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Judicial Deference of the Board of Immigration Appeals' Regulatory Interpretations in Light of *Kisor v. Wilkie*

Melissa Fullmer

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COMMENT

JUDICIAL DEFERENCE OF THE BOARD OF IMMIGRATION APPEALS' REGULATORY INTERPRETATIONS IN LIGHT OF *KISOR V. WILKIE*

MELISSA FULLMER*

| | | |
|------|---|-----|
| I. | Introduction..... | 868 |
| II. | Administrative Law: A Primer | 871 |
| III. | Judicial Review in Immigration Cases..... | 872 |
| | A. Criticisms..... | 874 |
| IV. | <i>Kisor v. Wilkie</i> | 875 |
| | A. Factual Background of <i>Kisor</i> | 876 |
| | B. Arguments Presented | 876 |
| | C. The “New” <i>Auer</i> Deference..... | 878 |
| | D. The Court’s Reasoning..... | 879 |
| V. | <i>Kisor</i> and Immigration: Potential Implications | 880 |
| | A. <i>Auer</i> and the BIA Streamlining System | 880 |
| | B. The Final Rule | 882 |
| | C. The (Non)Interchangeability of <i>Chevron</i> versus <i>Auer</i> | 886 |

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| | |
|--|-----|
| 1. <i>Chevron</i> and <i>Auer</i> Deference as Applied in Immigration Cases | 886 |
| 2. The Significance of Mistaking <i>Auer</i> for <i>Chevron</i> | 892 |
| D. <i>Auer</i> and the Attorney General's Certification Authority | 894 |
| 1. <i>Matter of A-B-</i> | 895 |
| E. <i>Matter of Castro-Tumr</i> : Abrogated by the Fourth and Seventh Circuits | 897 |
| VI. Conclusion | 902 |

I. INTRODUCTION

Immigration law is notoriously unique. And in today's political climate, it is far too easy to forget that immigration law is *administrative* law. A hierarchy of administrative agencies adjudicate immigration cases, but unlike other agencies, the appeals process looks quite different for immigration proceedings. Regardless, as an administrative system, every landmark Supreme Court case affecting administrative law, like *Kisor v. Wilkie*,¹ necessarily welcomes change to immigration law. However, judicial deference in immigration is controversial as an astonishing number of appeals are decided by the Board of Immigration Appeals—the executive agency responsible for answering some of our nation's most hotly-contested issues.

Since its grant of certiorari by the Supreme Court, the administrative law community had eagerly awaited the outcome of *Kisor v. Wilkie*.² The Court revisited the scope of *Auer*³ deference—sometimes referred to as *Seminole Rock*⁴ deference—which for decades has guided courts to give broad deference to administrative agencies' interpretations of their own ambiguous regulations so long as they were not plainly inconsistent with the

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

2. *Id.*

3. *Auer v. Robbins*, 519 U.S. 452 (1997).

4. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

text.⁵ Not all have been thrilled with *Auer*'s tenure.⁶ Some critics opined that *Auer* granted administrative agencies too much power.⁷ Ironically, the late Justice Scalia, author of the *Auer* decision, believed it was time for the Court to review its decision.⁸ Others believed it severely undermined courts' authority to conduct hearings and form their own judgments.⁹ Regardless of their various reasons for opposing *Auer*, critics had this much in common—*Kisor* should finally lay the decades-old policy to rest.¹⁰

Conversely, some legal scholars passionately supported *Auer* for allowing administrative agencies to make decisions according to their well-founded expertise.¹¹ Supporters lauded the doctrine for being tried and true, attacking criticism as mere speculation.¹² Some claimed keeping *Auer* as the foundation for regulatory interpretation is crucial for preventing the inevitable parade of constitutional arguments against administrative laws.¹³ For *Auer* supporters, *Kisor* was an opportunity to maintain the status quo

5. See *Kisor*, 139 S. Ct. at 2405 (“Under [the *Auer*] doctrine, this Court has long deferred to an agency’s reasonable reading of its own genuinely ambiguous regulations.”).

6. See Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J.L. & PUB. POL’Y 625, 626–27 (2019) (advocating the Court seize the opportunity in *Kisor* to “retire” *Seminole Rock* deference).

7. *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, K., concurring) (providing the vehement criticism of The Honorable Judge Kent A. Jordan of the Third Circuit that *Auer* “spread the spores of the ever-expanding administrative state”).

8. See *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 616–17 (2013) (Scalia, J., dissenting) (criticizing the “unnatural” interpretation of an EPA regulation on the basis of *Auer*).

9. See Mark Chenoweth, *Chief Justice Roberts Is Dead Wrong About Auer Deference*, FORBES (Jun. 30, 2019, 3:20 PM) <https://www.forbes.com/sites/markchenoweth/2019/06/30/chief-justice-roberts-is-dead-wrong-about-auer-deference/#37882ccc5c67> [<https://perma.cc/CAD6-ZZ87>] (“*Auer* deference stands for the idea that judges must defer to federal agencies when interpreting those agencies’ regulations[.]”).

10. See Larkin & Slattery, *supra* note 6, at 626–27 (“In *Kisor v. Wilkie*, the Supreme Court has an opportunity this Term to correct its mistake in *Seminole Rock*. It should.”).

11. See Daniel E. Walters, *The Empty Case for Overruling Auer Deference*, THE REG. REV. (Dec. 11, 2018), <https://www.theregreview.org/2018/12/11/walters-empty-case-overruling-auer-deference/> [<https://perma.cc/9S5D-3EE4>] (complimenting *Auer* deference for giving agencies confidence in their “good faith [statutory] interpretations”).

12. See Ronald M. Levin, *Auer and the Incentives Issue*, YALE J. ON REG. (Sept. 19, 2016) <http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin/> [<https://perma.cc/3C6Z-WBT9>] (hailing *Auer*, older than the Administrative Procedure Act itself, as a “venerable doctrine”); see also Walters, *The Self-Delegation False Alarm*, *supra* note 11, at 92 (reporting *Auer* deference did not encourage agencies to purposefully create ambiguous regulations in hopes of being afforded blind deference from the courts).

13. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 299 (2017) (insisting the use of “heavy constitutional artillery” would lead to the dismantling of numerous federal agencies).

and leave administrative agencies responsible for interpreting their own rules.

Ultimately, it was the *Auer* loyalists who had cause to celebrate.¹⁴ However, this victory was not unconditional.¹⁵ That Court took the opportunity to “reinforce [*Auer*’s] limits” and qualify when deference is to be granted or denied.¹⁶ In her opinion, Justice Kagan gave a sobering reminder: “The deference doctrine we describe is potent in its place, but cabined in its scope.”¹⁷ Ultimately, the *Kisor* decision reinforces *Auer*’s limits so much that some say it has been thoroughly “gut[ted].”¹⁸

The heated discussion surrounding *Kisor* was not unwarranted. Simply put, administrative law is a vast area of law that affects all those within the country.¹⁹ On that same note, administrative law also impacts those who wish to *enter* the country.²⁰

This Comment will discuss judicial deference as applied to immigration law before and after *Kisor*. Part II will review the history of administrative law in the United States and how it has expanded over several decades. Part III will briefly summarize the structure of immigration law and how it has historically limited judicial review. Part IV will summarize *Kisor*—its factual background, arguments by its parties, and holding. Following the discussion of *Kisor*, Part V of this Comment will assess the implications of its holding on the large, crucial area of administrative law that is immigration, particularly regarding the Attorney General’s certification review powers and recently promulgated regulations. This Comment will draw comparisons between *Chevron* and *Auer* in the review of judicial deference trends in immigration. Further, though controversial, *Kisor* serves as an important tool for the circuit courts to consistently adjudicate immigration decisions and limit deference granted to the executive branch.

This Comment predicts that *Kisor*’s holding will bring *Auer* deference to the forefront of judicial deference doctrines—welcoming an influx of *Auer*

14. See *Kisor*, 139 S. Ct. at 2408 (affirming *Auer* deference).

15. *Id.*

16. *Id.*

17. *Id.*

18. William Yeatman, *The Auer Doctrine Suffers Pyrrhic Victory in Kisor v. Wilkie*, CATO INST. (June 27, 2019, 10:39 AM), <https://www.cato.org/blog/auer-doctrine-suffers-pyrrhic-victory-kisor-v-wilkie> [https://perma.cc/ZQ4E-5CFA].

19. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 1–2 (3d ed. 2014).

20. Department of Justice, *Organizational Chart*, <https://www.justice.gov/agencies/chart> [https://perma.cc/ZN4E-BJNY] (providing immigration cases that are adjudicated by the Department of Justice’s Executive Office of Immigration Review).

challenges to the federal courts. Further, it is expected that the federal courts will defer to the Board of Immigration Appeals and the Attorney General less frequently now that *Kisor* has reinforced *Auer*'s limits.

II. ADMINISTRATIVE LAW: A PRIMER

The state of current administrative law is far from what was conceivable at its inception in the eighteenth century.²¹ Today, regulations are overseen, executed, and adjudicated through a complex web of executive departments and independent commissions.²²

As famously described by Justice Breyer, administrative agencies are “*quasi* legislative and *quasi* adjudicative,” but never to be confused for being either in totality.²³ Legislative agencies’ powers are delegated and restricted by Congress.²⁴ The non-delegation doctrine generally prevents Congress from divesting itself of its legislative power.²⁵ Moreover, the checks-and-balances system of our government intends to prevent agencies from becoming a “fourth branch of government,” though whether this has been accomplished has been a point of contention over the course of several decades.²⁶ This conversation is especially prevalent in immigration law due to immigration law’s separation from “mainstream constitutional norms.”²⁷

21. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) (explaining the Founders’ goal of maintaining “a handful of cabinet departments” to help efficiently run the government).

22. *Id.* at 584 (providing a list, created by Strauss, of several examples of how regulations are administered—including the Department of Labor’s oversight of the Occupational Safety and Health Administration (OSHA), an executive agency, and the Occupational Safety and Health Review Commission, an independent commission).

23. *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 774 (2002) (Breyer, J., dissenting).

24. See Strauss, *supra* note 21, at 581–82 (providing a brief of the governmental origins and structure of administrative agencies).

25. See U.S. CONST. art. 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States[.]”).

26. See *Fed. Trade Comm’n v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (“[Administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.”) (Jackson, J., dissenting).

27. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584 (2017); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548 (1990) (coining the term “subconstitutional immigration law” in reference to the “interpretation . . . of [immigration] statutes, regulations, administrative guidelines, and the like”).

