SUPREME COURT OF THE UNITED STATES

No. 18–15

JAMES L. KISOR, PETITIONER *v.* ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 26, 2019]

JUSTICE KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. See *Auer* v. *Robbins*, 519 U. S. 452 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

I

We begin by summarizing how petitioner James Kisor's case made its way to this Court. Truth be told, nothing recounted in this Part has much bearing on the rest of our decision. The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision's deference doctrine. But a recitation of the facts and proceedings below at least shows how the question presented arose.

Kisor is a Vietnam War veteran seeking disability benefits from the Department of Veterans Affairs (VA). He first applied in 1982, alleging that he had developed post-traumatic stress disorder (PTSD) as a result of his participation in a military action called Operation Harvest Moon. The report of the agency's evaluating psychiatrist noted Kisor's involvement in that battle, but found that he "d[id] not suffer from PTSD." App. 12, 14. The VA thus denied Kisor benefits. There matters stood until 2006, when Kisor moved to reopen his claim. Based on a new psychiatric report, the VA this time agreed that Kisor suffered from PTSD. But it granted him benefits only from the date of his motion to reopen, rather than (as he requested) from the date of his first application.

The Board of Veterans' Appeals—a part of the VA, represented in Kisor's case by a single administrative judge—affirmed that timing decision, based on its interpretation of an agency rule. Under the VA's regulation, the agency could grant Kisor retroactive benefits if it found there were "relevant official service department records" that it had not considered in its initial denial. See 38 CFR §3.156(c)(1) (2013). The Board acknowledged that Kisor had come up with two new service records, both confirming his participation in Operation Harvest Moon. But according to the Board, those records were not "relevant" because they did not go to the reason for the denial—that Kisor did not have PTSD. See App. to Pet. for

Cert. 43a ("[The] documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat"). The Court of Appeals for Veterans Claims, an independent Article I court that initially reviews the Board's decisions, affirmed for the same reason.

The Court of Appeals for the Federal Circuit also affirmed, but it did so based on deference to the Board's interpretation of the VA rule. See *Kisor* v. *Shulkin*, 869 F. 3d 1360, 1368 (2017). Kisor had argued to the Federal Circuit that to count as "relevant," a service record need not (as the Board thought) "counter[] the basis of the prior denial"; instead, it could relate to some other criterion for obtaining disability benefits. *Id.,* at 1366 (internal quotation marks omitted). The Federal Circuit found the regulation "ambiguous" as between the two readings. *Id.,* at 1367. The rule, said the court, does not specifically address "whether 'relevant' records are those casting doubt on the agency's prior [rationale or] those relating to the veteran's claim more broadly." *Ibid.* So how to choose between the two views? The court continued: "Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." *Id.*, at 1368. Because that was so, the court believed *Auer* deference appropriate: The agency's construction of its own regulation would govern unless "plainly erroneous or inconsistent with the VA's regulatory framework." *Ibid.* (internal quotation marks omitted). Applying that standard, the court upheld the Board's reading—and so approved the denial of retroactive benefits.

We then granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*. 586 U. S. ___ (2018).

II

Before addressing that question directly, we spend some time describing what *Auer* deference is, and is not, for. You might view this Part as "just background" because we have made many of its points in prior decisions. But even if so, it is background that matters. For our account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving.

A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 203 (1947). Or a "problem[] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.,* at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 CFR pt. 36, App. A, p. 563 (1996). Must the Washington Wiz-

ards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579, 581–582 (CADC 1997).

- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba* v. *Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).

- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 CFR §50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress* v. *Mine Safety and Health Admin.*, 995 F. 2d 1106, 1107–1108 (CADC 1993).

- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 CFR §314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC* v. *FDA*, 625 F. 3d 760, 762–763 (CADC 2010); Tr. of Oral Arg. 12, 35.[1]

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[1] In case you're wondering, the regulatory definition of active moiety is "[t]he molecule or ion, excluding those appended portions of the molecule

- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime if they are paid on a "salary basis." 29 CFR §541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? 519 U. S., at 459–462.

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often.[2] But

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that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or the noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance." 21 CFR §314.3(b) (2018).

