Florida Real Property and Business Litigation Report

Volume XII, Issue 26
July 1, 2019
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Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

KISOR *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS

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

No. 18–15. Argued March 27, 2019—Decided June 26, 2019

Petitioner James Kisor, a Vietnam War veteran, first sought disability benefits from the Department of Veterans Affairs (VA) in 1982, alleging that he had developed post-traumatic stress disorder from his military service. The agency denied his initial request, but in 2006, Kisor moved to reopen his claim. The VA this time agreed he was eligible for benefits, but it granted those benefits only from the date of his motion to reopen, not (as Kisor had requested) from the date of his first application. The Board of Veterans' Appeals—a part of the VA—affirmed that retroactivity decision, based on its interpretation of an agency rule governing such claims. The Court of Appeals for Veterans Claims affirmed.

The Federal Circuit also affirmed, but it did so by applying a doctrine called *Auer* (or sometimes, *Seminole Rock*) deference. See *Auer* v. *Robbins*, 519 U. S. 452; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. Under that doctrine, this Court has long deferred to an agency's reasonable reading of its own genuinely ambiguous regulations. The Court of Appeals concluded that the VA regulation at issue was ambiguous, and it therefore deferred to the Board's interpretation of the rule. Kisor now asks the Court to overrule *Auer*, as well as its predecessor *Seminole Rock*, discarding the deference those decisions give to agencies.

Held: The judgment is vacated and remanded.

869 F. 3d 1360, vacated and remanded.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, holding that *Auer* and *Seminole Rock* are not overruled. Pp. 11–19, 25–29.

(a) This Court's deference doctrine is rooted in a presumption that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. The Court adopts that presumption for a set of reasons related to the comparative attributes of courts and agencies in answering interpretive questions. But when the reasons for the presumption do not hold up, or when countervailing reasons outweigh them, courts should not give deference to an agency's reading. The Court has thus cabined *Auer*'s scope in varied and critical ways.

First and foremost, a court should not afford *Auer* deference unless, after exhausting all the "traditional tools" of construction, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9, the regulation is genuinely ambiguous. A court must carefully consider the text, structure, history, and purpose of a regulation before resorting to deference. If genuine ambiguity remains, the agency's reading must still fall "within the bounds of reasonable interpretation." *Arlington* v. *FCC*, 569 U. S. 290, 296.

And even then, not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. Rather, a court must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. See, *e.g., Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155. The inquiry along this dimension does not reduce to an exhaustive test, but the Court has laid out some especially important markers for identifying when *Auer* deference is and is not appropriate. To begin with, the regulatory interpretation must be the agency's authoritative or official position, rather than any more *ad hoc* statement not reflecting the agency's views. Next, the agency's interpretation must in some way implicate its substantive expertise, as the basis for deference ebbs when the subject matter of a dispute is distant from the agency's ordinary duties. Finally, an agency's reading of a rule must reflect its "fair and considered judgment." *Auer*, 519 U. S., at 462. A court should decline to defer, for example, to a merely "'convenient litigating position,'" *Christopher*, 567 U. S., at 155., or to a new interpretation that creates "unfair surprise" to regulated parties, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170. Pp. 11–19.

(b) *Stare decisis* cuts strongly against overruling *Auer*. Adherence to precedent is "a foundation stone of the rule of law," *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798, and any departure from the doctrine demands "special justification," *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266. That is even more than usually so in the circumstances here. First, Kisor asks the Court to overrule a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. *Bay Mills*, 572 U. S., at 798. Second, because *Auer* deference pervades the whole corpus of administrative law, abandoning it would cast doubt on many settled constructions of rules. And third, even if the Court is wrong about *Auer*, "Congress remains free to alter what [the Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173. For approaching a century, Congress has let this deference regime work side-by-side with both the Administrative Procedure Act (APA) and the many statutes delegating rulemaking power to agencies. This Court would thus need a particularly "special justification" to now reverse *Auer*.

Kisor offers nothing of that ilk. Nearly all of his arguments relate to whether the doctrine is wrong or poorly reasoned. He does not claim that *Auer* deference is "unworkable," a traditional basis for overruling a case, *Patterson*, 491 U. S., at 173, or point to changes in legal rules that make *Auer* a "doctrinal dinosaur," *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___. Instead, his lone special justification is that the administrative state has evolved substantially since this Court decided *Seminole Rock* in 1945. It is true that agencies have far-reaching influence today; that is one reason the Court has taken care to reinforce the limits of *Auer* deference. But it is no answer to the growth of agencies for courts to take over their expertise-based, policymaking functions. Pp. 25–28.

(c) Turning to Kisor's own case, a remand is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the VA's regulation ambiguous before bringing all its interpretive tools to bear on the question. Second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity, rather than assessing whether the interpretation is of the sort that Congress would want to receive deference. On remand, the Court of Appeals must reconsider whether *Auer* deference is warranted, bearing in mind the principles outlined in this opinion. Pp. 28–29.

JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts II–A and III–A:

(a) *Auer* deference is rooted in 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. In part, the presumption arises because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.,* at 152. In still greater measure, the presumption stems from an awareness that resolving genuine regulatory ambiguities often "'entail[s] the exercise of judgment grounded in policy concerns,'" an area where agencies have a comparative advantage over courts. *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512. Finally, the presumption reflects the well-known benefits of uniformity in interpreting ambiguous rules. *Auer* deference promotes "resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation," *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568. Pp. 4–11.