III. JUDICIAL REVIEW IN IMMIGRATION CASES

Immigration law involves a complex interaction across various administrative executive agencies, including the Department of Homeland Security (DHS), the Department of Justice (DOJ), and U.S. Citizenship and Immigration Services (USCIS).²⁸ This Comment focuses on the DOJ, led by the Attorney General, which handles the adjudication of immigration removal proceedings.²⁹ Within the DOJ is the Executive Office for Immigration Review (EOIR), which employs Immigration Judges (IJs) to interpret and adjudicate removal proceedings pursuant to the Immigration and Nationality Act (INA) and the Code of Federal Regulations (CFR).³⁰ The CFR, promulgated by the Attorney General, entrusts the power to answer interpretative issues with him or herself.³¹ Within the EOIR, IJs serve as extensions of the Attorney General and issue final decisions on his or her behalf.³²

The EOIR's appellate body is the Board of Immigration Appeals (BIA or the Board), which consists of twenty-one attorneys, appointed by the Attorney General "to act as the Attorney General's delegates in the cases that come before them."³³ As an appellate body, the BIA's purpose is to "provide clear and uniform guidance" of immigration laws.³⁴

The CFR delegates the BIA power to act in accordance with the INA "as is appropriate and necessary" for a case on review.³⁵ If the Board wishes to create binding precedent on meanings of "laws, regulations, or procedures," the Code allows for panel decisions, which are adjudicated by three members.³⁶ These panel decisions are also used in other circumstances, including addressing inconsistencies and reviewing "clearly erroneous factual determination[s] by . . . Immigration Judges."³⁷

28. See Department of Justice, *Organizational Chart*, <https://www.justice.gov/agencies/chart> [<https://perma.cc/ZN4E-BJNY>] (providing a visual aid depicting the hierarchy within the DOJ).

29. See *id.* (depicting the organizational structure of the DOJ, headed by the Attorney General).

30. 8 U.S.C. §§ 1101–1701 (2019).

31. See 8 C.F.R. § 1003.1(a)(1) (2019) (expressing the Attorney General's duties and power to delegate power to the DOJ); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 138 (2019).

32. Martin S. Krezalek, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA's Ability to Affirm Without Opinion*, 21 GEO. IMMIGR. L.J. 277, 284 (2007).

33. 8 C.F.R. § 1003.1 (2019).

34. *Id.* § 1003.1(d)(1).

35. *Id.* § 1003.1(d)(1)(ii).

36. *Id.* § 1003.1(a)(3). The significance of these panel decisions will be discussed further *infra*.

37. *Id.* § 1003.1(e)(6)(i)–(v).

Historically, the general trend among federal courts has been to afford great deference to agents within the DOJ.³⁸ Immigration cases reviewable by the federal Courts of Appeals were significantly limited by the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA or the Act).³⁹ The IIRIRA is largely responsible for how the country adjudicates immigration cases today.⁴⁰ Foremost, the Act boosted the status of IJs from “special inquiry officer[s]” within Immigration Naturalization Services (INS) to administrative judges within EOIR.⁴¹ Additionally, the IIRIRA combined exclusion proceedings with deportation proceedings to form what are now known as “removal proceedings.”⁴² The IIRIRA is also to thank for expedited removal proceedings for respondents lacking the “credible fear” necessary to seek asylum.⁴³ Strikingly, Article III courts were barred from reviewing denials of discretionary relief, granting IJs more discretion than ever.⁴⁴ The amendments made to the INA were—and still are—controversial for significantly altering immigration procedures.⁴⁵ The degree to which the IIRIRA divested the circuit courts

38. See, e.g., *Chen v. I.N.S.*, 87 F.3d 5, 7–8 (1st Cir. 1996) (affirming the BIA’s ability to exercise “independent review” of an Immigration Judge’s findings without elaborate explanation, in accordance with the “administrative appeal” of immigration law).

39. See generally Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1242) (modifying definitions in the INA and limiting judicial review of immigration cases); see also M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1557–60 (1997) (narrating the appellate procedure of immigration cases before and after the IIRIRA).

40. See Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. 923, 926–27 (2006) (listing the measures in which the IIRIRA changed the immigration system).

41. *Id.* at 938; Krezalek, *supra* note 32, at 283 (evidencing the INS—which is now known as DHS, Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP)—was partitioned into several agencies in response to the terrorist attacks on September 11, 2001).

42. See Grant, *supra* note 40, at 927 (listing the measures in which the IIRIRA changed the immigration system).

43. *Id.* at 933 (evidencing expedited removal was created to allow for more efficiency because a respondent “could be ordered removed without a hearing . . . thus clearing judges’ dockets of numerous and essentially uncontested matters”).

44. See Medina, *supra* note 39, at 1526 (asserting the executive branch’s dominance in post-IIRIRA immigration proceedings “upset [the constitutional balance preserved by the separation of powers principle] to an untenable degree”).

45. See, e.g., Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. ON MIGRATION & HUM. SEC. 356 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/233150241700500207> (criticizing the IIRIRA for imposing substantial burdens on applying for asylum and contributing to a “record high” backlog of immigration cases).

has been criticized as an “attempt[] to eliminate Article III review of agency decisions” under several types of immigration cases.⁴⁶ Arguably, such divestment is more than the traditional level of deference granted to an executive agency.

In 2005, Congress introduced the REAL ID Act, which similarly limited the types of cases reviewable by federal courts.⁴⁷ The REAL ID Act was enacted in response to the Supreme Court’s decision in *I.N.S. v. St. Cyr*,⁴⁸ which held Article III courts had jurisdiction to rule on legal issues for the respondent’s petition for habeas corpus without any limitations from the IIRIRA or Antiterrorism and Effective Death Penalty Act (AEDPA).⁴⁹ The Court, after thorough analysis of legislative intent, determined the INS failed to “overcome . . . the strong presumption in favor of judicial review of administrative action.”⁵⁰ The REAL ID Act not-so subtly disagreed with the Court’s holding in *St. Cyr*.⁵¹ However, the REAL ID Act compromised by allowing judicial courts to review: (i) the constitutionality of a statute or regulation, or (ii) the legality of the Attorney General’s decisions.⁵²

A. Criticisms

The Legislature has gone to great lengths to protect the level of deference granted to immigration agencies.⁵³ The BIA’s discretion was even once described as “unfettered at the outset.”⁵⁴ Some scholars speculate this level

46. Medina, *supra* note 39, at 1525.

47. 8 U.S.C. § 1252 (2005).

48. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

49. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, 110 Stat. 1214; *see also* Aguilar v. U.S. Immigr. & Customs Enft Div. of the Dep’t of Homeland Sec., 510 F.3d 1, 9 (1st Cir. 2007) (“[Through enacting the REAL ID Act,] Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.”); *St. Cyr*, 533 U.S. at 314.

50. *St. Cyr*, 533 U.S. at 314.

51. Krezalek, *supra* note 32, at 286–87 (describing the REAL ID Act provision withholding jurisdiction from habeas corpus review as a “direct response” to *St. Cyr*); *see also St. Cyr*, 533 U.S. at 327 (Scalia, J., dissenting) (absconding the Court for “find[ing] ambiguity in the utterly clear language of a statute” that restricts all courts’ power to review issues of respondents “found deportable by reason of their criminal acts”).

52. 8 U.S.C. § 1252(e)(3)(A)(i)–(ii).

53. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (“Of course many provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.”).

54. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

of congressional deference given to the BIA is especially worrisome.⁵⁵ Furthermore, immigration law has a reputation for being prosecutorial in nature, in contrast to other administrative law forums.⁵⁶ This raises special concerns as to whether deference should truly be so broad.⁵⁷ Also, consider the structural makeup of the DOJ and its sub-agencies; the same regulations that grant authorities to the Attorney General are created by the Attorney General.⁵⁸ One need not be a constitutional law aficionado to question whether such power is appropriate in our checks-and-balances system. Nevertheless, such concerns have historically had little sway.⁵⁹

Likewise, before *Kisor*, *Auer* deference was controversial for bestowing “reflexive” deference to agencies with little analysis.⁶⁰ Statistics tend to portray *Auer* as the most generous judicial deference doctrine, calling into question whether deference was truly warranted in the ninety percent of cases *Auer* was granted in.⁶¹ The following summary is *Kisor*’s response to those concerns.

IV. *KISOR V. WILKIE*

The concept of regulatory deference did not originate in *Auer*. The doctrine first appeared in *Seminole Rock*, which *Auer* affirmed two decades later.⁶² *Auer* adopted the “plainly erroneous or inconsistent” language from

55. *E.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (“The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still.”).

56. *Cf.* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 826–27 (2018) (“Although a deterrence strategy might be permissible in the criminal justice system, courts have made clear that it may not motivate the civil immigration system.”).

57. *See* Sweeney, *supra* note 31, at 138 (“Former BIA Member Lory Rosenberg regards these twin powers as giving the Attorney General ‘an exclusive level of authority over the course of immigration law and policy[.]’”).

58. *See* 8 U.S.C. § 1103(a)(3) (2000) (outlining the rights and duties of the Attorney General under immigration law).

59. *See, e.g.*, *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (upholding the Attorney General’s authority to promulgate streamlining regulations pursuant to his “broad discretion . . . to fashion the procedures of the BIA”).

60. *Kisor*, 139 S. Ct. at 2415 (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)).

61. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (comparing the percentages of cases in which agencies prevailed under different judicial deference doctrines, with *Auer* being granted the most).

62. Larkin & Slattery, *supra* note 6, at 625.

Seminole Rock, but *Auer* went further to say that an agency interpretation can be found in unexpected places—like an amicus brief—so long as it reflected the agency's "fair and considered judgment."⁶³ Since *Auer*, federal courts have invoked the doctrine when deciding whether to defer to an agency's regulatory interpretation.

A. *Factual Background of Kisor*

Kisor began as a suit between Kisor, a Vietnam War veteran, and the Department of Veteran Affairs (VA), after the VA denied him PTSD benefits for the time he requested.⁶⁴ The Board of Veteran's Appeals (the Board) interpreted the VA's regulations to only "grant Kisor retroactive benefits if it found there were 'relevant official service department records'" unconsidered in the first suit.⁶⁵ Finding Kisor's new records irrelevant to the initial denial, the Board affirmed the VA's decision.⁶⁶ The Board's decision was again affirmed by the Court of Appeals for Veteran's Claims, "an independent Article I court that initially reviews the Board's decisions."⁶⁷

The Federal Circuit deferred to the Board's interpretation, describing the VA's regulation "ambiguous" as to whether "relevant" records must support the agency's reasons for denial or the veteran's claim in its entirety.⁶⁸ Applying *Auer* deference, the Federal Circuit reasoned the VA's own construction of its own regulation was not "plainly erroneous or inconsistent with the VA's regulatory framework."⁶⁹ This action inspired Kisor to file for certiorari and pray the Supreme Court overrule *Auer*.⁷⁰

B. *Arguments Presented*

Kisor's argument in favor of overruling *Auer* and *Seminole Rock* was largely policy-based. Primarily, Kisor challenged *Auer* for allowing agencies to have "expansive, unreviewable lawmaking authority."⁷¹ According to Kisor,

63. *Bowles*, 325 U.S. at 414; *Auer*, 519 U.S. at 462.

64. *Kisor*, 139 S. Ct. at 2409.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Kisor*, 139 S. Ct. at 2409.