[2] See, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 613 (2011); *Chase Bank USA, N. A.* v. *McCoy*, 562 U. S. 195, 208–210 (2011); *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U. S. 261, 274–275 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 328 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 171 (2007); *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 387–388 (2003).

the name is something of a misnomer. Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference—for the 1945 decision in which we declared that when "the meaning of [a regulation] is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U. S., at 414.[3] And *Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. See *United States* v. *Eaton*, 169 U. S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight"); see Brief for Administrative Law Scholars as *Amici Curiae* 5, n. 3 (collecting early cases); Brief for AFL–CIO as *Amicus Curiae* 8 (same).

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151–153 (1991).

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[3] Our (pre-*Auer*) decisions applying *Seminole Rock* deference are legion. See, *e.g.*, *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 94–95 (1995); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512 (1994); *Stinson* v. *United States*, 508 U. S. 36, 44–45 (1993); *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 189–190 (1991); *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 358–359 (1989); *Mullins Coal Co. of Va.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 159 (1987); *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 158, n. 13 (1982); *Blanding* v. *DuBose*, 454 U. S. 393, 401 (1982) (*per curiam*); *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U. S. 12, 15 (1975) (*per curiam*); *Ehlert* v. *United States*, 402 U. S. 99, 105 (1971); *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. See *id.,* at 151. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. See *supra,* at 4. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U. S., at 151. Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.,* at 152. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. *Mullins Coal Co. of Va.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 159 (1987). The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem. To be sure, this justification has its limits. It does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule (*e.g.,* if the agency never thought about whether and when chest X-rays would count as a "diagnosis"). See *supra,* at 5. Then, the agency will not be uncovering a specific intention; at most (though this is not

nothing), it will be offering insight into the analogous issues the drafters considered and the purposes they designed the regulation to serve. And the defense works yet less well when lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before. All that said, the point holds good for a significant category of "contemporaneous" readings. *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986). Want to know what a rule means? Ask its author.

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512 (1994) (internal quotation marks omitted). Return to our TSA example. See *supra,* at 5. In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. See *supra,* at 4–5. It is easy enough to know what "comparable lines of sight" means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. Or finally, take the more technical "moiety" example. See *supra,* at 5–6. Or maybe, don't. If you are a judge, you probably have no idea of what the FDA's rule means, or whether its policy is implicated when a previously

approved moiety is connected to lysine through a non-ester covalent bond.

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." *Martin*, 499 U. S., at 151; see *Thomas Jefferson*, 512 U. S., at 512. Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 167–168 (2007). And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499 (2010); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696 (1991) (discussing as a matter of democratic accountability the "proper roles of the political and judicial branches" in filling regulatory gaps). It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568 (1980). That preference may be strongest when the interpretive issue

arises in the context of a "complex and highly technical regulatory program." *Thomas Jefferson*, 512 U. S., at 512. After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing. (Is there anything to be said for courts all over the country trying to figure out what makes for a new active moiety?) But the uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading. Consider *Auer* itself. See *supra,* at 6. There, four Circuits held that police captains were "subject to" pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. Two other Circuits held that captains were "subject to" pay deductions only if the department's actual practice made that punishment a realistic possibility. See *Auer*, 519 U. S., at 460. Had the agency issued an interpretation before all those rulings (rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158, n. 17 (2012) (noting for this reason that *Auer* deference imparts "predictability to the administrative process" (internal quotation marks omitted)). *Auer* deference thus serves to ensure consistency in federal regulatory law, for everyone who needs to know what it requires.

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable

agency constructions of those truly ambiguous rules are entitled to deference. As just explained, we presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. See *supra,* at 7–11. But when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade." *Christopher*, 567 U. S., at 159 (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). We have thus cautioned that *Auer* deference is just a "general rule"; it "does not apply in all cases." *Christopher*, 567 U. S., at 155. And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is "unwarranted." *Ibid*. In particular, that will be so when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, "fair[, or] considered judgment." *Ibid.* (quoting *Auer*, 519 U. S., at 462); cf. *United States* v. *Mead Corp.*, 533 U. S. 218, 229–231 (2001) (adopting a similar approach to *Chevron* deference).