(b) None of Kisor's arguments provide good reason to reconsider *Auer* deference. First, he claims that *Auer* is inconsistent with the APA's judicial review provision, which instructs reviewing courts to "determine the meaning" of an agency action. 5 U. S. C. §706. Even when a court defers to a regulatory reading, however, 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. This Court thus presumes that Congress would want courts to do so by reviewing agency interpretations for reasonableness. That is especially so because Section 706, when enacted, was understood to restate the present law of judicial review—which would have included deference under *Seminole Rock*. Nor does *Auer* circumvent the APA's rulemaking requirements, which require regulations to go through notice and comment before they can bind third parties. Even though a court might defer to an agency's interpretation of a regulation, the agency's interpretation itself never forms the basis for an enforcement action. Rather, an agency bringing an enforcement action must always rely on a rule that went through notice and comment. And courts, in turn, always retain the final authority to approve—or not—an agency's reading of that notice-and-comment rule. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, ___.

Kisor's policy and constitutional arguments fail just as roundly. As a policy matter, he contends that *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. But no real evidence backs up that assertion and strong incentives cut in the opposite direction. Finally, Kisor asserts that *Auer* deference violates "separation-of-powers principles" by vesting both legislative and judicial functions in one branch. If that objection is to agencies' usurping the interpretive role of courts, *Auer*—when properly understood and applied—does no such thing. And if the objection is instead to the supposed commingling of functions within an agency, this Court has explained that even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of the 'executive Power,'" and thus raise no constitutional concerns. *Arlington*, 569 U. S., at 304–305, n. 4. Pp. 19–25.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and an opinion with respect to Parts II–A and III–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, in which KAVANAUGH, J., joined as to Parts I, II, III, IV, and V, and in which ALITO, J., joined as to Parts I, II, and III. KAVANAUGH, J., filed an opinion concurring in the judgment, in which ALITO, J., joined.

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 Wizards 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

[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

[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-

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

served."[4] Unsurprisingly, the government's early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful *evidence* of its original public meaning.[5] But courts respected executive interpretations only because and to the extent "they embodied understandings made roughly contemporaneously with . . . enactment and stably maintained and practiced since that time," not "because they were executive as such."[6]

Writing for four Members of the Court, JUSTICE KAGAN suggests that *Auer*'s very different approach to the interpretation of agency regulations was foreshadowed as early as this Court's 1898 decision in *United States* v. *Eaton*.[7] *Ante*, at 7. But this is mistaken. The question in that case was whether Mr. Eaton's appointment as temporary vice-consul to Siam was consistent with State Department regulations. After several pages of careful and independent legal analysis, the Court held that the regulations did authorize the appointment. That conclusion, the Court explained, was "rendered necessary by a consideration of

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[4] *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 (1936) (concurring opinion). See also *FTC* v. *Gratz*, 253 U. S. 421, 427 (1920); *ICC* v. *Union Pacific R. Co.*, 222 U. S. 541, 547 (1912); *Belden* v. *Chase*, 150 U. S. 674, 698 (1893); *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840); accord, Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197, 206–207 (1991).

[5] Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 930–947 (2017) (Origins).

[6] *Id.*, at 943, 962; cf. *NLRB* v. *Noel Canning*, 573 U. S. 513, 572–573 (2014) (Scalia, J., concurring in judgment) (an "open, widespread, and unchallenged" governmental practice can "guide [courts'] interpretation" of an ambiguous text, but it cannot "alter" the meaning of that text); *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect").

[7] 169 U. S. 331.

the text."[8] Only *after* reaching this conclusion did the Court observe that the State Department had previously adopted the same construction, noting along the way that the Department's views were "entitled to the greatest weight" and that the Court saw "no reason in this case to doubt [their] correctness."[9] *Eaton* thus simply followed the well-worn path of acknowledging that an agency's interpretation of a regulation can supply *evidence* of its meaning.[10] Nowhere did the Court even hint that it would have deferred to the State Department's views about the meaning of the law if its own independent textual analysis had not led it to the same conclusion.

All this is borne out by the Court's later teachings in *Skidmore* v. *Swift & Co.* in 1944.[11] The question there was whether the time overnight employees spent waiting to respond to fire alarms could amount to compensable overtime under the Fair Labor Standards Act. The lower courts had held as a matter of law that it could not. In an opinion by Justice Jackson, this Court reversed. The Court first held, based on its own independent analysis, that "no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time."[12] Only then did the Court consider "what, if any, deference courts should pay" to the views of the Administrator of the Labor Department's Wage and Hour

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[8] *Id.*, at 342.

[9] *Id.*, at 342–343.

[10] Cf. Newman, How Courts Interpret Regulations, 35 Cal. L. Rev. 509, 521, and n. 78 (1947) (noting that *Eaton* suggested administrative interpretations could be "'persuasive' but not binding").

[11] 323 U. S. 134.

[12] *Id.*, at 136–137. Much of the legal analysis supporting this conclusion was contained in the companion case, *Armour & Co.* v. *Wantock*, 323 U. S. 126 (1944), which made no mention of any administrative interpretations. *Id.*, at 129–134; see *Skidmore*, 323 U. S., at 136 (citing the "reasons set forth in the *Armour* case decided herewith").