71. Brief for Petitioner at 25, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–15), 2019 WL 338890.

Auer should not have survived Congress's enactment of the Administrative Procedure Act (APA), which mandated the "procedural checks on agency rulemaking" known as "notice-and-comment."⁷² Generally, "notice-and-comment" requires agencies to publish their proposed rules in the Federal Register.⁷³ Following the publication, "interested persons" are allowed to comment on the rule by submitting "data, views, or arguments."⁷⁴ Agencies are allowed to incorporate the rule with a "general statement of their basis and purpose" only after this procedure.⁷⁵ Kisor argued *Auer* allowed agencies to issue binding interpretations without enduring "notice-and-comment," "thus gut[ting] . . . the heart of the APA."⁷⁶ Kisor additionally contended that allowing an agency's regulatory interpretation to become binding contravened other Court rulings precluding deference to interpretive rules.⁷⁷ Further, Kisor boldly argued that *Auer* deference contradicted the government's separation-of-powers system, analogizing Congress's limitation from interpreting its own enactments to support the conclusion that agencies should not interpret their own rules.⁷⁸

The Respondent took a practical approach in support of *Seminole Rock* and *Auer*. Rather than generally advocating for *Auer* deference as it has existed, the Solicitor General agreed the doctrine contained flaws and thus requested the Court to limit *Auer* to "certain prerequisites," many of which were used for *Chevron*⁷⁹ deference.⁸⁰ The Respondent argued that "more drastic changes" to judicial deference and the APA should be left to Congress. Further, the Respondent raised *stare decisis* as another defense to overruling *Seminole Rock*.⁸¹

72. *Id.*

73. 5 U.S.C. § 553(b)–(d) (1966).

74. *Id.* § 553(c).

75. *Id.*

76. Brief for Petitioner at 30.

77. *Id.* at 31–33 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding interpretive rules "enjoy no *Chevron* status as a class").

78. *Id.* at 43–45.

79. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

80. See Brief for Respondent at 27, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–25), 2019 WL 929000 (arguing "[b]ecause *Seminole Rock* does not clearly flow from pre-APA history or the APA," *Auer* deference should be subject to limitations similar to those imposed by the Court for *Chevron*).

81. *Id.* at 35.

C. *The "New" Auer Deference*

Indeed, the Court remained convinced *Auer* was a necessary part of administrative law.⁸² But to quell the fears of its opposers—that the administrative state would reign as an unsupervised “fourth branch” of our federalist system—the Court reinforced *Auer*’s limits.⁸³ After the reviewing court “exhaust[s] all the ‘traditional tools’ of construction,” an agency regulation must be found to be “genuinely ambiguous.”⁸⁴ At first blush, this step sounds simple enough. But determining the genuine ambiguity of a regulation first requires a thorough inquiry into “the text, structure, history, and purpose of a regulation.”⁸⁵ The Court reassured this is not a “rigid test,” but simply a variety of factors to be considered.⁸⁶ Additionally, the interpretation must be reasonable or “within the zone of ambiguity” remaining after the textual, historical, and structural inquiry.⁸⁷ Still, reasonableness does not guarantee *Auer* deference; the agency must *deserve* deference.⁸⁸ This in itself requires yet another inquiry: whether the interpretation was an actual position taken by the agency versus an “ad hoc statement.”⁸⁹ Once an official position is found, courts must determine the interpretation falls within the purview of the agency’s special expertise.⁹⁰ Even then, certain provisions may be found to be more appropriately handled by an Article III judge.⁹¹

The *Auer* analysis does not end there. An agency’s interpretation must “reflect ‘fair and considered judgment’” and cannot create “unfair surprise”

82. See *Kisor*, 139 S. Ct. at 2423 (holding despite changes to the administrative state since *Seminole Rock*, administrative agencies should still “have leeway to say what [ambiguous terms] mean”).

83. See *id.* at 2414–18 (delineating criteria that must first be satisfied before affording agencies *Auer* deference).

84. *Id.* at 2415.

85. *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991)); see *Kisor*, 139 S. Ct. at 2415 (providing the optimistic continuation of Justice Kagan that this “careful consider[ation]” will settle many ambiguities before *Auer* deference is needed).

86. *Id.* at 2414.

87. *Id.* at 2416.

88. *Kisor*, 139 S. Ct. at 2416.

89. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 257–59 (2001)) (clarifying this official position must “at the least emanate” from official actors, if not from the heads themselves).

90. *Id.* at 2417.

91. See *id.* (suggesting questions regarding common-law property, attorneys’ fees, or judicial review should be answered by a judge).

to the litigating parties.⁹² In the end, what appeared to be a simple rule on its face is indeed a multi-factor test, which should comfort its detractors.⁹³

D. *The Court's Reasoning*

Deciding whether to retire *Auer* deference was no easy decision for the Court; *Auer* was upheld with five votes—one of which was the Chief Justice's vote based solely on stare decisis.⁹⁴ Though it was a close decision, the Court upheld *Auer* deference for several reasons, dismantling each of Kisor's arguments:

First, *Auer* deference did not conflict with the APA because of the numerous steps a court must take before deferring.⁹⁵ On the contrary, the Court concluded it was actually consistent with the APA.⁹⁶ The absence of a notice-and-comment procedure for interpretive rules was rendered harmless because the federal courts reserve the ultimate approval of the agency's interpretation.⁹⁷

Next, any claim that *Auer* infringes upon separation-of-powers was determined to be misplaced. The Court rationalized that an agency's blend of legislative and judicial powers is ultimately an executive power that has been permissible since our government's origins.⁹⁸ Additionally, without a compelling reason against it, stare decisis controls.⁹⁹ The history of precedent relying on *Seminole Rock* and *Auer* was believed far too great to overrule each one.¹⁰⁰ The Court confidently added that even if its rationale was wrong, Congress could always overrule the doctrines by revising the

92. *Id.* at 2418 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

93. *See Kisor*, 139 S. Ct. at 2418 (“What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.”).

94. *Id.* at 2425 (Gorsuch, J., concurring).

95. *See id.* at 2419 (quoting Brief for Petitioner at 29, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15), 338890) (reemphasizing the procedure of “meaningful judicial review”).

96. *See id.* at 2420 (citing 5 U.S.C. § 706 (2020)) (reasoning *Auer* deference assists courts in their duty to “determine the meaning” of a rule by pointing out that *Seminole Rock* is older than the APA itself).

97. *Id.* at 2421.

98. *Kisor*, 139 S. Ct. at 2422 (citing *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 304–05 (2013)).

99. *Id.*

100. *Id.*

APA.¹⁰¹ Regardless of how much the administrative state had changed, the Court held *Auer* stood the test of time for good reason.¹⁰²

V. *KISOR* AND IMMIGRATION: POTENTIAL IMPLICATIONS

As stated in *Kisor*, *Auer* deference is intended to “ensure consistency in federal regulatory law.”¹⁰³ In response to *Auer* skeptics, Justice Kagan humorously questioned whether there is “anything to be said for courts all over the country trying to figure out what makes for a new active moiety?”¹⁰⁴ Indeed, it is hard to fight the notion that delegating the duty of interpreting agency regulations to Article III judges would inevitably lead to “piecemeal” litigation and inconsistent results—at least when it comes to active moieties.¹⁰⁵ But immigration law presents its own unique challenges, and *Kisor* is largely silent on the matter.¹⁰⁶ Now that *Kisor* is controlling precedent in administrative law appeals—and consequently, immigration appeals to the BIA—*Kisor* will be the case of choice for judicial review of the BIA’s regulatory interpretations.¹⁰⁷

A. *Auer* and the BIA Streamlining System

In 1999, in the midst of the drastic changes to immigration proceedings, the DOJ introduced amendments to the BIA’s appellate review process,

101. *Id.* at 2422–23.

102. *See Kisor*, 139 S. Ct. at 2423 (lauding how *Auer* deference has withstood Congress’ second-guessing “for approaching a century”).

103. *Id.* at 2414.

104. *Id.*

105. *Id.* at 2413–14 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

106. *See generally Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (failing to include a discussion of BIA interpretations); *Kisor*, 139 S. Ct. at 2449 n.3 (citing one immigration case, amongst over a dozen in Justice Gorsuch’s concurrence, within a footnote to demonstrate the large volume of pre-*Auer* decisions applying *Seminole Rock* deference).

107. For example, before *Kisor*, the Sixth Circuit questioned whether *Pereira v. Sessions* implied the BIA’s interpretation of 8 C.F.R. § 1003.14(a) is undeserving of deference, but the court ultimately decided to defer. *See Hernandez-Perez v. Whitaker*, 911 F.3d 305, 313–14 (6th Cir. 2018) (quoting *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 445 (BIA 2018)) (noting regulations dictating the contents of a “charging document” are ambiguous because they do not “specify the time and date of the initial hearing before jurisdiction will vest”); *see also Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019)) (agreeing the BIA deserved “substantial deference” for its interpretation of its own regulation in *Bermudez-Cota*). *But see United States v. Cortez*, 930 F.3d 350, 366 (4th Cir. 2019) (disagreeing any ambiguity existed by stating “the regulations . . . unambiguously *do* create a dichotomy between the notice that must be given to a noncitizen under statutory § 1229(a) and the information that must be provided to an immigration court to commence proceedings under regulatory § 1003.14(a)”).

known as “streamlining.”¹⁰⁸ In response to the “enormous and unprecedented” backlog of cases presented to the BIA, the DOJ proposed single-member affirmances without opinion (AWOs) and AWOs by panel’s when “appropriate.”¹⁰⁹ Appropriate circumstances included, among others, cases based on the BIA’s precedent “where there is no basis for overruling the precedent” or precedent of certain Article III courts.¹¹⁰ Three-member panel decisions were to be reserved for cases at reasonable risk of reversible error.¹¹¹

In 2002, regulations were amended to bolster the use of AWOs.¹¹² What was once used at the BIA’s discretion became mandatory where: the “decision under review was correct”; only “harmless or nonmaterial” errors occurred, if any; the issue could be absolved by existing precedent.¹¹³ The 2002 promulgation reinforced that “there is no statutory right or law requiring a particular form of decision or method of review before the BIA.”¹¹⁴

The streamlining system is unsurprisingly subject to criticism.¹¹⁵ The streamlining procedure not only affected how deportation procedures were argued by respondents’ attorneys but also encouraged attorneys to “reflexively file petitions for review.”¹¹⁶ Indeed, statistics showed a spike in BIA appeals in all circuit courts, which began after the amendments in

108. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135, 56138 (codified at 8 C.F.R. § 1003.1(a)(7)) (Oct. 18, 1999) [hereinafter Streamlining] (evidencing the streamlining procedure also settled a circuit split as to whether Due Process required the BIA to explain their reasons for a decision adequately).

109. *Id.* at 56135–36 (establishing an AWO consists of a signed affirmance without further explanation).

110. *Id.*

111. *Id.*

112. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002) [hereinafter Procedural Reforms] (amending streamlining procedures).