We take the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent. At times, this Court has applied *Auer* deference without significant analysis of the underlying regulation. See, *e.g., United States* v. *Larionoff*, 431 U. S. 864, 872 (1977) (stating that the Court "need not tarry" over the regulation's language given *Seminole Rock*). At other times, the Court has given *Auer* deference without careful attention to the nature and context of the interpretation. See, *e.g., Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 276, and nn. 22–23 (1969) (deferring to an agency's view as expressed in letters to third parties). And in a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," *Seminole*

Rock, 325 U. S., at 414—may suggest a caricature of the doctrine, in which deference is "reflexive." *Pereira* v. *Sessions*, 585 U. S. ___, ___ (2018) (Kennedy, J., concurring) (slip op., at 2). So we cannot deny that Kisor has a bit of grist for his claim that *Auer* "bestows on agencies expansive, unreviewable" authority. Brief for Petitioner 25. But in fact *Auer* does no such thing: It gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions. So before we turn to Kisor's specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.[4]

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. See *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000); *Seminole Rock*, 325 U. S., at 414 (deferring only "if the meaning of the words used is in doubt"). If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. See *supra,* at 9–10. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." See *Christensen*, 529 U. S., at 588. *Auer* does not, and indeed could not, go that far.

And before concluding that a rule is genuinely ambigu-

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[4]The proper understanding of the scope and limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur only in the judgment.

ous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." *Pauley*, 501 U. S., at 696. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. See *id.,* at 707 (Scalia, J., dissenting) (A regulation is not ambiguous merely because "discerning the only possible interpretation requires a taxing inquiry"). To make that effort, a court must "carefully consider[]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. *Ibid.* Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." *Thomas Jefferson*, 512 U. S., at 515. In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. See, *e.g., Ohio Dept. of Medicaid* v. *Price*, 864 F. 3d 469, 477 (CA6 2017). But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." *Arlington* v. *FCC*, 569 U. S. 290, 296 (2013). And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. See *Christopher*, 567 U. S., at 155; see also *Mead*, 533 U. S., at 229–231, 236–237 (requiring an analogous though not identical inquiry for *Chevron* deference). As explained above, we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. See *supra,* at 7–11. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold. Cf. *Mead*, 533 U. S., at 236 ("tailor[ing] deference to [the] variety" of administrative action); *Arlington*, 569 U. S., at 309–310 (BREYER, J., concurring in part and concurring in judgment) (noting that "context-specific[] factors" may show that "Congress would [not] have intended the agency to resolve [some] ambiguity"). The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *Mead*, 533 U. S., at 257–259, and n. 6 (Scalia, J., dissenting). That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we

have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. *Ford Motor Credit*, 444 U. S., at 566, n. 9, 567, n. 10 (declining to "draw a radical distinction between" agency heads and staff for *Auer* deference). But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. See, *e.g., Paralyzed Veterans*, 117 F. 3d, at 587 (refusing to consider a "speech of a mid-level official" as an "authoritative departmental position"); *N. Y. State Dept. of Social Servs.* v. *Bowen*, 835 F. 2d 360, 365–366 (CADC 1987) (rejecting the idea that an "informal memorandum" recounting a telephone conversation between employees could count as an "authoritative pronouncement"); *Exelon Generation Co.* v. *Local 15*, *Int'l Brotherhood of Elec. Workers, AFL–CIO*, 676 F. 3d 566, 576–578 (CA7 2012) (declining deference when the agency had itself "disclaimed the use of regulatory guides as authoritative"). If the interpretation does not do so, a court may not defer.

Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the agency." *Martin*, 499 U. S., at 153. So the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." *Arlington*, 569 U. S., at 309 (opinion of BREYER, J.). This Court indicated as much when it analyzed a "split enforcement" scheme, in which Congress divided regulatory power between two entities. *Martin*, 499 U. S., at 151. To decide "*whose* reasonable interpretation" of a rule controlled, we "presum[ed] Congress intended to invest interpretive power" in whichever actor was "best position[ed] to

develop" expertise about the given problem. *Id.*, at 149, 153. The same idea holds good as between agencies and courts. "Generally, agencies have a nuanced understanding of the regulations they administer." Brief for Respondent 33. That point is most obvious when a rule is technical; think back to our "moiety" or "diagnosis" examples. See *supra*, at 5–6. But more prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation. See *ibid.* Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, see *Jicarilla Apache Tribe* v. *FERC*, 578 F. 2d 289, 292–293 (CA10 1978), or one concerning the award of an attorney's fee, see *West Va. Highlands Conservancy, Inc.* v. *Norton*, 343 F. 3d 239 (CA4 2003). Cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649–650 (1990) (declining to award *Chevron* deference when an agency interprets a judicial-review provision). When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.[5]