Division.[13] And on that question the Court reaffirmed the traditional rule that an agency's interpretation of the law is "not controlling upon the courts" and is entitled only to a weight proportional to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[14] At the time, the influential administrative law scholar Kenneth Culp Davis considered this "[a]n entirely reliable statement" of the law.[15]

B

In truth, the seeds of the *Auer* doctrine were first planted only in 1945, in *Bowles* v. *Seminole Rock & Sand Co.*[16] That case involved regulations issued by the Office of Price Administration (OPA), which Congress had tasked with stabilizing the national economy during the Second World War through the use of emergency price controls. It was in that context that the Court declared—for the first time and without citing any authority—that "if the meaning of [the regulation were] in doubt," the agency's interpretation would merit "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[17]

Yet even then it was far from clear how much weight

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[13] *Id.*, at 139.

[14] *Id.*, at 140; see also *id.*, at 139 (the agency's views "are not, of course, conclusive, even in the cases with which they directly deal" and do not "bin[d] a district court's processes, as an authoritative pronouncement of a higher court might do").

[15] Davis, Administrative Rules—Interpretative, Legislative, and Retroactive, 57 Yale L. J. 919, 936–939, and n. 86 (1948); see also K. Davis, Administrative Law §249, p. 901 (1951) ("[S]ubstitution of judicial judgment on the content of interpretative rules is always permissible, even though the reviewing court may give 'weight' or 'great weight' to the rule. The best guide may be the Court's formula in *Skidmore* . . . ").

[16] 325 U. S. 410.

[17] *Id.*, at 414.

the Court really placed on the agency's interpretation. As it had in *Eaton*, the Court in *Seminole Rock* began with an extended discussion of "the plain words of the regulation," which led it to conclude that the text "clearly" supported the government's position.[18] Only after reaching that conclusion based on its own independent analysis did the Court proceed to add that "[a]ny doubts . . . are removed by reference to the administrative construction."[19]

So confused was all this that readers at the time didn't perceive *Seminole Rock*'s dictum as changing anything. Professor Davis observed that the Court's discussion about giving "controlling weight" to the agency's interpretation was an unexplained aside that made no difference to the case's outcome.[20] The dictum, too, was readily explained as reflecting the unusual factual context in which the case arose, involving an emergency government program created to deal with "unique circumstances of war and economic depression."[21] And the Court decided *Seminole Rock* the same Term it issued *Skidmore*, where it reaffirmed the traditional rule that an agency's views about the law may *persuade* a court but can never *control* its judgment. In fact, the Court in *Seminole Rock* was careful to note that the OPA interpretation before it bore many of the characteristics *Skidmore* would have recognized as increasing its persuasive force: It had been announced concurrently with the regulation, disseminated widely to the regulated community, and adhered to consistently by the agency.[22]

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[18] *Id.*, at 414–417.

[19] *Id.*, at 417.

[20] See Davis, Scope of Review of Federal Administrative Action, 50 Colum. L. Rev. 559, 597 (1950).

[21] Lost History 60; see also Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L. J. Am. U. 1, 12 (1996).

[22] 325 U. S., at 417–418; see Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J. L. & Pub. Pol'y 87, 88 (2018) ("A closer look at *Seminole Rock* suggests an unremarkable application of the less-deferential standard

No wonder, then, that for many years after the decision, courts "connected *Seminole Rock* more closely with the deference framework . . . under *Skidmore*" and generally engaged in a *Skidmore*-type analysis, accepting the agency's interpretation "only after independently examining the regulation and concluding that the agency interpretation was sound."[23] If *Seminole Rock*'s "controlling weight" dictum was afforded any force, it was usually only in the price control context; even then it was ordinarily extended only to "official" agency interpretations that were published contemporaneously with the regulation and widely distributed.[24] The Fourth Circuit exemplified the early understanding of *Seminole Rock* when it observed—citing both *Seminole Rock* and *Skidmore*—that "under settled principles" an official agency interpretation in an opinion letter was entitled only to "respectful consideration."[25] The letter, the court stressed, did not "have the effect of law," and "[i]t would be absurd to hold that the courts must subordinate their judgment as to the meaning of a . . . regulation to the mere unsupported opinion of an associate counsel in an administrative department."[26]

C

This Court did not cite *Seminole Rock*'s "controlling weight" dictum again until 1965, in *Udall* v. *Tallman*.[27] And though *Tallman* "did very little to advance the jurisprudential understanding of *Seminole Rock*," it certainly helped fuel the expansion of so-called "*Seminole Rock*

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of review of *Skidmore*").

[23] Lost History 94–97; see Pojanowski, *supra*, at 92–96.

[24] Lost History 65–68.

[25] *Southern Goods Corp.* v. *Bowles*, 158 F. 2d 587, 590 (1946).

[26] *Ibid.*

[27] 380 U. S. 1, 4, 17–18 (accepting a regulatory interpretation by the Secretary of the Interior that was consistent, widely disseminated, and heavily relied upon, while not suggesting any disagreement with the Secretary's interpretation).

deference."[28] From the 1960s on, this Court and lower courts began to cite the *Seminole Rock* dictum with increasing frequency and in a wider variety of circumstances, but still without much explanation. They also increasingly divorced *Seminole Rock* from *Skidmore*.[29]

Auer represents the apotheosis of this line of cases. In the name of what some now call the *Auer* doctrine, courts have in recent years "mechanically applied and reflexively treated" *Seminole Rock*'s dictum "as a constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis."[30] Under *Auer*, judges are forced to subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court. After all, if the court agrees that the agency's reading is the best one, *Auer* does no real work; the doctrine matters only when a court would conclude that the agency's interpretation is *not* the best or fairest reading of the regulation.