113. *See* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463, 31464 (codified at 8 C.F.R. 1003, 1292) (July 2, 2019) [hereinafter Affirmance Without Opinion] (comparing 8 C.F.R. 3.1(a)(7)(ii) (instructing that a single BIA member “may” issue an AWO) with 8 C.F.R. 1003.1(e)(4) (2003) (instructing that a single BIA member “shall” issue an AWO under certain circumstances)).

114. *Id.* at 31465 (citing Procedural Reforms, *supra* note 112, at 54883, 54888–90).

115. John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 87 (2005).

116. *See id.* (observing respondents adapted to “fight[ing] tooth and nail on every legal issue” due to the high stakes of removal proceedings and little chance for judicial review).

2002 were promulgated.¹¹⁷ Most astonishing are the numbers reported by the Ninth Circuit in 2004: the court witnessed a “560% increase in immigration appeals since 2001” and nearly half of its docket consisted of only immigration cases.¹¹⁸

Like prior attempts at expanding immigration agency authority, the streamlining rule heard constitutional objections.¹¹⁹ In response to concerned comments, the DOJ’s rationalization boiled down to the need for efficiency considering the staggering caseload presented to a board of twenty-one members.¹²⁰ Threats to due process were determined to be rare and, for the most part, the DOJ argued constitutional rights would be protected by existing procedural guidelines.¹²¹ Particularly, the streamlining process protected due process because it still allowed respondents’ cases to be heard by an IJ and to “present arguments to the BIA.”¹²² Thus, IJs issue final agency orders, which are only reviewable based on whether the IJ correctly applied a statute.¹²³ Still, some commentators predicted the inevitability of inconsistent results and administrative inefficiency.¹²⁴

B. *The Final Rule*

A new regulation promulgated by EOIR appears to preemptively protect the BIA from *Kisor* scrutiny by broadening the definition of the agency’s fair and considered judgment. However, this effort will likely prove ineffective.

In response to the EOIR’s enormous backlog, the DOJ published a proposed regulatory change to “amend the Department of Justice (Department) regulations regarding the administrative review procedures of

117. Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1001–02 (2006).

118. *Id.* at 1002.

119. See Streamlining, *supra* note 108, at 56137 (summarizing comments on the proposed rule, including citations to the Fifth Amendment’s Due Process Clause).

120. *Id.* at 56136.

121. *Id.* at 56138.

122. Drew Marksity, Comment, *Judicial Review of Agency Action: Federal Appellate Review of Board of Immigration Appeals Streamlining Procedure*, 76 U. CIN. L. REV. 645, 655–56 (2008); see Affirmance Without Opinion, *supra* note 113 (citing circuit court cases affirming “that respondents have no constitutional or statutory right to a particular form or manner of a BIA decision”).

123. Marksity, *supra* note 122, at 655.

124. See Palmer, *supra* note 115, at 30–31 (2005) (discussing various criticisms against single member decisions, including more chance for error, inconsistent opinions, and diminished credibility).

the [BIA],” just days after the Court issued *Kisor*.¹²⁵ This proposal, known as the “final rule” intended to:

- (i) Promote single-member written opinions instead of AWOs when reviewing IJ decisions;¹²⁶
- (ii) Employ panel decisions for “complex, novel, unusual, or recurring issue[s] of law or fact”;¹²⁷
- (iii) If passed by a majority vote of permanent BIA members, permit panel decisions to become precedential.¹²⁸

The DOJ explained the Final Rule is intended to “secur[e] finality in immigration cases” or in other words, minimize the overwhelming number of appeals brought before the BIA.¹²⁹ A similar effort was first proposed in 2008, suggesting panel decisions could become precedential through panel members’ votes.¹³⁰

This was suggested in response to the Board’s concern that not enough precedent could be issued due to the vast majority of cases resolving through AWO or panel decision.¹³¹ With more precedent, the proposal suggested, the BIA and the Attorney General could “reclaim” the *Chevron* deference to which it was entitled.¹³² Particularly in light of *United States v. Mead*,¹³³ which held *Chevron* cannot be applied to statutory interpretations lacking the force of law, precedent was thought essential to “promote national uniformity and obtain *Chevron* deference for the Board’s interpretive decisions.”¹³⁴

The Final Rule found the current system satisfactory; thus, the DOJ decided not to allow three-member panels to establish their own

125. Affirmance Without Opinion, *supra* note 113, at 31463.

126. *Id.*

127. *Id.*

128. *Id.* at 31468.

129. *Id.* at 31464.

130. *Id.* at 34659–60.

131. *See id.* (stating the importance of issuing precedent for encouraging consistent IJ decisions).

132. *Id.* at 34661.

133. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

134. Affirmance Without Opinion, *supra* note 113, at 34660 (citing *Mead Corp.*, 533 U.S. at 226–27 (2001)).

precedent.¹³⁵ This may have been because the original proposal received nationwide opposition.¹³⁶ Despite this, the Final Rule maintained the mandatory use of AWOs—thus indicating the EOIR choice to forego the three-member vote method of establishing precedent does not mean the agency is no longer concerned with receiving appropriate judicial deference. The Final Rule states:

As discussed above, the Attorney General expects that the BIA will continue to exercise its authority to issue precedent decisions as widely as is practicable to promote the consistency and uniformity of adjudications and to provide authoritative nationwide guidance to the immigration judges . . . and the federal courts *with respect to the interpretation of ambiguous provisions of the immigration statutes and regulations*¹³⁷

Oddly, the EOIR chose not to adopt the amendment most likely to effectively garner more precedential weight for panel decisions while still adhering to the use of single-member, unwritten decisions.¹³⁸ However, it is precisely the use of AWOs that garners criticism for failing to provide guidance and resulting in inconsistencies.¹³⁹ After all, the federal courts have already recognized that single-member decisions do not warrant judicial deference.¹⁴⁰ Understandably, the overwhelmingly large caseload demanded the use of “abbreviated order[s],”¹⁴¹ but the reviewing courts

135. See *Affirmance Without Opinion*, *supra* note 113, at 31468 (electing to maintain “the process of a majority vote of permanent members of the BIA and not, as initially proposed, by majority vote of the permanent BIA members assigned to a three-member panel”).

136. See Am. Immigr. L. Found., *Re: Comments on Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*; EOIR Docket No. 159P, 12 (Aug. 18, 2008), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/BIAAWO-regcmts.pdf [<https://perma.cc/W2JL-8Z7F>] (challenging the proposed rule and dismantling EOIR’s argument that reclaiming *Chevron* is necessary).

137. See *Affirmance Without Opinion*, *supra* note 113, at 31469 (emphasis added).

138. *Id.* at 31468.

139. See *Marksity*, *supra* note 122, at 658 (describing “the complexity that can arise for appeals courts when trying to balance deference to agencies with the party’s right to receive a just hearing” in immigration appeals pertaining to single member opinions and AWOs).

140. See *Lezama-Garcia v. Holder*, 666 F.3d 518, 524–25 (9th Cir. 2011) (holding an unwritten single-member BIA opinion is not the fair and considered judgment of the agency).

141. *Affirmance Without Opinion*, *supra* note 113, at 31464 (evidencing the Final Rule urges the use of AWOs are not intended to “reflect an abbreviated review,” only the use of an “abbreviated order”).

will not change their minds about AWOs any time soon—especially after *Kisor*.¹⁴²

Immigration attorney and former Immigration Judge Jeffrey Chase castigated the Final Rule for pressuring the BIA's staff attorneys into issuing AWOs for complex legal issues more appropriately handled by written opinion—all to meet their monthly quotas.¹⁴³ This essentially amounts to “an abbreviated review of the case,” contrary to the DOJ's promise.¹⁴⁴ Chase further criticized that “through the new regulations, the Department of Justice is essentially saying that, due to the crushing case load, just trust that it is doing everything correctly, and defer to its two-sentence boilerplate decisions without requiring further explanation of its reasoning.”¹⁴⁵

Chase's comments echo those made by the Court in *Mead*, where it refused to grant *Chevron* deference to rulings released at a pace similar to the BIA.¹⁴⁶ This indicates that, despite EOIR's former efforts to “reclaim” *Chevron* deference, the Final Rule fails to provide a means for guaranteed judicial review.¹⁴⁷ Additionally—assuming it is true the BIA's staff attorneys are foregoing written opinions on complex legal issues to meet a quota—any regulatory interpretations resulting from this practice may be found to constitute “convenient litigating position[s]” unworthy of *Auer* deference.¹⁴⁸

142. See *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (“Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care . . . can be understood, but not excused, as consequences of a crushing workload[.]”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (applying *Auer* deference).

143. Jeffrey S. Chase, *EOIR's Troubling New Regulations*, OPINIONS/ANALYSIS ON IMMIGR. L. (July 5, 2019), <https://www.jeffreyschase.com/blog/2019/7/5/eoirs-troubling-new-regulations> [<https://perma.cc/9BP6-CCDJ>].

144. *Id.* (citing *Kadia*, 501 F.3d at 820).

145. *Id.*

146. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 233 (2001) (“Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.”); see Chase, *supra* note 143 (“The BIA has certainly not earned the deference the Department of Justice believes it deserves based on the regulatory presumption.”).

147. See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34654, 34661 (June 18, 2008).

148. *Kisor*, 139 S. Ct. at 2418 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)).

C. *The (Non)Interchangeability of Chevron versus Auer*

Notably, in its 2002 amendments, the DOJ intentionally allowed for panel decisions to “establish precedent construing the means of laws, regulations, or procedure”—explicitly including both *Chevron* steps.¹⁴⁹

However, immigration appeals also implicate regulatory interpretation challenges, which are not intended to be analyzed per *Chevron*'s two-part test.¹⁵⁰ Because *Auer* is considerably more elusive than *Chevron*, and because statutory interpretation issues are more commonplace, the body of *Auer* cases in immigration is significantly smaller. Even the Court's opinion in *Kisor* analogized the two doctrines when reiterating *Auer*'s scope,¹⁵¹ perhaps due to the Petitioner's argument that *Chevron* supported the need to overrule *Auer*.¹⁵² However, Chief Justice Roberts ended his opinion with a reminder: “Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.”¹⁵³

Given this clarification, immigration attorneys should be especially vigilant about “fram[ing] their arguments” in accordance with *Kisor*'s “narrow” elements.¹⁵⁴

1. *Chevron* and *Auer* Deference as Applied in Immigration Cases

Being that judicial review of the BIA's decisions is not limited to statutory interpretation, immigration lawyers and adjudicators should be familiar with

149. See Procedural Reforms, *supra* note 112, at 54888 (intending the precedential authorities of BIA panels to “encompass[] both the *Chevron* step II interpretive issues as well as the initial *Chevron* step I interpretation”).

150. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); see *infra* Section VC1 (expanding upon the idea that *Chevron* is reserved for statutory interpretations, not regulatory interpretations).

151. See *Kisor*, 139 S. Ct. at 2416 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)) (“Under *Auer*, as under *Chevron*, the agency's reading must fall ‘within the bounds of reasonable interpretation.’”); see also *id.* at 2416 (citing *Mead* as a case “requiring an analogous though not identical inquiry for *Chevron* deference”).

