in Determining the Regulations Were Unambiguous, Invaded the Attorney General's Policy Discretion

The Fourth Circuit applied *Kisor* incorrectly for the opposite reason than the courts in *Trawler* and *Wolfington*: it prevented the attorney general from exercising his policy discretion.[325] Words like "appropriate" and "necessary" in regulations are policy-laden terms, and those terms rarely have a "plain meaning," as Justice Kavanaugh's concurrence made clear.[326] When courts use plain meaning to disagree with an agency as to whether an action is "appropriate" or "necessary," that disagreement resembles policy more than law. And that disagreement is more appropriate in *State Farm*

317. *See supra* note 135 and accompanying text. Even if a court properly adopts the front-end model, it is still unclear how ambiguous a regulation must be to deserve *Auer* deference.
318. *See supra* note 135 and accompanying text.
319. Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019).
320. *See supra* Part I.C.
321. *See supra* note 83 and accompanying text.
322. Wolfington v. Reconstructive Orthopaedic Assocs. II PC, 935 F.3d 187, 204 (3d Cir. 2019).
323. *See supra* Part II.B.
324. *See supra* Part II.C.
325. *See supra* Part III.B.
326. Kisor v. Wilkie, 139 S. Ct. 2400, 2448–49 (Kavanaugh, J., concurring).

review than *Auer* deference. To borrow a phrase used by Justice Kagan, the regulations in *Romero* sounded more in "policy than in law."[327] That is, "appropriate" and "necessary" are not terms subject to a textual gloss.[328]

Factually, the attorney general's reading of the regulation was itself grounded in policy.[329] His precedential decision concluded that administrative closures delay removal proceedings and benefit undocumented immigrants and the use of closures skyrocketed after 2011.[330] Moreover, the attorney general pointed out that most administratively closed cases are never reopened, which effectively allows undocumented immigrants to permanently stay in the country.[331] In response, the Fourth Circuit never considered these points raised by the attorney general.[332] It merely identified one instance in which the practice was helpful—where an undocumented immigrant, during deportation proceedings, applied for a visa.[333] Based on that narrow situation, the court concluded that administrative closure could theoretically be "appropriate" or "necessary" textually.[334]

However, the attorney general acknowledged that, in limited instances, administrative closure could be helpful, but that the cost of the procedure outweighed its benefits.[335] This resembles the cost-benefit analysis that Justice Kagan referenced in *Kisor* regarding the issue of comparable lines of sight for the disabled in arenas.[336] There, the Court allowed the pertinent agency to engage in its own cost-benefit analysis rather than textually interpreting the word "comparable."[337] But the Fourth Circuit disallowed the attorney general from doing the same. Just because administrative closure could possibly be helpful in one scenario does not mean that the existence of the practice, on balance, is appropriate or necessary. The attorney general had to consider the costs of administrative closure (e.g., indefinite suspension of cases) and the benefits of the practice (e.g., the narrow context cited by the Fourth Circuit).[338] By replacing that cost-benefit analysis with textual

327. *Id.* at 2413 (majority opinion). Specifically, Justice Kagan said the cost-benefit analysis for deciding whether arenas should consider standing spectators when creating "comparable lines of sight" for the disabled was a matter of policy, not law. *Id.*

328. Romero v. Barr, 937 F.3d 282, 293 (2019).

329. *In re* Castro-Tum, 27 I. & N. Dec. 271, 281 (Att'y Gen. 2018).

330. *Id.* at 271.

331. *Id.* at 272. It is hard to imagine how a practice that allows deportees to permanently stay in the country is "appropriate or necessary" to effectuate removal proceedings.

332. *See supra* note 254 and accompanying text.

333. *See supra* note 261 and accompanying text.

334. *See supra* note 255 and accompanying text.

335. *See In re Castro-Tum*, 27 I. & N. Dec. at 291 ("By contrast, administrative closure has produced a backlog all its own, with far fewer cases being recalendared than closed and some cases suspended for decades."). This excerpt inherently acknowledges that administrative closure is sometimes effective but, overall, clogs IJs' dockets and allows undocumented immigrants to remain in the United States.

336. *See supra* note 118 and accompanying text.

337. *See supra* note 118 and accompanying text.

338. *See supra* note 118 and accompanying text.

analysis, the Fourth Circuit usurped the policy discretion invested in the attorney general by Congress.[339]

C. The Eleventh Circuit Properly Toed the Line Between Respect for Policy Discretion and Rigorous Statutory Interpretation

Without question, the Eleventh Circuit confronted "hard interpretive conundrums" relating to "complex rules."[340] In response, it analyzed the regulation's text, structure, and purpose to come to an answer about its meaning.[341] Therefore, it faithfully followed *Kisor* in that it did not "reflexively" apply *Auer* deference—it instead followed the "reviewing and restraining functions" of the judiciary.[342] By avoiding a reflexive application of *Auer* deference, the Eleventh Circuit avoided the very practice that gave James Kisor the "grist" for his complaints about *Auer* deference.[343]