To be sure, JUSTICE KAGAN paints a very different picture of *Auer*, asking us to imagine it riding to the rescue only in cases where the scales of justice are evenly balanced between two equally persuasive readings. But that's a fantasy: "If nature knows of such equipoise in legal arguments, the courts at least do not."[31] In the real world the judge uses his traditional interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law. Of course, there are close cases and reasonable judges will sometimes disagree. But every day, in courts throughout this country, judges manage with these traditional tools to reach conclusions about the meaning of statutes, rules of proce-

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[28] Lost History 80.

[29] See generally *id.*, at 68–92, 98.

[30] *Id.*, at 53.

[31] Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 520.

dure, contracts, and the Constitution. Yet when it comes to interpreting federal regulations, *Auer* displaces this process and requires judges instead to treat the agency's interpretation as controlling even when it is "not . . . the best one."[32]

If that were not troubling enough, *Auer* has also become "a doctrine of uncertain scope and application."[33] This Court has never offered meaningful guidance on how to decide whether the agency's reading is "reasonable" enough to demand judicial deference—and lower courts have drawn that line in wildly different places.[34] Deepening the confusion, this Court and lower courts have, over time, tried to soften *Auer*'s rigidity by declaring that it "might" not apply in some ill-defined circumstances, such as when the agency's interpretation "conflicts with a prior interpretation" or reflects a "convenient litigating position" or a "*post hoc* rationalization" for past agency action.[35] All this has resulted in "widespread confusion" about when and how to apply *Auer* deference.[36]

In light of *Auer*'s many problems, it should come as no surprise that several Members of this Court,[37] along with

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[32] *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 613 (2013); see *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 702 (1991) (the agency's interpretation "need not be the best or most natural one by grammatical or other standards").

[33] Hickman & Thomson, The *Chevron*ization of *Auer*, 103 Minn. L. Rev. Headnotes 103, 105 (2019).

[34] See Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2134–2144 (2016).

[35] *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (alterations and internal quotation marks omitted).

[36] Leske, Splits in the *Rock*: The Conflicting Interpretations of the *Seminole Rock* Deference Doctrine by the U. S. Courts of Appeals, 66 Admin. L. Rev. 787, 832 (2014); see Hickman & Thomson, *supra*, at 111 (noting a "glut of recent cases in which members of the same court are openly divided on the proper application of *Auer*").

[37] See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, ___–___ (2015) (ALITO, J., concurring in part and concurring in judgment) (slip op., at

a great many lower court judges[38] and members of the legal academy,[39] have questioned *Auer*'s validity and pleaded with this Court to reconsider it.

D

That's where things stood when James Kisor asked the Department of Veterans Affairs to reopen his disability benefits claim. Mr. Kisor served as a United States Marine from 1962 through 1966 and saw combat in Vietnam.

1–2); *id.*, at ___–___ (Scalia, J., concurring in judgment) (slip op., at 1–5); *id.*, at ___–___ (THOMAS, J., concurring in judgment) (slip op., at 8–23); *Decker*, 568 U. S., at 615–616 (ROBERTS, C. J., joined by ALITO, J., concurring); *id.*, at 616–621 (Scalia, J., concurring in part and dissenting in part); *Talk America*, *Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 67–69 (2011) (Scalia, J., concurring); see also Kavanaugh, Keynote Address: Justice Scalia and Deference 19:06 (June 2, 2016), http://vimeo.com/169758593 (predicting "that *Auer* will someday be overruled and that Justice Scalia's dissent in *Decker* will be the law of the land").

[38] See, *e.g.*, *Forrest Gen. Hospital* v. *Azar*, ___ F. 3d ___, ___, 2019 WL 2417409, *7 (CA5 2019); *San Diego Gas & Elec. Co.* v. *FERC*, 913 F. 3d 127, 145, n. 4 (CADC 2019) (Randolph, J., dissenting); *United States* v. *Havis*, 907 F. 3d 439, 450–452 (CA6 2018) (Thapar, J., concurring), vacated, 921 F. 3d 628, on reh'g en banc, ___ F. 3d ___ (CA6 2019); *Marsh* v. *J. Alexander's LLC*, 905 F. 3d 610, 652–653 (CA9 2018) (Ikuta, J., dissenting); *Egan* v. *Delaware River Port Auth.*, 851 F. 3d 263, 279 (CA3 2017) (Jordan, J., concurring in judgment); *Perez* v. *Loren Cook Co.*, 803 F. 3d 935, 938, n. 2 (CA8 2015) (en banc); *Johnson* v. *McDonald*, 762 F. 3d 1362, 1366–1368 (CA Fed. 2014) (O'Malley, J., concurring); *Exelon Generation Co.* v. *Local 15*, *Int'l Brotherhood of Elec. Workers*, *AFL–CIO*, 676 F. 3d 566, 576, n. 5 (CA7 2012).