152. See Brief for Petitioner at 46, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–15), 2019 WL 338890 (asserting *Chevron* “promotes, rather than skirts, notice-and-comment rulemaking”).

153. *Kisor*, 139 S. Ct. at 2425 (Roberts, J., concurring in part) (clarifying the Chief Justice's opinion—“I do not regard the Court's decision today to touch upon the latter question”).

154. Brent Owen, *US District Courts Start Applying Kisor v. Wilkie; Is Auer Deference Now a ‘Paper Tiger’?*, NAT'L L. REV. (Oct. 14, 2019), <https://www.natlawreview.com/article/us-district-courts-start-applying-kisor-v-wilkie-auer-deference-now-paper-tiger> [https://perma.cc/27AV-XDTZ].

the distinction between *Chevron*¹⁵⁵ and *Auer*.¹⁵⁶

Auer—referred to as *Chevron*'s “less-famous doctrinal cousin”¹⁵⁷—is similar to *Chevron* in that both doctrines are equally potent formulations of deference to agency interpretations.¹⁵⁸ Additionally, the Court's rationale of the importance of applying *Chevron* to the Executive Branch is a familiar one: immigration proceedings invoke a special expertise, particularly in foreign relations.¹⁵⁹ However, understanding the impact of *Kisor* on appellate review of BIA decisions requires an understanding of when *Auer*¹⁶⁰ will be applied versus *Chevron*.¹⁶¹

The crucial distinction is that *Chevron* applies when an agency interprets a statute, while *Auer* is reserved for the review of an agency's interpretation of its own regulations.¹⁶² Notably, while *Chevron* is a relatively simple two-prong test, *Auer*'s multi-layered analysis is “harder to apply and less certain in its application.”¹⁶³ Even when the Court has made certain that it is “mistake[n] to suppose that *Auer* is in any way a ‘logical corollary to *Chevron*,’”¹⁶⁴ this distinction has proven itself a source of confusion in the circuit courts, at least when reviewing BIA decisions.¹⁶⁵

155. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

156. *Auer v. Robbins*, 519 U.S. 452 (1997).

157. *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 229 (5th Cir. 2019).

158. *See Kisor*, 139 S. Ct. at 2416 (striking down speculation that *Auer* was the more generous of doctrines); *see also Forrest Gen. Hosp.*, 926 F.3d at 230 (“In practice, *Auer* deference mirrors *Chevron* deference.”); *contra Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 620 (Scalia, J., concurring in part and dissenting in part) (arguing because “[t]he duration of the uncertainty produced by a vague regulation need not be as long as the uncertainty produced by a vague statute[,]” the *Auer* doctrine is significantly distinguishable from *Chevron*).

159. *I.N.S. v. Aguirre-Aguilar*, 526 U.S. 415, 425 (1999).

160. *Auer*, 519 U.S. 452 (1997).

161. *Chevron U.S.A., Inc.*, 467 U.S. 837 (1984).

162. *Compare Auer*, 519 U.S. at 461 (establishing deference for ambiguous regulations), *with Chevron U.S.A. Inc.*, 467 U.S. at 866 (creating the test for deference of ambiguous statutes).

163. Kristen E. Hickman & Mark R. Thompson, *The Chevronization of Auer*, 103 MINN. L. REV. HEADNOTES 103, 107 (2019).

164. *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., concurring) (quoting *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part)).

165. Or, *Auer* is ignored entirely. *See Gomez v. Lynch*, 831 F.3d 652, 656 (5th Cir. 2016) (noting the total absence of an *Auer* argument in a dispute over the interpretation of a regulation); *see also Go v. Holder*, 744 F.3d 604, 610 (9th Cir. 2014) (Wallace, J., concurring) (admonishing the creation of “an intracircuit split as to the type of deference owed” to agencies because of the confusion between *Auer* and *Chevron*).

Take, for instance, *Chong Shin Chen v. Ashcroft*.¹⁶⁶ There, the Ninth Circuit reviewed whether an AWO by the BIA violated streamlining regulations.¹⁶⁷ That court held “a great deal of deference” was owed to an agency’s interpretation of its own regulation unless “an alternative reading is compelled by the regulation’s plain language.”¹⁶⁸ It did not state the streamlining regulation was ambiguous, but its analysis neglected the BIA’s interpretation of the term “insubstantial” was necessarily a question of ambiguity.¹⁶⁹ As noted by the dissent, the court made no reference to *Auer*: “I flag here an issue overlooked by the majority: the governing standard of review. Not only does the majority fail to analyze and decide which standard to adopt, but the majority also neglects to state explicitly which standard it is applying.”¹⁷⁰

More concerning—ignoring *Auer* is not unique to judicial review of streamlining regulations. Before *Kisor*, some immigration respondents struggled challenging their removal proceedings on regulatory interpretation grounds due to confusion between *Chevron* and *Auer*. In the Second Circuit case *Linares Huaraya v. Mukasey*,¹⁷¹ a respondent from Peru sought review from the BIA when the IJ denied his application for adjustment of status.¹⁷² At the hearing level, the respondent was required to show that his visa application was “approvable when filed” as mandated by regulation.¹⁷³ Because Congress had extended that date two years after the respondent’s petition, the IJ was required to determine whether the respondent was “grandfathered” into the older, more restricted deadline by interpreting the applicable regulation.¹⁷⁴ Satisfying the adjustment of status requirements according to the CFR demanded a “properly filed, meritorious in fact, and non-frivolous” application.¹⁷⁵ The IJ—applying the BIA’s interpretation of the same regulation in a prior decision—denied the respondent’s

166. *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004).

167. *Id.*

168. *Id.* at 1086.

169. *Id.*; see Jonathan H. Adler, *Auer Evasions*, 16 GEO. J.L. & PUB. POL’Y 1, 16 (2018) (evidencing the ambiguity for *Auer*’s purposes means the regulation “risks depriving the regulated community of adequate notice” of what is required, or the “requirements . . . are not clear”).

170. See *Chong Shin Chen*, 378 F.3d at 1090 (Wallace, J., dissenting) (contending “some deferential standard clearly is in order here”) (citing *Auer*, 519 U.S. at 461).

171. *Linares Huaraya v. Mukasey*, 550 F.3d 224 (2d Cir. 2008).

172. *Id.* at 226–27.

173. *Id.* (quoting 8 C.F.R. § 1245.10(a)).

174. *Id.*

175. *Id.*

application for failing to show the marriage upon which his application relied was “entered into in good faith.”¹⁷⁶ The BIA accepted the IJ’s decision in an unpublished, non-precedential opinion.¹⁷⁷

On appeal, the respondent claimed the BIA’s interpretation of the CFR was undeserving of *Chevron* deference, specifically challenging the BIA’s interpretations of the terms “meritorious in fact” and “non-frivolous.”¹⁷⁸ The Second Circuit recognized the respondent’s error and asserted that *Auer* deference was truly applicable: “In arguing for *Chevron* deference, Huarcaya conflates the issue of whether the agency has legitimately interpreted a congressional statute with whether the BIA has legitimately interpreted its own regulations.”¹⁷⁹

Similarly, in *Rodriguez-Avalos v. Holder*,¹⁸⁰ the Fifth Circuit reviewed the BIA’s interpretation of “good moral character,” a factor in cancellation of removal applications and defined in the INA.¹⁸¹ Because the INA calls for statutory interpretation, it was indisputable that *Chevron* was the applicable doctrine.¹⁸² However, in its statement of the law, the court declared *Chevron* deference is afforded “to the BIA’s interpretation of the statutes and regulations” for precedential decisions.¹⁸³ According to the court, non-precedential decisions were to be afforded *Skidmore*¹⁸⁴ deference—another administrative law doctrine of interpretation that is less deferential than *Chevron* and just as obscure as *Auer*.¹⁸⁵ Again, the distinction between statutes and regulations was muddled, and the *Auer* precedent completely disregarded.¹⁸⁶

176. *Id.* at 227 (citing *Matter of Huarcaya*, No. A 79 078 179, 2007 WL 4707389 (B.I.A. Dec. 17, 2007)).

177. *Id.* at 227.

178. *Id.* at 227–28.

179. *Id.* at 228 (emphasis added).

180. *Rodriguez-Avalos v. Holder*, 788 F.3d 444 (5th Cir. 2015).

181. *Id.* at 448; 8 U.S.C. 1229b(b)(1)(B).

182. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

183. *Rodriguez-Avalos*, 788 F.3d at 449.

184. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

185. *Rodriguez-Avalos*, 788 F.3d at 449 n.8; see *Skidmore*, 323 U.S. at 140 (considering the “thoroughness evident in [the reviewing court’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade” in deciding whether to afford an agency deference of a statute); see also Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1110 (2001) (discussing how *Chevron* has overshadowed *Skidmore* deference despite *Skidmore* pre-dating *Chevron* by almost forty years).

186. Although reviewing the BIA’s interpretation of a statute, the Second Circuit made a similar statement of law in *Ramsameachire v. Ashcroft*. See *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir.

In a later decision, the Fifth Circuit recognized this error; in *Gomez v. Lynch*,¹⁸⁷ the court commented that the absence of *Auer* analysis in the government's argument was certainly the result of the *Rodriguez-Avalos* case.¹⁸⁸ Although the *Rodriguez-Avalos* court was correct that *Skidmore* applies to non-binding interpretations of statutes, the court cautioned that stating this rule immediately after the prior misstatement was confusing.¹⁸⁹

Even when courts are certain that *Chevron* is inapplicable, their holdings do not always reflect the same certainty that *Auer* does. In *Wangchuck v. Department of Homeland Security*,¹⁹⁰ the Second Circuit stated the standard of review of the BIA's interpretations of immigration regulations was "substantial deference."¹⁹¹ Then, in *Zhu v. Gonzales*,¹⁹² the Fifth Circuit similarly deferred to the BIA using substantial evidence, the standard of review typically applied in the review of final agency decisions, instead of interpretation of ambiguous regulations.¹⁹³ There, the BIA's interpretation of regulations defining past persecution for asylum cases "support[ed]" the court's holding.¹⁹⁴ This reflects another trend: not only were courts partial to *Chevron* deference where an ambiguous regulation was at issue; at times, both were ignored altogether. Concededly, the court never declared the regulation in question was ambiguous, which may have influenced its decision to withhold *Auer* from discussion. Still, it is telling that *Auer* was not at least recognized.¹⁹⁵

2004) ("With respect to questions of law, the agency's interpretation of the statutes it administers or its own regulations is entitled to 'substantial deference.'") (citing *Chevron*, 467 U.S. at 843).

187. *Gomez v. Lynch*, 831 F.3d 652 (5th Cir. 2016).

188. *Id.* at 656.