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. *Christopher*, 567 U. S., at 155 (quoting *Auer*, 519 U. S., at 462). That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." *Christopher*, 567 U. S., at

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[5] For a similar reason, this Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text. See *Gonzales* v. *Oregon*, 546 U. S. 243, 257 (2006). An agency, we explained, gets no "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Ibid.*

155 (quoting *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 213 (1988) and *Auer*, 519 U. S., at 462).[6] And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. *Long Island Care*, 551 U. S., at 170. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. *Thomas Jefferson*, 512 U. S., at 515. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. See *Christopher*, 567 U. S., at 155–156. Here too the lack of "fair warning" outweighed the reasons to apply *Auer*. *Id.,* at 156 (internal quotation marks omitted).

* * *

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined

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[6]The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs. See *Bowen*, 488 U. S., at 212–213. But we have not entirely foreclosed that practice. *Auer* itself deferred to a new regulatory interpretation presented in an *amicus curiae* brief in this Court. There, the agency was not a party to the litigation, and had expressed its views only in response to the Court's request. "[I]n the circumstances," the Court explained, "[t]here [was] simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U. S., at 462.

Auer's scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

III

That brings us to the lone question presented here—whether we should abandon the longstanding doctrine just described. In contending that we should, Kisor raises statutory, policy, and constitutional claims (in that order). But he faces an uphill climb. He must first convince us that *Auer* deference is wrong. And even then, he must overcome *stare decisis*—the special care we take to preserve our precedents. In the event, Kisor fails at the first step: None of his arguments provide good reason to doubt *Auer* deference. And even if that were not so, Kisor does not offer the kind of special justification needed to overrule *Auer,* and *Seminole Rock,* and all our many other decisions deferring to reasonable agency constructions of ambiguous rules.

A

Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administrative Procedure Act (APA). See 5 U. S. C. §706. As Kisor notes, Congress enacted the APA in 1946—the year after *Seminole Rock*—to serve as "the fundamental charter of the administrative state." Brief for Petitioner 26 (internal quotation marks omitted). Section 706 of the Act, governing judicial review of agency action, states (among other things) that reviewing courts shall "determine the meaning or applicability of the terms of an agency action" (including a regulation). According to Kisor, *Auer* violates that edict by thwarting "meaningful judicial review" of agency rules. Brief for Petitioner 29. Courts under *Auer*, he asserts (now in the

language of Section 706), "abdicate their office of determining the meaning" of a regulation. *Id.,* at 27 (internal quotation marks omitted).

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. See *supra,* at 13–18. As we have explained, a court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover. There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them. And even if that is the case, courts must on their own determine whether the nature or context of the agency's construction reverses the usual presumption of deference. Most notably, a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties. All of that figures as "meaningful judicial review." Brief for Petitioner 29.

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. 5 U. S. C. §706. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency's reading for reasonableness. To see the point, assume that a regulatory (say, an employment) statute expressly instructed courts to apply *Auer* deference when reviewing an agency's interpretations of its ambiguous rules. Nothing in that statute would conflict with Section 706. Instead, the employment law would simply make clear *how* a court is to "determine the meaning" of such a rule—by deferring to an agency's reasonable reading. *Ibid*. Of course, that is not the world we know: Most substantive statutes do not say anything about *Auer* deference, one way or the other.

But for all the reasons spelled out above, we have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude to construe its ambiguous rules. See *supra,* at 7–11. And that presumption operates just like the hypothesized statute above. Because of it, once again, courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to "determine the meaning" of a rule precisely by deferring to the agency's reasonable reading. See Sunstein & Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297, 306 (2017) (If Congress intends "that the meaning of a regulation turns on the agency's interpretation of its meaning," then courts comply with Section 706's command to "'determine the meaning' [of the regulation] by deferring to that view"); cf. *Arlington*, 569 U. S., at 317 (ROBERTS, C. J., dissenting) (similarly addressing why *Chevron* deference comports with Section 706). Section 706 and *Auer* thus go hand in hand.