[39] See, *e.g.*, Hickman & Thomson, *supra*, at 111–113; Adler, *Auer* Evasions, 16 Geo. J. L. & Pub. Pol'y 1, 26 (2018); Pojanowski, 16 Geo. J. L. & Pub. Pol'y, at 99; Knudsen & Wildermuth, Lessons From the Lost History of *Seminole Rock*, 22 Geo. Mason L. Rev. 647, 667 (2015); Leske, *supra*, at 789–793; Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 108–110 (2000); Anthony, 10 Admin. L. J., at 4–12; Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 696 (1996).

In the early 1980s, a VA counselor observed that Mr. Kisor was battling depression and suicidal thoughts and suggested he might be suffering from post-traumatic stress disorder. In light of this, Mr. Kisor filed a claim for disability benefits in 1982. But, in the end, the VA denied the claim.

In 2006, Mr. Kisor sought to reopen the matter. In connection with that request, he presented new evidence, including a psychiatrist's report diagnosing him with PTSD and additional records documenting his service in Vietnam. The VA reopened Mr. Kisor's claim and granted him disability benefits effective June 5, 2006, the date he had submitted his new request. Mr. Kisor argued that a VA regulation entitled him to an earlier effective date for disability benefits, one tracing back to his original submission in 1982. But the Board of Veterans Appeals concluded that the applicable regulation didn't authorize that relief.

Mr. Kisor appealed the Board's ruling all the way to the Federal Circuit, arguing that the Board had misinterpreted the relevant regulation. The Federal Circuit affirmed. Relying on the *Auer* doctrine, the court held that it had no choice but to treat the Board's interpretation as "'controlling'" unless that interpretation was "'plainly erroneous or inconsistent with the regulatio[n].'"[40] Without even trying to determine who had the better reading of the regulation, the Board or Mr. Kisor, the court declared that "[t]he Board's interpretation does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework."[41] Case closed.

Mr. Kisor sought and was denied rehearing en banc. Three judges dissented and joined those who have questioned "the logic behind continued adherence to the [*Auer*] doctrine"; they argued that, without *Auer* deference, Mr.

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[40] *Kisor* v. *Shulkin*, 869 F. 3d 1360, 1367 (2017).

[41] *Id.*, at 1368.

Kisor's reading of the regulation would likely prevail.[42] Mr. Kisor then asked us to grant certiorari to reconsider *Auer*. Thinking it past time to do so, we granted the petition.[43]

II. The Administrative Procedure Act

When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn't be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the Administrative Procedure Act. The APA is a "seminal" statute that Congress wrote to define the relationship between courts and agencies.[44] Some have even described it as a kind of constitution for our "administrative state." Yet, remarkably, until today this Court has never made any serious effort to square the *Auer* doctrine with the APA. Even now, only four Justices make the attempt. And for at least two reasons, their arguments are wholly unpersuasive.

A

The first problem lies in §706. That provision instructs reviewing courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law."[45] Determining the meaning of a statute or regulation, of course, presents a classic legal question. But in case these directives were not clear enough, the APA further directs courts to "determine the meaning" of any relevant "agency action," including any rule issued by the agency.[46] The APA thus requires a

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[42] *Kisor* v. *Shulkin*, 880 F. 3d 1378, 1379 (CA Fed. 2018) (opinion of O'Malley, J.).

[43] 586 U. S. ___ (2018).

[44] *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967).

[45] 5 U. S. C. §706.

[46] *Ibid.*; see §551(13) (defining "agency action").

reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't "decid[ing]" the relevant "questio[n] of law" or "determin[ing] the meaning" of the regulation. Instead, it's allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.[47]

JUSTICE KAGAN seeks to address the glaring inconsistency between our judge-made rule and the controlling statute this way. On her account, the APA tells a reviewing court to "determine the meaning" of regulations, but it does not tell the court "*how*" to do that. Thus, we are told, reading the regulation for itself and deferring to the agency's reading are just two equally valid ways for a court to fulfill its statutory duty to "determine the meaning" of the regulation. *Ante*, at 20–21.

But the APA isn't as anemic as that. Its unqualified command requires the court to determine legal questions—including questions about a regulation's meaning—by its own lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand. Nor can there be any doubt that, when Congress wrote the APA, it knew perfectly well how to require judicial deference to an agency when it wished—in fact, Congress repeatedly specified deferential standards for judicial review *elsewhere* in the statute.[48] But when it

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[47] The case before us doesn't arise under the APA, but the statute that governs here is plainly modeled on the APA and contains essentially the same commands. It directs a reviewing court to "decide all relevant questions of law" and to "set aside any regulation or any interpretation thereof" that is "not in accordance with law." 38 U. S. C. §7292(d)(1).

[48] See, *e.g.*, §706(2)(A) (arbitrary and capricious, abuse of discretion); §706(2)(E) (substantial evidence); see also *Universal Camera Corp.* v.

comes to the business of interpreting regulations, no such command exists; instead, Congress told courts to "determine" those matters for themselves. Though one hardly needs to be an academic to recognize the point, "commentators in administrative law have 'generally acknowledged' that Section 706 seems to require de novo review on questions of law."[49]

What the statutory language suggests, experience confirms. If *Auer* deference were really just another way for courts to "determine the meaning" of regulations under §706, you might expect that a final judicial "determination" would at least settle, as a matter of precedent, the question of what the regulation "means." Of course, even after one court has spoken on a regulation's meaning, that

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NLRB, 340 U. S. 474, 482, n. 14 (1951) (noting that as originally proposed, the APA's judicial review provision would have included an explicit requirement for courts to accord "due weight" to "the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it" (internal quotation marks omitted)).