189. *See id.* at 656–57 (suggesting the *Skidmore* comment, read "in context," could mislead one to believe the doctrine applies to "agency regulatory interpretations" (emphasis added)). Courts continue to use the doctrines interchangeably, but the circuits are quicker to catch these errors thanks to the refresher provided by *Kisor*. *See, e.g.,* *Perez v. Cuccinelli*, 949 F.3d 865, 877 n.6 (4th Cir. 2020) ("The district court ruled that USCIS's interpretation of clause (i) is entitled to *Chevron* deference, as well as deference under *Auer*. . . . As the Supreme Court recently emphasized, however, *Auer* deference applies solely to an agency's interpretation of its own ambiguous regulation and, even then, only in narrow circumstances [citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)] *Auer* deference cannot apply here because the Agency Decisions did not invoke any regulation—or any authority whatsoever—in pronouncing that clause (i) requires a permanent custody order.").

190. *Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 525 (2d Cir. 2006).

191. *Id.* at 528 (quoting *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006)).

192. *Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007).

193. *Id.* at 594.

194. *Id.* at 600.

195. *Compare id.* (not referencing *Auer* at all), *with* *Niang v. Gonzales*, 492 F.3d 505, 515–16 (4th Cir. 2007) (Williams, J., concurring) (analyzing *Auer* in the alternative).

The concurring judge in *Niang v. Gonzales*¹⁹⁶ shared the same sentiment. In *Niang*, the Fourth Circuit reviewed the BIA's analysis of whether the respondent satisfied her burden of demonstrating "persecution" as defined by the CFR for her asylum application.¹⁹⁷ The court reviewed the BIA's decision under the substantial evidence standard and held the respondent could not demonstrate persecution "based on a fear of psychological harm alone."¹⁹⁸

Justice Williams's concurrence noted the majority failed to even address the BIA's interpretation of the regulation, considering *Niang*'s holding "st[ood] in tension" with a prior BIA decision.¹⁹⁹ For this very reason, Justice Williams would have required an analysis of the BIA's interpretations of the INA and CFR under *Chevron* and *Auer*, respectively.²⁰⁰ The BIA, she continued, had made no determination as to the ambiguity of either the INA or CFR provisions, yet "the majority decline[d] to . . . even address[] the BIA's interpretation of ['persecution']."²⁰¹

These cases exemplify the lack of *Auer* guidance in immigration law. Legal scholars have recognized the absence of meaningful direction for *Auer* generally and have various opinions as to why *Auer* has remained so inconspicuous.²⁰² Some argue the doctrine has been so from the start, since *Seminole Rock*.²⁰³ After all, the Supreme Court decided *Seminole Rock*, with "no indication . . . that a new doctrine of administrative law had just been announced."²⁰⁴ Regardless, *Kisor*'s holding has settled the question by clearly reinforcing the applicability of the *Auer* doctrine.

196. *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007).

197. *Id.* at 509–10.

198. *Id.* at 512.

199. *Id.* at 515 (Williams, J., concurring) (citing *Matter of C-Y-Z*, 21 I&N Dec. 915 (BIA 1997) (en banc)).

200. *Niang*, 492 F.3d at 515–16.

201. *Id.* at 516.

202. See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 63 (2015) (reviewing the unsung, often misunderstood, nature of *Seminole Rock* deference). Knudsen and Wildermuth observed the confusion between *Seminole Rock*, *Chevron*, and *Skidmore* deference but contended that mistakes in application have diminished since *United States v. Mead Corp.*, which clarified the difference between *Chevron* and *Skidmore*. See *id.* at 94–95 (citing *United States v. Mead Corp.*, 533 U.S. 218, 236–38 (2001)) (stating *Mead* "has required lawyers and courts to be much more careful in articulating what deference standard applies in a particular circumstance").

203. *Id.* at 63.

204. *Id.*

2. The Significance of Mistaking *Auer* for *Chevron*

Of course, one wonders if the mistaken interchanging of *Chevron* and *Auer* is significant if the courts overlook the doctrines' differences. The "import" of *Chevron* deference in *Kisor*'s opinion has been described as "striking."²⁰⁵ Although she distinguished the two doctrines, Justice Kagan still clarified that "agency constructions of rules [do not] receive greater deference than agency constructions of statutes," implying it is no easier for a respondent to prevail under *Auer* than under *Chevron*.²⁰⁶ As Justice Kagan reminded both doctrines demand a reasonableness analysis.²⁰⁷

Yet, if *Chevron* and *Auer* are treated so similarly due to their overlap, analyzing *Chevron* trends in immigration may indicate future trends of *Auer* deference now that *Kisor* has rejuvenated *Auer*'s place in the administrative state.²⁰⁸ For example, the *Kisor* Court faced the question of whether the VA Board's rulings—tens of thousands of which are not precedential—are representative of the VA's fair and considered judgment. Although the Court left this exact question to be resolved by the government on remand, *Kisor* cited *Mead*, colloquially recognized as "*Chevron* step-zero,"²⁰⁹ as an example of the Court limiting the deferential value of large volumes of opinions.²¹⁰ In *Mead*, the Court elected to refuse *Chevron* deference where

205. Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 70 (2019); see also *id.* ("Moreover, the plurality opinion's reasoning seems readily applicable to *Chevron*, which the plurality frequently cited.").

206. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (quoting *Ohio Dep't of Medicaid v. Price*, 864 F.3d 469, 477 (6th Cir. 2017)).

207. *Kisor*, 139 S. Ct. at 2416; see Evan Bernick, *Auer is Dead; Long Live Auer*, YALE J. ON REG. (June 28, 2019), <https://www.yalejreg.com/nc/auer-is-dead-long-live-auer-by-evan-bernick/> [<https://perma.cc/3RMW-UVU9>] (citing *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011)) (evidencing the idea that Justice Kagan played a role in identifying *Chevron*'s second step "with hard-look review," but did not apply the same step to *Auer* in *Kisor*).

208. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 591 (2000) (Scalia, J., concurring in part) ("What we said in a case involving an agency's interpretation of its own regulations applies equally, in my view, to an agency's interpretation of its governing statute[.]"); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (explaining that according to the "anti-parroting" doctrine, a regulation that "does little more than restate the terms of the statute itself" is to be analyzed under *Chevron*, not *Auer*); see *id.* at 278 (Scalia, J., dissenting) (coining the "anti-parroting" phrase).

209. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211–13 (2006) (analyzing *Mead* as a component of the *Chevron* "Step Zero Trilogy").

210. *Kisor*, 139 S. Ct. at 2424 (citing *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001)). The two cases are distinguishable in that *Mead* concerned written interpretations, while the BIA issues appellate decisions. See *Mead*, 533 U.S. at 222 (citing 19 C.F.R. § 177.8 (2000)) (describing the Secretary of the Treasury's role of issuing "tariff letters" for certain imports).

classification rulings²¹¹ by the United States Customs Service were “churned out at a rate of 10,000 a year at an agency’s 46 scattered offices.”²¹² Even when the interpretation in question was found in a letter from Headquarters with “developed reasoning,” the Court refused to treat the letter as any more deserving of deference.²¹³

Similarly, the BIA churns out a sizeable amount of cases each year—enough to inspire the streamlining mechanism in the first place.²¹⁴ In the 2019 fiscal year alone, EOIR reported that 54,092 appeals were filed and 19,449 were completed, yet a staggering 65,201 appeals remained pending.²¹⁵ This is the largest amount of pending cases remaining at the end of a fiscal year in ten years—twice the amount left at the end of 2018.²¹⁶ More importantly, the BIA has completed nearly twice as many appeals as the ten-thousand per year suggested by *Mead*.²¹⁷

Pre-*Kisor*, some circuit courts believed less deference should be afforded to the BIA’s streamlined decisions.²¹⁸ The Ninth Circuit once held “the nature of [a] one-member, non-precedential, BIA order—one that does not explain its reasoning—‘does not reflect the agency’s fair and considered judgment on the matter in question.’”²¹⁹ For example, the *Rodriguez-Avalos* case relied on precedent to hold BIA panel interpretations of statutes are granted only *Skidmore* deference, which is invoked for an agency’s statutory interpretation “lacking the force of law.”²²⁰ Yet, even the BIA’s new regulations, which expand the potential for issuing precedent and thus the

211. *Mead*, 533 U.S. at 222 n.1 (citing 19 C.F.R. § 177.1(d)(1) (2000)) (defining “ruling” in its context as “a written statement . . . that interprets and applies the provisions of the Customs and related laws to a specific set of facts”).

212. *Mead*, 533 U.S. at 233.

213. *Id.* at 234.

214. See Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1067, 1111 (2018) (reporting the BIA’s massive caseload affords members “only 7–10 minutes for the average case”—less time than Administrative Law Judges and Federal judges have to review cases).

215. *Case Appeals Filed, Completed, and Pending*, EXEC. OFF. FOR IMMIGR. REV. ADJUDICATION STAT. (Oct. 23, 2019), <https://www.justice.gov/eoir/page/file/1198906/download> [https://perma.cc/4JHG-BA3J].

216. *Id.*

217. *Mead*, 533 U.S. at 233.

218. See, e.g., *Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (holding the court will not afford *Auer* deference to single-member, unwritten opinion, similar to how the court does not afford *Chevron* deference to such decisions when they interpret an ambiguous statute).

219. *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

220. *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 449 n.8 (5th Cir. 2015) (citing *Rodriguez-Benitez v. Holder*, 763 F.3d 404, 406 (5th Cir. 2014)); Sunstein, *supra* note 210, at 211.

potential for issuing regulatory interpretations with the “force of law,” do not promise certain deference in light of *Kisor*’s “cabined . . . scope.”²²¹

D. *Auer and the Attorney General’s Certification Authority*

There has yet to be a significant number of immigration cases focused on regulatory interpretation since *Kisor*. However, before *Kisor*, the Supreme Court issued *Christopher v. SmithKline Beecham Corporation*²²² and elaborated on the concept of an agency’s “fair and considered judgment” as applicable to *Auer* deference.²²³ There, the Court refused to defer to the Department of Labor’s interpretation of its own regulation contained within an amicus brief, despite the fact the *Auer* Court itself deferred to a similar interpretation.²²⁴ *SmithKline* was distinguishable, the Court reasoned, because deferring to the instant interpretation would create unfair surprise to the litigants, especially without notice-and-comment safeguards.²²⁵

Post-*SmithKline*, the Fifth Circuit scrutinized the BIA’s regulatory interpretation under *Auer*’s fair-and-considered-judgment standard.²²⁶ The court recognized the standard was “not . . . hard . . . to satisfy,” but will fail where “inconsistencies . . . are sufficient reason to believe” that an opinion is not representative of the agency’s fair and considered judgment.²²⁷ In that instance, the BIA’s contrary interpretation of the same regulation previously analyzed in a strikingly similar (though unpublished) case refused *Auer* deference for failing to meet the “fair and considered judgment” threshold.²²⁸

The fair-and-considered-judgment element of *Auer*’s analysis is further complicated by the Attorney General’s role in the immigration appeals process.²²⁹ As the head of the DOJ, the Attorney General maintains the authority to establish certain BIA decisions as precedent.²³⁰ Establishing

221. See Board of Immigration Appeals: Affirmance Without Opinion, *supra* note 113, at 31469 (amending the BIA’s ability to issue precedent); Sunstein, *supra* note 210, at 211; *Kisor*, 139 S. Ct. at 2408.

222. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

223. *Id.* at 155.

224. *Id.* at 159.

225. *Id.* at 156–57.

226. *Gomez v. Lynch*, 831 F.3d 652, 658 (5th Cir. 2016).

227. *Id.* at 657.

228. *Id.* at 656–57.

229. See 8 C.F.R. § 1003.1 (2019) (codifying the Attorney General’s authorities regarding immigration appeals).

230. *Id.* § 1003.1(g).

precedent includes overruling past precedent, creating new standards, and “confront[ing] . . . a split in circuit precedent.”²³¹ Essentially, the Attorney General possesses the same amount of control as any court, which has inspired a fair amount of criticism from the circuits.²³² Unlike a court that is bound by precedent the majority of the time, the Attorney General is under no obligation to defer to the BIA’s fact findings and legal conclusions.²³³ Most significantly, in light of *Kisor* and the reaffirmed *Auer* deference, the Attorney General bears the “primary responsibility [of] construing ambiguous provisions in immigration laws.”²³⁴

This power, like the BIA’s streamlining regulations, has continuously survived due process challenges.²³⁵ Particularly, the Attorney General’s certification “contravene[s] . . . [the] right to a full and fair hearing by a neutral adjudicator.”²³⁶ As bearing the “primary responsibility” of regulatory interpretation, the Attorney General’s actions serve to voice a holistic agency opinion: broadly speaking, the opinion of the DOJ; and narrowly speaking, the opinion of the BIA.²³⁷ The following cases are controversial examples of the Attorney General’s exercise of authority, one of which already abrogated by a circuit court on *Auer* grounds.

1. *Matter of A-B-*

Consider *Matter of A-B-*,²³⁸ an interim decision issued by then-Attorney General Sessions in 2018 that revisited the “particular social group” (PSG) element of certain asylum applications.²³⁹ In 2014, the BIA decided *Matter of A-R-C-G*-²⁴⁰ and held “married women in Guatemala who are unable to

231. Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1772 (2010).

232. See *Xian Tong Dong v. Holder*, 696 F.3d 121, 124 (1st Cir. 2012) (describing the Attorney General’s authority as “unfettered”).

233. See *Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003) (“When I undertake review of such decisions pursuant to a referral under 8 C.F.R. § 1003.1(h), the delegated authorities of the IJ and BIA are superseded and I am authorized to make the determination based on my own conclusions on the facts and the law.”).

234. *Matter of A-B-*, 27 I&N Dec. 316, 325 (A.G. 2018) (citing *M-E-V-G-*, 26 I&N Dec. 227, 230; 8 C.F.R. § 1003.1(g)).

235. See *id.* (expressing dissatisfaction in the lack of due process scrutiny).

236. See *id.* at 324 (stating the regulatory power of the Attorney General).

237. See Trice, *supra* note 232, at 1772 (“[T]he certification power is used most frequently to announce new or changed legal rules or to advance policy goals of the Attorney General.”).

238. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

239. *Id.* at 316.

240. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

leave their relationship” constituted a valid PSG for asylum seekers.²⁴¹ The facts in *A-B-* were similar to those in *A-R-C-G-*, except the respondent in *A-B-*’s El-Salvadorian nationality.²⁴² However, Sessions found several flaws in *A-R-C-G-*, one being inconsistency with BIA precedent holding a PSG may not be devised solely on the existence of harm to the applicant.²⁴³ In concluding *A-R-C-G-* was wrongly decided and “should not have been issued as a precedential decision,” Attorney General Sessions vacated *A-B-* and overruled *Matter of A-R-C-G-*, asserting victims of “private criminal activity” are not sufferers by reason of belonging to a PSG.²⁴⁴

A-B- is a controversial example of the Attorney General self-referring BIA decisions and altering precedent.²⁴⁵ Though there is nothing unlawful about the Attorney General’s actions,²⁴⁶ they challenge the perceived notions of due process and fairly provoke critics of the “ever-expanding administrative state,” particularly in immigration.²⁴⁷ Critics speculate the Attorney General’s certification powers are an avenue for furthering the Executive’s political agenda.²⁴⁸

Although *A-B-* particularly implicated *Chevron* concerns, the case sparks questioning as to whether *Auer* deference would be appropriate.²⁴⁹ As for *Chevron*, Professor Jessica Senat scrutinized that *Chevron* deference is not suitable in immigration law, and broadly speaking, “flexibility in the

241. *Id.* at 390.

242. *See Matter of A-B-*, 27 I&N Dec. at 319–20 (summarizing the underlying facts and procedural history of *A-B-*).

243. *Id.* at 325 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007)).

244. *Id.*

245. *See* Jessica Senat, *The Asylum Makeover: Chevron Deference, the Self-Referral and Review Authority*, 35 *TOURO L. REV.* 867, 891 (2019) (“Sessions’ opinion is an example of why judicial deference may be ill-fitted under the immigration context[.]”).

246. *See* 8 C.F.R. § 1003.1(g) (promulgating the Attorney General’s power to review BIA cases). *Compare* Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 *IOWA L. REV.* 841, 899–90 (2016) (“The Attorney General is not usurping the authority of the Board when he reviews its decisions, but is exercising an authority that has been given to him by Congress.”), *with* Senat, *supra* note 246, at 891 (arguing Sessions’ reversal of *A-B-* demonstrates the dangers of judicial review in immigration).

247. *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring); *see* Caroline Holiday, *Making Domestic Violence Private Again: Referral Authority and Rights Rollback in Matter of A-B-*, 60 *B.C. L. REV.* 2145, 2147 (2019) (arguing *Matter of A-B-* demonstrates “the inherent danger of the Attorney General’s unchecked referral authority”).

248. *See* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 *TUL. L. REV.* 707, 759 (2019) (observing Attorney General Sessions’s “prosecutorial approach” to the asylum system).

249. *Matter of A-B-*, 27 I&N Dec. at 326–27.

administrative process cannot work in the context of immigration law.”²⁵⁰ Because the BIA historically has demonstrated internal inconsistency, Senat states respondents applying for asylum do not stand a fair chance against “changing standards” and “ambiguous language.”²⁵¹ Additionally, critics attack the Attorney General’s qualifications as minimal in immigration expertise. Assuming this is true, the Attorney General’s lack of special knowledge in immigration law would diminish the possibility of receiving *Auer* deference for his or regulatory interpretations.²⁵²

However, the following case suggests *Auer* does not necessarily allow agencies unfettered “flexibility.”²⁵³

E. *Matter of Castro-Tum: Abrogated by the Fourth and Seventh Circuits*

Matter of Castro-Tum originated as an appeal by DHS, challenging an IJ’s decision to administratively close proceedings for an unaccompanied minor who did not appear at his hearing.²⁵⁴ DHS argued it had met its burden of providing the minor adequate notice of hearing, and the BIA agreed.²⁵⁵ However, the BIA allowed all cases administratively closed at the time to remain closed until either party to the case requested “recalendaring.”²⁵⁶

In 2018, the Attorney General used his certification authority to review *Matter of Castro-Tum*²⁵⁷ and held IJs and the BIA cannot “suspend indefinitely immigration proceedings by administrative closure,” limiting administrative closure to cases where closure was once expressly authorized through a “previous regulation or a previously judicially approved settlement.”²⁵⁸ The BIA had previously interpreted regulations—which delegated IJs to “regulate the course of the hearing” and take “appropriate and necessary” action over cases—to include the authority to grant

250. Senat, *supra* note 246, at 882.

251. *Id.*

252. See Marouf, *supra* note 248, at 759 (discussing speculation surrounding the application of *Chevron* to immigration).

253. Senat, *supra* note 246, at 882.

254. *Matter of Castro-Tum*, 27 I&N Dec. 271 (BIA 2018).

255. *Id.* at 293.

256. See *id.* at 292 (discussing the ambiguity of “administrative closure[s] in immigration proceedings”).

257. *Matter of Castro-Tum*, 27 I&N Dec. 271 (BIA 2018).

258. *Id.* at 272.

administrative closure even without the consent of both parties.²⁵⁹ Thus, Attorney General Session's *Castro-Tum* decision overruled over twenty years of BIA precedent allowing IJs to administratively close cases.²⁶⁰

Castro-Tum rejected the concept that IJs have a "general authority" to grant administrative closure, instead holding that previously existing regulations specifically tailored for administrative closure were intended to limit the circumstances under which it would be permissible.²⁶¹

Castro-Tum instead intended to prevent IJs and the BIA from using administrative closure as a convenient tool to pause the case and remove it from the IJ's active calendar to ease caseloads—a practice once backed by precedent.²⁶² Unsurprisingly, *Castro-Tum* was criticized as an overreach of power and circumvention of notice-and-comment.²⁶³ The Attorney General's review of *Castro-Tum* called into question whether it is true *Auer* provided "space . . . for [agency officials to] engage in opportunism . . . on their own initiative."²⁶⁴ In fairness, *Castro-Tum* was a lawful exercise of opportunism, but opportunism no less.

Roughly one year later, *Castro-Tum* received its first negative treatment from one circuit court. In the first *Auer*-based opinion since the Court decided *Kisor*, the Fourth Circuit scrutinized the Attorney General's regulatory interpretation which formed the basis for his *Castro-Tum* opinion.²⁶⁵

Originally, the Fourth Circuit found *Auer* deference to be unnecessary because the regulation was unambiguous, as determined by both the regulations' plain language and its context in light of other "relevant

259. See *Matter of Avetisyan*, 25 I&N 688, 691–94 (BIA 2012) (interpreting 8 C.F.R. §§ 1003.10(b) and 1240.1(a)(1)(iv), (c) and establishing a balancing test to be used by IJs before granting administrative closure).

260. *Matter of Castro-Tum*, 27 I&N Dec. at 274.

261. See *id.* at 276–77 (describing previously promulgated regulations allowing or mandating administrative closure).

262. See Louisa Edzie, *Matter of Castro-Tum: The Future of Administrative Closures and Due Process*, IMMIGR. & HUM. RIGHTS L. REV. (Feb. 25, 2019), <https://lawblogs.uc.edu/ihr/r/2019/02/25/matter-of-castro-tum-the-future-of-administrative-closures-and-due-process/> [https://perma.cc/FJ/M2-8KV8] (citing *Matter of Avetisyan*, 25 I&N 688, 692 (BIA 2012)).

263. See *id.* (summarizing the Catholic Legal Immigration Network, Inc.'s amicus brief challenging *Castro-Tum* and arguing the decision violated due process).