Moreover, in rejecting the application of *Auer* deference, the Eleventh Circuit did not encroach upon the HHS's policy discretion. After all, the regulation covered "significant proposed policies."[344] As in *Romero*, it may have been improper for the Eleventh Circuit to embark on a textual analysis of the term "significant," as that term is really a placeholder for the agency's policy discretion.[345] But the court did not decide whether or not the proposed policy was "significant"; instead, it decided under what circumstances the secretary must refer significant proposed policies to the Federal Register for public comment.[346] This was a purely "legal" question and not an ad hoc judicial determination of whether the proposed policy was "significant."[347]

D. Explaining Kisor*'s Divergent Interpretation: A Problem with* Auer *Itself*

This Note highlighted different ways that courts have applied *Auer* deference in the months following *Kisor*.[348] Some courts still reflexively apply *Auer* deference, while others have not heeded *Kisor*'s holding regarding respect for an agency's policy discretion.[349] This section offers explanations for the divergence among courts and offers an opinion for the best way to read *Kisor*.

Kisor, and the larger issue of deference to administrative agencies, will always be subject to disparate application because of two competing values: the duty of the judiciary to "say what the law is" and Congress's intent to

339. *See supra* note 118 and accompanying text.
340. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).
341. *Id.*
342. *Id.*
343. *Id.* at 2413.
344. Callahan v. U.S. Dep't of Health & Human Servs., 939 F.3d 1241, 1253 (11th Cir. 2019).
345. *See Kisor*, 139 S. Ct. at 2449 (Kavanaugh, J., concurring).
346. *See Callahan*, 939 F.3d at 1258.
347. *Id.*
348. *See supra* Part III.
349. *See supra* Parts III.B–C.

delegate policymaking authority to an agency. Courts that do not rigorously interpret a regulation before applying deference tend only to cite propositions from *Kisor* that reflect congressional intent. For example, the Third Circuit's opinion in *Wolfington*, perhaps the opinion with the lowest threshold for ambiguity, only cited references to *Kisor*'s holding about policy judgments.[350] In contrast, the Fourth Circuit in *Romero v. Barr* focused on quoting and referencing the portions of *Kisor* that prescribe thorough statutory interpretation.[351] The court never referenced the parts of *Kisor* that counsel respect and deference to an agency's policy decisions.[352] Moreover, as a matter of common sense, *Kisor* is difficult to interpret because each of the three concurring opinions offers a different opinion as to the meaning of the majority and plurality opinions.[353]

Many issues that reach the Supreme Court involve a doctrine that has two or more competing values. But *Auer* deference is unique because the competing values determine whether to apply the doctrine, not the content of the doctrine itself.[354] The first step to determine whether to apply the doctrine rests on a subjective determination—whether a regulation is "ambiguous."[355] And, as stated, the Supreme Court has never tried to define "ambiguity" for these purposes.

This problem, the lack of a definition for ambiguity, is the ultimate barrier to an effective deference regime. Even if all courts heeded the instruction in *Kisor* to empty their legal toolkits, there is no guidance on what to do after the toolkits are empty. Even if courts heed the new limitations on *Auer* deference that *Kisor* imposed, the lack of definition of "ambiguity" will still prevent the uniform application of *Auer* deference. As long as the Court remains silent on this issue, litigants can expect unpredictability in the application of *Auer* deference.[356]

E. Toeing the Line: The Proper Way to Interpret Kisor

How then shall we interpret *Kisor*? Admittedly, Justice Kagan repeatedly cabined the decision's change on *Auer* deference.[357] But the fundamental phrase from the opinion—"genuine ambiguity"—is unprecedented in case

350. *See* Wolfington v. Reconstructive Orthopaedic Assocs. II PC, 935 F.3d 187, 204 (3d Cir. 2019).

351. *See supra* note 255. Selective quotation or citation of different principles of *Auer* deference was a problem before *Kisor*. *See* Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 805 (2014) (stating that different circuits quote different parts of the rule statement from *Seminole Rock*).

352. *See supra* note 255 and accompanying text.

353. *See* Schofield v. Saul, 950 F.3d 315, 322 (5th Cir. 2020) (citing *Kisor*'s majority opinion, Justice Gorsuch's concurrence, and Chief Justice Roberts's concurrence to show how *Kisor* left the state of *Auer* deference undefined).

354. Kavanaugh, *supra* note 150, at 2134.

355. *Id.*

356. *See id.* at 2135 n.88 (explaining that few judges and scholars engage with the threshold problem of what constitutes ambiguity).

357. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2410 (2019).

law about *Auer* deference.[358] The Court's iteration of *Auer* in *Kisor* fundamentally shifts from the iteration of the rule in *Decker*.[359] Justice Anthony Kennedy stated that *Auer* deference can apply even if the agency's interpretation is not the best.[360] But the Court in *Kisor* stated that *Auer* deference is warranted only if there is "no single right answer."[361] Logically, if *Kisor* held that *Auer* deference is only appropriate if there is no right answer to an interpretative question, then a court cannot defer to an agency if the agency's interpretation is not the best one.[362] Therefore, it is best to conceive *Kisor* as a shift from the iteration in *Decker* to some extent.[363]

But the question is to what extent *Kisor* shifts from the iteration in *Decker*. If *Auer* deference is only applied when a court is otherwise convinced that the agency's interpretation is superior, then it makes no difference in any case.[364] For *Auer* deference to have vitality, it must be applied in situations where a court recognizes that the agency's interpretation is inferior to that of its adversary.[365] It would be improper to interpret *Kisor* to limit *Auer* deference to a meaningless doctrine after the Court took the opportunity to justify and uphold it.[366]

The best reading of *Kisor* is one that modifies the rule from *Decker* to the extent that the agency's interpretation is grounded in legal interpretation. If an agency has an inferior legal interpretation of a regulation, courts should never defer to it, even if the interpretive process leading to the right answer is long and exacting.[367] However, if an agency's interpretation of a regulation is based in policy,[368] and the policy it advances seems worse or disfavorable to the policy advanced by its adversary, courts should nonetheless defer to the agency. An interpretation of *Kisor* needs to reconcile the need for rigorous interpretation of regulations with the need to give appropriate deference to an agency's policy discretion.[369] This understanding of *Kisor* respects the distinction Justice Kagan reinforced

358. *Id.* at 2416.

359. *See supra* note 69 and accompanying text.

360. *See supra* note 69 and accompanying text.

361. *Kisor*, 139 S. Ct. at 2415.

362. If a court concludes that an agency's interpretation is inferior, then it has in fact come to an answer.

363. *See Kisor*, 139 S. Ct. at 2415.

364. *See id.* at 2430 (Gorsuch, J., concurring).

365. *See supra* note 154 and accompanying text.

366. *See supra* note 154 and accompanying text.

367. *See supra* Part II.B. "It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. . . . [T]o say that [an agency's view], if at least reasonable, will ever be *binding*—that is, seemingly, a striking abdication of judicial responsibility." Scalia, *supra* note 149, at 513–14.

368. One way to recognize that regulatory interpretation involves policy choices is if the resolution requires cost-benefit analysis, *see supra* note 117 and accompanying text, or if the regulation uses broad phrases like "reasonable," which allows the agency to pick among various permissible policy choices. *See* Kavanaugh, *supra* note 150, at 2154–55.

369. *See supra* Parts II.B–C.

between law and policy while retaining the doctrine's vitality and relevance.[370]

Moreover, this interpretation avoids the problem of the term "ambiguous" having no definition. Since *Auer* deference will never be applied to legal questions, courts will return to their normal interpretive function. Normally, courts use the tools of statutory interpretation to determine the meaning of a statute or regulation. They do not have to decide the overarching question of whether the provision being interpreted is ambiguous.[371] Nor should they. The duty of the judiciary is to "say what the law is," not to say "whether or not the law is ambiguous."[372] Instead, if the preferability of an agency's policy choice is ambiguous, courts should freely defer to them.

This interpretation also fits quite neatly with the cases previously discussed. The Eastern District of North Carolina and the Third Circuit improperly deferred to legal arguments, while the Eleven Circuit performed its own independent legal analysis.[373] The Fourth Circuit refused to defer to *policy* arguments, which should receive the most deference under *Kisor*.[374]

What constitutes "law" versus "policy" is where the struggle in lower courts should exist because, while Justice Kagan proffered that distinction, she offered no guiding principle for the two concepts.[375] The distinction is easier to understand in theory than in application. After all, modes of statutory interpretation include considering a statute or regulation's policy purpose. And Justice Kavanaugh's suggestion that courts should give policy discretion to agencies for regulations that use broad terms like "reasonable" is a useful starting point but not the entire answer.[376] When a court determines whether to apply deference, it must consider the fine distinction between policy and law without a clear definition from the Supreme Court about their meanings.

CONCLUSION

The issue of whether to apply *Auer* deference will continue to plague courts and litigants alike. While *Kisor* presented an opportunity to clarify the doctrine, early decisions interpreting the decision cast that hope into doubt. That is because lower courts, to uniformly apply deference regimes, need precedent on (1) how much ambiguity is necessary for a regulation to

370. *See supra* Part II.B. Justice Kavanaugh makes a very similar point in his 2016 book review. *See* Kavanaugh, *supra* note 150, at 2154 (arguing that agencies should receive deference when regulations use phrases like "reasonable" or "appropriate" but not when the interpretive question involves "a specific statutory term or phrase").

371. *See* Kavanaugh, *supra* note 150, at 2144 ("[J]udges should strive to find the best reading of the statute. They should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous. In other words, we can try to make sure that judges do not—or at least only rarely—have to ask whether a statute is clear or ambiguous in the course of interpreting it.").

372. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

373. *See supra* Parts IV.A, C.

374. *See supra* Part IV.B.

375. *See supra* Part II.B.

376. *See* Kavanaugh, *supra* note 150, at 2153–54.

be "genuinely ambiguous" and (2) the distinction between law and policy. Without further input from the Supreme Court on those two critical issues, *Auer* deference will be an uncontrollable doctrine that perpetually subjects litigants to uncertainty.