[49] Duffy, Administrative Common Law in Judicial Review, 77 Texas L. Rev. 113, 194–195 (1998); see Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1085–1086 (1997) (noting the "embarrassing" fact that "the APA appears to compel th[e] conclusion" that "courts should decide all questions of law de novo"). See also, *e.g.*, Origins 985; Mashaw, Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective, 32 Cardozo L. Rev. 2241, 2243 (2011); Garrett, Legislating Chevron, 101 Mich. L. Rev. 2637, 2640 (2003); Molot, Reexamining *Marbury* in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation, 96 Nw. U. L. Rev. 1239, 1249 (2002); Anthony, 10 Admin. L. J. Am. U., at 9–10; Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473, and n. 85 (1989); Starr, Sunstein, Willard, & Morrison, Judicial Review of Administrative Action in a Conservative Era, 39 Admin. L. Rev. 353, 368 (1987) (remarks of Prof. Sunstein); Pierce & Shapiro, Political and Judicial Review of Agency Action, 59 Texas L. Rev. 1175, 1182 (1981); 4 K. Davis, Administrative Law §30.01, pp. 190–191 (1958).

court or another might properly give weight to a new agency interpretation as part of the court's own decision-making process. See *supra*, at 6. But in light of *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*,[50] courts have interpreted *Auer* as forbidding a court from ever "determin[ing] the meaning" of a regulation with the force that normally attaches to precedent, because an agency is always free to adopt a different view and insist on judicial deference to its new judgment.[51] And if an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really "determine[s]" what the regulation means?

To test the point further, consider a statute that tells a court to "determin[e]" an appropriate sentence in a criminal case.[52] If the judge said he was sending a defendant to prison for longer than he believed appropriate only in deference to the government's "reasonable" sentencing recommendation, would anyone really think that complied with the law? Or take a statute that instructs a court to "determine" whether a consent judgment proposed by the government in a civil antitrust case "is in the public interest."[53] If a court thought the proposed judgment harmful to the public but decided to defer to the government's "reasonable" contrary view anyway, would anyone suggest the court had complied with Congress's instruction?

Nor does JUSTICE KAGAN's reading of §706 offer any logical stopping point. If courts can "determine the meaning" of a regulation by deferring to any "reasonable" agency reading, then why not by deferring to *any* agency reading? If it were really true that the APA has nothing to say

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[50] 545 U. S. 967 (2005).

[51] See, *e.g.*, *In re Lovin*, 652 F. 3d 1349, 1353–1354 (CA Fed. 2011); *Levy* v. *Sterling Holding Co.*, 544 F. 3d 493, 502–503 (CA3 2008).

[52] 18 U. S. C. §3553(a).

[53] 15 U. S. C. §16(e)(1).

about *how* courts decide what regulations mean, then it would follow that the APA tolerates a rule that "the agency is always right." And if you find yourself in a place as absurd as that, you might want to consider whether you've taken a wrong turn along the way.

B

The problems don't end there. *Auer* is also incompatible with the APA's instructions in §553. That provision requires agencies to follow notice-and-comment procedures when issuing or amending legally binding regulations (what the APA calls "substantive rules"), but not when offering mere interpretations of those regulations.[54] An agency wishing to adopt or amend a binding regulation thus must publish a proposal in the Federal Register, give interested members of the public an opportunity to submit written comments on the proposal, and consider those comments before issuing the final regulation. Under the APA, that regulation then carries the force of law unless and until it is amended or repealed.[55] By contrast, an agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses.

Auer effectively nullifies the distinction Congress drew here. Under *Auer*, courts must treat as "controlling" not only an agency's duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment. For all practical purposes, "the new interpretation might as well be a new regulation."[56] *Auer* thus obliterates a distinction Congress thought vital and supplies

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[54] See *Perez*, 575 U. S., at ___–___ (slip op., at 2–3).

[55] *United States* v. *Nixon*, 418 U. S. 683, 695–696 (1974).

[56] *Perez*, 575 U. S., at ___ (THOMAS, J., concurring in judgment) (slip op., at 16).

agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law.[57]

Think of it this way. We've held that the Constitution's specification of a "single, finely wrought" procedure for the enactment of statutes (bicameralism and presentment) necessarily implies that Congress cannot amend an enacted statute without following that procedure—say, by allowing a single House to change what the law requires.[58] By the same logic, Congress's specification in the APA of procedures for the creation of new substantive rules (like notice and comment) necessarily implies that an agency cannot amend a substantive rule without following those procedures. To hold otherwise, as *Auer* demands, subverts the APA's design.

Certain *amici* contend this argument is "out of place" in this particular case because the VA happened to issue the interpretation challenged here in an adjudicative proceeding.[59] But the premise on which they proceed—that the APA permits agencies to issue "controlling" amendments to their regulations in adjudicative proceedings—is not correct. Once an agency issues a substantive rule through notice and comment, it can amend that rule only by following the same notice-and-comment procedures.[60] Whether an agency issues its interpretation in a press release or something it chooses to call an "adjudication," all we have is the agency's opinion about what an existing rule means, something that the APA tells us is *not* binding in a court of law or on the American people.

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[57] *Ibid.*; see *id.*, at ___ (Scalia, J., concurring in judgment) (slip op., at 3) (*Auer* lets agencies "use [interpretive] rules not just to advise the public, but also to bind them").