264. Bernick, *supra* note 208.

265. See *Romero v. Barr*, 937 F.3d 282, 292 (4th Cir. 2019) (applying *Auer* analysis to the Attorney General's interpretation of 8 C.F.R. §§ 1003.10(b)—instructing IJs "to resolve the questions before them in a timely and impartial manner"—and 1003.1(d)(1)(ii)—authorizing the BIA members to "exercise their independent judgment and discretion" in resolving cases).

regulations.”²⁶⁶ For these reasons, the court held *Castro-Tum*'s interpretation erroneous.²⁶⁷ However, in the alternative, the court would still not defer to the Attorney General's interpretation in *Castro-Tum* based on the last factor prescribed by *Kisor*: unfair surprise, which the court designated as the “most important[]” factor of the analysis.²⁶⁸ *Kisor* described unfair surprise as the consequence of “an agency substitut[ing] one view of a rule for another” or “retroactive[ly] [imposing] liability on” previously uncontested “longstanding conduct.”²⁶⁹ According to the Fourth Circuit, *Castro-Tum* constituted unfair surprise because it departed from the common practice of administrative closure and did not “give fair warning to the . . . parties” of those cases to which *Castro-Tum* was retroactively applied.²⁷⁰

Romero not only considered the interests of the IJs and BIA who had used administrative closure to ease their caseloads—the court rebuked *Castro-Tum* for “undermin[ing] the significant reliance interests such petitioners have developed.”²⁷¹ In conclusion, the court admonished that *Castro-Tum* hampered the administrative process.²⁷²

Romero's holding suggests two ideas. First, the court's thorough analysis is proof that the circuit courts will not blindly defer to agencies' regulatory interpretations following *Kisor*, as the courts once did, or were at least encouraged to do.²⁷³ Although *Romero* is only binding in the Fourth Circuit, the court's decision suggests that not even an executive officer's opinion, issued in accordance with his own promulgations, is immune from

266. See *id.* at 292–93 (citing *Kisor*, 139 S. Ct. at 2414–15) (citing cases supporting the interpretation of the word “any” in “any action . . . appropriate and necessary for the disposition” of IJ and BIA cases to encompass administrative closure, not limited to previous promulgations); see also *id.* at 293 (interpreting administrative closure as an “action” under the contested regulation); *id.* (disagreeing with the Attorney General, holding the only limitation to administrative closure “is that the circumstances be appropriate and necessary”).

267. *Id.* at 294.

268. See *id.* at 291–92 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019)).

269. See *Kisor*, 139 S. Ct. at 2418 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012)).

270. See *Romero*, 937 F.3d at 296 (quoting *SmithKline*, 567 U.S. at 155–56 (2012)). *Castro-Tum*'s retroactive application necessitated reopening more than 330,000 cases. *Id.* at 297.

271. *Id.* at 296.

272. See *id.* (“[S]uch a sudden shift in longstanding agency interpretation frustrates mechanisms for predictability that are supposed to be baked into the administrative process.”).

273. See Bernick, *supra* note 208 (reflecting on “the Federal Circuit . . . reflexive[] defer[ence] to the Board of Veteran's Appeals” leading up to *Kisor*).

scrutiny.²⁷⁴ Regulatory interpretations can fail at any step of the *Kisor* analysis,²⁷⁵ especially if the Attorney General's opinion presents a "stark departure" from agency policy.²⁷⁶ Indeed, the Fourth Circuit's thorough examination of the Attorney General's pleas for deference is demonstrative of Justice Kagan's position that *Auer* "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions."²⁷⁷ Second, *Romero* may have opened the door to more appeals challenging decisions made by the Attorney General pursuant to his certification authority.²⁷⁸

On *Kisor*'s first anniversary, the Seventh Circuit followed in the Fourth Circuit's footsteps and similarly rejected *Castro-Tum* in *Meza Morales v. Barr*.²⁷⁹ Then-Judge Amy Coney Barrett rejected the government's argument that *Castro-Tum* provided a reasonable interpretation deserving of *Auer* deference.²⁸⁰ The court agreed with the Fourth Circuit that the regulation in question was unambiguous, but similarly held that assuming ambiguity *arguendo*, deference would be unwarranted.²⁸¹ While the Seventh Circuit did not emphasize undue surprise as the Fourth Circuit did in *Romero*, Justice Barrett provided a new warning to the Attorney General, which rings true for the administrative state as a whole: "The Attorney General may amend these rules through the proper procedures. But he may not, 'under the guise of interpreting a regulation, . . . create *de facto* a new regulation' that contradicts the one in place."²⁸²

274. See *id.* (proposing, in comparison to *Chevron*, that "*Auer* is no longer 'a revolutionary shift of authority from the judiciary to the executive'").

275. See *Romero*, 937 F.3d at 292 (finding *Auer* deference to the Attorney General's interpretation inappropriate because the regulation was determined unambiguous in the first step of the analysis).

276. *Id.* at 297.

277. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); see *Romero*, 937 F.3d at 292 (exercising the court's authority to "say what the law is" by declaring the meaning of the BIA's regulation); see also *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

278. For example, there is currently a circuit split as to whether the Attorney General may grant waivers of inadmissibility to noncitizens seeking U visas from USCIS. See *Meza Morales v. Barr*, 973 F.3d 656, 659 n.1 (7th Cir. 2020) (citing cases from the eleventh, third, and ninth circuits).

279. See *id.* at 666 ("Castro-Tum's interpretive arguments fail to convince us that administrative closure is not plainly within an immigration judge's authority to take 'any action' that is 'appropriate and necessary for the disposition of . . . cases.'").

280. *Id.* at 664.

281. *Id.* at 667.

282. See *id.* (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

In *Hernandez-Serrano v. Barr*,²⁸³ the Sixth Circuit officially created a circuit split on the administrative closure issue. Citing *Kisor*, the court upheld *Castro-Tum* as a proper interpretation of the CFR.²⁸⁴ However, in doing so, the court appeared more concerned with the policy considerations against administrative closures than whether the Attorney General's interpretation deserved *Auer* deference.²⁸⁵ Although the court disagreed with the *Romero* court that the regulation was ambiguous, it continued to argue what exactly renders an action "appropriate and necessary."²⁸⁶ This itself is an admission that the regulation is ambiguous, bolstered by the fact that two—now three—circuit courts disagree as to what the regulation unambiguously states.²⁸⁷ As noted by the dissent: "[O]ne does not need to open up a dictionary in order to realize the capaciousness of [the] phrase . . . 'appropriate and necessary.'"²⁸⁸

The circuits should continue the path of the Fourth and Seventh Circuits by providing due scrutiny to the Attorney General's—and all immigration agencies'—regulatory interpretations. Notably, because *Romero* is only binding in the Fourth Circuit, and *Meza* in the Seventh, IJs and the BIA are only allowed to use general administrative closure for cases arising within their respective circuits.²⁸⁹ IJs in states with the largest backlogs like Texas, California, and New York will continue confronting their caseloads without general administrative closure as an option for respondents—at least until a case like *Romero* appears in their respective circuits.²⁹⁰ Considering judicial deference is intended to support administrative consistency, it would benefit IJs and respondents to have support from the rest of the circuit courts to administratively close cases regardless of its origin. These *Castro-Tum* cases demonstrate why it is important not to underestimate the power of regulatory interpretations; rejecting the Attorney General's stark removals

283. *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020).

284. *Id.* at 462–63.

285. *See id.* at 471 (Clay, J., dissenting) ("[W]hether immigration courts have granted administrative closure too frequently, and have failed to reopen administratively closed cases too often, is of no significance to the question of whether *Castro-Tum* [was] wrongly held . . .").

286. *Id.* at 464.

287. *Id.* at 470–71 (Clay, J., dissenting) (noting in the dissent, the majority did not address the Seventh Circuit's holding in *Meza Morales*).

288. *See id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

289. Edzie, *supra* note 263.

290. *See Immigration Court Backlog Tool*, TRAC IMMIGR. (Nov. 2019), https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/TUS9-BA7S>] (reporting the number of pending cases and wait times in each immigration court).

from settled expectations and attempts to create new rules via “interpretation” could mean thousands of respondents, seeking lawful relief from other agencies like USCIS, have a stronger opportunity to obtain it.²⁹¹

Although *Kisor* precedent is only in its formative stages, *Romero* and *Meza* prove that *Kisor* is reviving judicial scrutiny. The Court affirmed *Auer* deference and recognized its appropriate place in the administrative state while clarifying blind deference is inappropriate.²⁹²

VI. CONCLUSION

Immigration law has historically limited judicial review, yet this cannot prevent the federal courts from exercising their role in “say[ing] what the law is” when need be.²⁹³ Although the BIA’s regulations strive for judicial deference, *Kisor* reminds agencies that deference is never guaranteed.²⁹⁴ Significantly, even the Attorney General cannot create a “stark departure” from his agencies’ fair and considered judgment, even if doing so is lawful under his own regulations.²⁹⁵

In his concurring opinion, Justice Gorsuch belittled the *Auer* doctrine for “transform[ing] . . . into a paper tiger.”²⁹⁶ Yet, the so-called crippled *Auer* doctrine in *Romero* and *Meza* gave the circuit courts new fervor in challenging the Attorney General’s interpretation in *Castro-Tum*.²⁹⁷ For a doctrine that has been “cabined in its scope[,]” *Auer*’s new-and-improved analysis has since raised the bar for immigration agencies—and the Attorney General himself—while reviving the role of Article III courts.²⁹⁸ Instead of viewing *Kisor* as a “pyrrhic victory” for the *Auer* doctrine, *Kisor* should be celebrated

291. See *Hernandez-Serrano*, 981 F.3d at 472 (Clay, J., dissenting) (explaining how “administrative closure is [essential] . . . if [respondents] appear eligible for an immigrant visa but unable to obtain a provisional unlawful presence waiver”).

292. *Ovalle v. Attorney General United States*, 791 Fed. App’x 333, 334 (3d Cir. 2019) (providing an example in an unpublished opinion that the Third Circuit abrogated precedent deferring to the BIA’s regulatory interpretation that post-departure bars constituted jurisdictional limitations “of its *sua sponte* authority.” The court further held that *Kisor* limited *Auer* deference to interpretations that “implicate . . . [an agency’s] substantive expertise,” and deferring to the BIA’s interpretation of its *sua sponte* jurisdiction was inappropriate “[b]ecause . . . jurisdiction is precisely the kind of ‘interpretive issue[] [that] fall[s] more naturally into [the federal courts’] bailiwick.”).

293. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

294. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (limiting *Auer* deference from “issues [which] fall more naturally into a[n Article III] judge’s bailiwick.”).

295. *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019).

296. *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring).

297. See *Romero*, 937 F.3d at 297 (admonishing *Castro-Tum* for being “internally inconsistent”).

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

2021]

COMMENT

903

for seeking the end of “reflexive deference” and championing the importance of consistent regulatory interpretations.²⁹⁹ Ultimately, *Auer* is perhaps now a “paper tiger”—but a paper tiger with bite.³⁰⁰

299. Yeatman, *supra* note 18.

300. *Kisor*, 139 S. Ct. at 2426.