That is especially so given the practice of judicial review at the time of the APA's enactment. Section 706 was understood when enacted to "restate[] the present law as to the scope of judicial review." See Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978) (noting that this Court gives some deference to the Manual "because of the role played by the Department of Justice in drafting the legislation"). We have thus interpreted the APA not to "significantly alter the common law of judicial review of agency action." *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985) (internal quotation marks omitted). That pre-APA common law included *Seminole Rock* itself (decided the year before) along with prior decisions foretelling that ruling. See *supra,* at 7. Even assume that the deference regime laid

out in those cases had not yet fully taken hold. At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*. Cf. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 635–636 (1996) (arguing that courts before the APA used "flexible, common law methods to review administrative action"). And so nothing suggests that Section 706 imposes that requirement. Or otherwise said: If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use.

Kisor next claims that *Auer* circumvents the APA's rulemaking requirements. Section 553, as Kisor notes, mandates that an agency use notice-and-comment procedures before issuing legislative rules. See 5 U. S. C. §§553(b), (c). But the section allows agencies to issue "interpret[ive]" rules without notice and comment. See §553(b)(A). A key feature of those rules is that (unlike legislative rules) they are not supposed to "have the force and effect of law"—or, otherwise said, to bind private parties. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, ___ (2015) (slip op., at 3) (internal quotation marks omitted). Instead, interpretive rules are meant only to "advise the public" of how the agency understands, and is likely to apply, its binding statutes and legislative rules. *Ibid.* But consider, Kisor argues, what happens when a court gives *Auer* deference to an interpretive rule. The result, he asserts, is to make a rule that has never gone through notice and comment binding on the public. See Brief for Petitioner 21, 29. Or put another way, the interpretive rule ends up having the "force and effect of law" without ever paying the procedural cost. *Mortgage Bankers*, 575 U. S., at ___ (slip op., at 3).

But this Court rejected the identical argument just a few years ago, and for good reason. In *Mortgage Bankers*,

we held that interpretive rules, even when given *Auer* deference, do *not* have the force of law. See 575 U. S., at ___, and n. 4 (slip op., at 10, and n. 4). An interpretive rule itself never forms "the basis for an enforcement action"—because, as just noted, such a rule does not impose any "legally binding requirements" on private parties. *National Min. Assn.* v. *McCarthy*, 758 F. 3d 243, 251 (CADC 2014). An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment. And in all the ways discussed above, the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. See *supra,* at 13–18. Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference. In short, courts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule. See *Mortgage Bankers,* 575 U. S., at ___, n. 4 (slip op., at 10, n. 4) ("[I]t is the court that ultimately decides whether a given regulation means what the agency says"). No binding of anyone occurs merely by the agency's say-so.

And indeed, a court deciding whether to give *Auer* deference must heed the same procedural values as Section 553 reflects. Remember that a court may defer to only an agency's authoritative and considered judgments. See *supra,* at 15–18. No *ad hoc* statements or *post hoc* rationalizations need apply. And recall too that deference turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests. See *supra,* at 18. So an agency has a strong incentive to circulate its interpretations early and widely. In such ways, the doctrine of *Auer* deference reinforces, rather than undermines, the ideas of fairness and informed decisionmaking at the core of the APA.

To supplement his two APA arguments, Kisor turns to policy, leaning on a familiar claim about the incentives *Auer* creates. According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. See Brief for Petitioner 37–41. That argument received its fullest elaboration in a widely respected law review article pre-dating *Auer*. See Manning, 96 Colum. L. Rev., at 654–669. More recently, the concern about such self-delegation has appeared in opinions from this Court, starting with several from Justice Scalia calling for *Auer*'s reconsideration. See, *e.g., Christopher,* 567 U. S., at 158 (citing Manning, *supra,* at 655–668); *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 620–621 (2013) (Scalia, J., concurring in part and dissenting in part) (citing Manning, *supra*); *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (Scalia, J., concurring) (principally relying on Manning, *supra*).

