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WLF Asks Supreme Court to Overturn Precedent Granting Agencies Undue Deference

(*Kisor v. Wilkie*)

**“The federal government has not used *Auer* deference responsibly.”
—Corbin K. Barthold, WLF Litigation Counsel**

WASHINGTON, DC—Washington Legal Foundation today urged the U.S. Supreme Court to overturn *Auer v. Robbins*, a precedent that violates the separation of powers by instructing the judiciary to adopt, as binding law, the executive’s interpretations of its own regulations.

Under *Auer*, a court defers to an agency’s interpretation of its own ambiguous regulation, so long as that interpretation is not “plainly erroneous or inconsistent with the regulation” itself. *Auer* enables an agency, flush with power delegated by the legislature, to issue open-ended rules, and then to contort those rules as it sees fit. Just such a process was inflicted on James Kisor, a Vietnam veteran who was denied retroactive benefits based on the Department of Veterans Affairs’ reading of one of its own vague rules. Invoking *Auer*, the Federal Circuit upheld the VA’s decision without interpreting the rule for itself.

WLF’s brief offers concrete examples of agencies’ efforts aggressively to expand, or abruptly to alter, the import of their regulations. Agencies suddenly and radically change how they interpret rules—and then seek deference for those new interpretations. Agencies seek deference for their interpretations of rules unconnected with their areas of expertise. Agencies try to stretch the meaning of rules beyond the scope even of the statutes that give agencies the power to regulate in the first place. Under the guise of rule “interpretation,” agencies dodge notice-and-comment procedures, defy democratic norms, and undermine the very notion of equal justice under law.

Agencies, WLF shows, often use *Auer* as cover for highhanded, unpredictable, and nakedly political behavior. WLF therefore urges the Court to overturn *Auer* and restore the separation-of-powers principle by which it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Celebrating its 42nd year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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