[58] See *INS* v. *Chadha*, 462 U. S. 919, 951, 954 (1983).

[59] Brief for Administrative Law Scholars as *Amici Curiae* 9–10, n. 4.

[60] See *Perez*, 575 U. S., at ___ (slip op., at 8); *Marseilles Land & Water Co.* v. *FERC*, 345 F. 3d 916, 920 (CADC 2003).

If that won't work, JUSTICE KAGAN tries an alternative argument from nearly the opposite direction. She replies that affording *Auer* deference to an agency's interpretation of its own rules never offends the APA because the agency's interpretation lacks "the force of law" associated with substantive rules. Agency interpretations lack this force, we are told, because a court always retains the power to decide at least whether the interpretation is entitled to deference. *Ante*, at 22–23. But this argument rests on an implausibly narrow understanding of what it means for an agency action to bear the force of law. Under JUSTICE KAGAN's logic, even a binding substantive rule would lack the force of law because a court retains the power to decide whether the rule is arbitrary and capricious and thus invalid under the APA. But no one believes that. While an agency interpretation, just like a substantive rule, "must meet certain conditions before it gets deference," "once it does so [*Auer* makes it] every bit as binding as a substantive rule."[61] To suggest that *Auer* does not make an agency's interpretive guidance "binding o[n] anyone," *ante*, at 23, is linguistic hocus-pocus.

C

If *Auer* cannot be squared with the text of the APA, JUSTICE KAGAN suggests it at least conforms to a reasonable "presumption about congressional intent." *Ante*, at 7. The theory seems to be that whenever Congress grants an agency "rulemaking power," it *also* implicitly gives the agency "'the power authoritatively to interpret'" whatever rules the agency chooses to adopt. *Ante*, at 8. But against the clear statutory commands Congress gave us in the APA, what sense does it make to "presume" that Congress really, secretly, wanted courts to treat agency interpreta-

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[61] *Perez,* 575 U. S., at ___ (Scalia, J., concurring in judgment) (slip op., at 3).

tions as binding? Normally, this Court does not allow hidden legislative intentions to "muddy" such plainly expressed statutory directives.[62]

Even on its own terms, too, this argument proves pretty muddy. It goes something like this: The drafters of the APA did not intend to "'significantly alter'" established law governing judicial review of agency action as of 1946; the *Auer* doctrine was part of that established law; therefore, the APA implicitly requires courts to afford agencies *Auer* deference. *Ante*, at 21–22. But neither of this syllogism's essential premises stands on solid ground.

Take the major premise—that those who adopted the APA intended to work no change in the established law of judicial review of agency action. JUSTICE KAGAN is right, of course, that Attorney General Clark claimed as much shortly after the APA's passage. *Ante*, at 21. But his view, which reflected the interests of the executive branch, was far from universally shared. Others, including many members of Congress, thought the APA would clarify, if not expand, the scope of judicial review. For example, Senator McCarran, the Chairman of the Judiciary Committee, wrote that it would be "hard . . . for anyone to argue that this Act did anything other than cut down the 'cult of discretion' so far as federal law is concerned."[63] And both the House and Senate reports on the APA said it was intended to "provid[e] that questions of law are for courts rather than agencies to decide in the last analysis."[64]

Just five years after the APA's passage, this Court

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[62] *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011).

[63] McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 893 (1946).

[64] H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945); 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter). See also Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1662–1666 (1996).

seemed to side with those who thought the APA was intended to do more than just summarize existing law. In an opinion by Justice Frankfurter, the Court opined that the APA required courts to assume "*more* responsibility" for reviewing agency decisions "than some courts ha[d] shown in the past."[65] One early commentator likewise observed that the APA seemed designed to eliminate all doubt that questions of law "shall be decided by the reviewing Court for itself, and in the exercise of its own independent judgment"; "[m]ore explicit words to impose this mandate," he thought, "could hardly be found."[66]

JUSTICE KAGAN's syllogism runs into even more trouble with its minor premise—that the *Auer* doctrine was a well-established part of the common law background when Congress enacted the APA in 1946. As we've seen, this Court planted the seeds of *Auer* deference for the first time in dictum in *Seminole Rock*, just a year before Congress passed the APA. See Part I–B, *supra*. And that dictum did not somehow immediately become an entrenched part of the common law: For years following *Seminole Rock*, courts and "commentators largely ignored" it,[67] and those who took notice weren't sure what to make of it. Professor Davis, for example, doubted that the dictum could be "taken at face value" given that it seemed "irreconcilable" with the Court's approach in other cases.[68] In truth, when Congress passed the APA the law of judicial review of agency action was in a confused state. During the con-

[65] *Universal Camera*, 340 U. S., at 490 (emphasis added).

[66] Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). See also Origins 990–991 (critiquing the Attorney General's characterization of the APA as "inherently question begging" and unsupported by any analysis).

[67] Adler, 16 Geo. J. L. & Pub. Pol'y, at 7; see Lost History 63; Pojanowski, 16 Geo. J. L. & Pub. Pol'y, at 95–96.