But the claim has notable weaknesses, empirical and theoretical alike. First, it does not survive an encounter with experience. No real evidence—indeed, scarcely an anecdote—backs up the assertion. As two noted scholars (one of whom reviewed thousands of rules during four years of government service) have written: "[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely." Sunstein & Vermeule, 84 U. Chi. L. Rev., at 308. And even the argument's theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction. "[R]egulators want their regulations to be effective, and clarity promotes compliance." Brief for Administrative Law Scholars as *Amici Curiae* 18–19. Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities

in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates "separation-of-powers principles." See Brief for Petitioner 43. In his view, those principles prohibit "vest[ing] in a single branch the law-making and law-interpreting functions." *Id.,* at 45. If that objection is to agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function. See *supra,* at 13–18; *Mortgage Bankers,* 575 U. S., at ___, n. 4 (slip op., at 10, n. 4). If Kisor's objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. See, *e.g., Withrow* v. *Larkin*, 421 U. S. 35, 54 (1975) (permitting such a combination of functions); *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948) (same). That sort of mixing is endemic in agencies, and has been "since the beginning of the Republic." *Arlington*, 569 U. S., at 304–305, n. 4. It does not violate the separation of powers, we have explained, because even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of[] the 'executive Power'"—or otherwise said, ways of executing a statutory plan. *Ibid.* (quoting U. S. Const., Art. II, §1, cl. 1). So Kisor's last argument to dispatch *Auer* deference fails as roundly as the rest.

B

If all that were not enough, *stare decisis* cuts strongly against Kisor's position. "Overruling precedent is never a

small matter." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 7). Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). To be sure, *stare decisis* is "not an inexorable command." *Id.,* at 828. But any departure from the doctrine demands "special justification"—something more than "an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014).

And that is even more than usually so in the circumstances here. First, Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. *Bay Mills*, 572 U. S., at 798; see nn. 2, 3, *supra*. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. Second, because that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to "wrestle [with] whether or not *Auer*" had actually made a difference. Tr. of Oral Arg. 30; see *id.,* at 47 (Solicitor General agreeing that "every single regulation that's currently on the books whose interpretation has been established under *Seminole Rock* now [would have] to be relitigated anew"). It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.

And third, even if we are wrong about *Auer*, "Congress

remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) (stating that when that is so, "[c]onsiderations of *stare decisis* have special force"). In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at ___ (slip op., at 8). And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. See *Martin*, 499 U. S., at 151; *supra*, at 7–8. And it has done so even after Members of this Court began to raise questions about the doctrine. See, *e.g., Talk America*, 564 U. S., at 67–69 (Scalia, J., concurring). Given that history—and Congress's continuing ability to take up Kisor's arguments—we would need a particularly "special justification" to now reverse *Auer*.

Kisor offers nothing of that ilk. Nearly all his arguments about abandoning precedent are variants of his merits claims. We hear again, if in different parts of his briefs, that *Auer* deference frustrates "the policies embodied in the APA" and violates the separation of powers. Reply Brief 13, and n. 5; Brief for Petitioner 47–48. More generally, we learn that *Seminole Rock* was "wrong on its own terms" and "badly reasoned." *Id.,* at 47 (internal quotation marks omitted). Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent. Kisor does not claim that *Auer* deference is "unworkable," a traditional basis for overruling a case. *Patterson*, 491

U. S., at 173. Nor does he point to changes in legal rules that make *Auer* a "doctrinal dinosaur." *Kimble*, 576 U. S., at ___ (slip op., at 11). All he can muster is that "[t]he administrative state has evolved substantially since 1945." Brief for Petitioner 53. We do not doubt the point (although we note that *Auer* and other key deference decisions came along after most of that evolution took place). Still more, we agree with Kisor that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse. That is one reason we have taken care today to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules. But it is no answer to the growth of agencies for courts to take over their expertise-based, policymaking functions. Who knows? Maybe in 1945, the FDA was not thinking about "active moieties." See *supra,* at 5–6. But still, today—just as *Seminole Rock* and *Auer* held—it should have leeway to say what that term means.

IV

With that, we can finally return to Kisor's own case. You may remember that his retroactive benefits depend on the meaning of the term "relevant" records in a VA regulation. See *supra,* at 2–3. The Board of Veterans' Appeals, through a single judge's opinion, understood records to be relevant only if they relate to the basis of the VA's initial denial of benefits. By contrast, Kisor argued that records are relevant if they go to any benefits criterion, even one that was uncontested. The Federal Circuit upheld the Board's interpretation based on *Auer* deference.

Applying the principles outlined in this opinion, we hold that a redo is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the regulation ambiguous. We have insisted that a court bring all its interpretive tools to bear before finding that to be so. See

supra, at 13–14. It is not enough to casually remark, as the court did here, that "[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." 869 F. 3d, at 1368; see *supra,* at 13–14. Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning. The Solicitor General argued in this Court that the Board's reading is the only reasonable one. See Brief for Respondent 49–50. Perhaps Kisor will make the converse claim below. Before even considering deference, the court must seriously think through those positions.

And second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. A court must assess whether the interpretation is of the sort that Congress would want to receive deference. See *supra,* at 15–18. The Solicitor General suggested at oral argument that the answer in this case might be no. He explained that all 100 or so members of the VA Board act individually (rather than in panels) and that their roughly 80,000 annual decisions have no "precedential value." Tr. of Oral Arg. 64. He thus questioned whether a Board member's ruling "reflects the considered judgment of the agency as a whole." *Ibid.*; cf. *Mead*, 533 U. S., at 233 (declining to give *Chevron* deference to rulings "being churned out at a rate of 10,000 a year at an agency's 46 scattered offices"). We do not know what position the Government will take on that issue below. But the questions the Solicitor General raised are exactly the kind the court must consider in deciding whether to award *Auer* deference to the Board's interpretation.

We accordingly vacate the judgment below and remand the case for further proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–15

JAMES L. KISOR, PETITIONER *v.* ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 26, 2019]

CHIEF JUSTICE ROBERTS, concurring in part.

I join Parts I, II–B, III–B, and IV of the Court's opinion. We took this case to consider whether to overrule *Auer* v. *Robbins*, 519 U. S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). For the reasons the Court discusses in Part III–B, I agree that overruling those precedents is not warranted. I also agree with the Court's treatment in Part II–B of the bounds of *Auer* deference.

I write separately to suggest that the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. JUSTICE GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in

common.

That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.

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

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JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, with whom JUSTICE KAVANAUGH joins as to Parts I, II, III, IV, and V, and with whom JUSTICE ALITO joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*.[1] In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[2] Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today's decision is more a stay of execution than a

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[1] 519 U. S. 452 (1997).

[2] Larkin & Slattery, The World After *Seminole Rock* and *Auer*, 42 Harv. J. L. & Pub. Pol'y 625, 641 (2019) (internal quotation marks omitted).

pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Respectfully, we owe our colleagues on the lower courts more candid and useful guidance than this. And judges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands. One can hope that THE CHIEF JUSTICE is right, and that whether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. But means, not just ends, matter, and retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve. All to what end? So that we may *pretend* to abide *stare decisis*?

Consider this case. Mr. Kisor is a Marine who lost out on benefits for post-traumatic stress disorder when the court of appeals deferred to a regulatory interpretation advanced by the Department of Veterans Affairs. The court of appeals was guilty of nothing more than faithfully following *Auer*. But the majority today invokes *stare decisis*, of all things, to vacate that judgment and tell the court of appeals to try again using its newly retooled, multi-factored, and far less determinate version of *Auer*. Respectfully, I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford Mr. Kisor its best independent judgment of the law's meaning.

The Court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last. Until then, I hope that our judicial colleagues on other courts will take courage from today's ruling and realize that it has transformed *Auer* into a paper tiger.

I. How We Got Here

Where did *Auer* come from? Not from the Constitution, some ancient common law tradition, or even a modern statute. Instead, it began as an unexplained aside in a decision about emergency price controls at the height of the Second World War. Even then, the dictum sat on the shelf, little noticed, for years. Only in the last few decades of the 20th century did lawyers and courts really begin to dust it off and shape it into the reflexive rule of deference to regulatory agencies we know today. And they did so without ever pausing to consider whether a rule like that could be legally justified or even made sense. *Auer* is really little more than an accident.

A

Before the mid-20th century, few federal agencies engaged in extensive rulemaking, and those that did rarely sought deference for their regulatory interpretations.[3] But when the question arose, this Court did not hesitate to say that judges reviewing administrative action should decide all questions of law, including questions concerning the meaning of regulations. As Justice Brandeis put it, "[t]he inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine whether the applicable rules of law . . . were ob-

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[3] See Knudsen & Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L. J. 47, 55, 65, 68 (2015) (Lost History).