[68] Davis, 50 Colum. L. Rev., at 597–598; see also Davis, 57 Yale L. J., at 936, n. 72; Newman, 35 Cal. L. Rev., at 521–522.

gressional hearings on the bill, one witness's suggestion that Congress should leave the scope of judicial review "as it now is" drew this fair reply from Representative Walter, chairman of the House Subcommittee on Administrative Law and author of the House Report on the APA: "You say 'as it now is.' Frankly, I do not know what it now is . . . . [T]he Supreme Court apparently changes its mind daily."[69]

III. The Constitution

Not only is *Auer* incompatible with the APA; it also sits uneasily with the Constitution. Article III, §1 provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is "'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.'"[70] As Chief Justice Marshall put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[71] And never, this Court has warned, should the "judicial power . . . be shared with [the] Executive Branch."[72] Yet that seems to be exactly what *Auer* requires.

A

Our Nation's founders were painfully aware of the dangers of executive and legislative intrusion on judicial decision-making. One of the abuses of royal power that led to the American Revolution was King George's attempt

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[69] Hearings on H. R. 184 et al. before the House Committee on the Judiciary, 79th Cong., 1st Sess., 38 (1945); see Origins 988–989.

[70] *Patchak* v. *Zinke*, 583 U. S. ___, ___ (2018) (plurality opinion) (slip op., at 5) (quoting *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923)).

[71] *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803); see also *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"); The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton).

[72] *Miller* v. *Johnson*, 515 U. S. 900, 922 (1995).

to gain influence over colonial judges.[73] Colonial legislatures, too, had interfered with the courts' independence "at the behest of private interests and factions."[74] These experiences had taught the founders that "'there is no liberty if the power of judgment be not separated from the legislative and executive powers.'"[75] They knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of "litigants with unpopular or minority causes or . . . who belong to despised or suspect classes" count for little.[76] Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that—but what about everyone else? They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge. The rule of law begins to bleed into the rule of men.

Experiencing all this in their own time, the founders

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[73] See Declaration of Independence ¶11.

[74] *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 220–221 (1995).

[75] The Federalist No. 78, at 466.

[76] *Palmore* v. *United States*, 411 U. S. 389, 412 (1973) (Douglas, J., dissenting); see *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___ (2018) (GORSUCH, J., dissenting) (slip op., at 3) ("[W]hen an independent judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable"); *United States* v. *Hatter*, 532 U. S. 557, 568–569 (2001) (quoting John Marshall's admonition that a judge who may be called on to decide a dispute "'between the most powerful individual in the community, and the poorest and most unpopular'" must be "'perfectly and completely independent, with nothing to influence or control him but God and his conscience'" (alterations omitted)); Jackson, The Meaning of Statutes: What Congress Says or What the Court Says, 34 A. B. A. J. 535, 536 (1948) ("[T]he interpretation of [the laws'] fair meaning . . . should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted").

sought to ensure that those who came after them would not. Believing that "[n]o maxim was better established" than "that the power of making ought to be kept distinct from that of expounding, the laws,"[77] they designed a judiciary that would be able to interpret the laws "free from potential domination by other branches of government."[78] To that end, they resisted proposals that would have subjected judicial decisions to review by political actors.[79] And they rejected the British tradition of using the upper house of the legislature as a court of last resort, out of fear that a body with "even a partial agency in passing bad laws" would operate under the "same spirit" in "interpreting them."[80] Instead, they gave federal judges life tenure, subject only to removal by impeachment; and they guaranteed that the other branches could not reduce judges' compensation so long as they remained in office.

The founders afforded these extraordinary powers and protections not for the comfort of judges, but so that an independent judiciary could better guard the people from the arbitrary use of governmental power. And sitting atop the judicial branch, this Court has always carried a special duty to "jealously guar[d]" the Constitution's promise of judicial independence.[81] So we have long resisted any effort by the other branches to "'usurp a court's power to interpret and apply the law to the circumstances before it.'"[82] The judicial power to interpret the law, this Court has held, "can no more be shared with another branch

[77] 2 Records of the Federal Convention of 1787, p. 75 (M. Farrand ed. 1911); see also Manning, 96 Colum. L. Rev., at 640–648.

[78] *United States* v. *Will*, 449 U. S. 200, 218 (1980).

[79] See The Federalist No. 81, at 482 (A. Hamilton).

[80] *Id.*, at 483.

[81] *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 60 (1982) (plurality opinion).

[82] *Bank Markazi* v. *Peterson*, 578 U. S. ___, ___ (2016) (slip op., at 12) (alterations omitted).

than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."[83]

Auer represents no trivial threat to these foundational principles. Under the APA, substantive rules issued by federal agencies through notice-and-comment procedures bear "the 'force and effect of law'"[84] and are part of the body of federal law, binding on private individuals, that the Constitution charges federal judges with interpreting. Yet *Auer* tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean. Unlike Article III judges, executive officials are not, nor are they supposed to be, "wholly impartial."[85] They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may choose to "press the case for the side [they] represen[t]" instead of adopting the fairest and best reading.[86] *Auer* thus means that, far from being "kept distinct," the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised.

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[83] *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011) (internal quotation marks omitted).

[84] *Perez*, 575 U. S., at ___ (slip op., at 2); see *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295–296 (1979). To be sure, our precedent allowing executive agencies to issue legally binding regulations to govern private conduct may raise constitutional questions of its own. See, *e.g.*, *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, ___–___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 4–11).

[85] Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 390 (1947).

[86] *Id.*, at 390–391, and n. 58; see also Kavanaugh, 129 Harv. L. Rev., at 2151 (in pursuing their policy goals, "[e]xecutive branch agencies often think they can take a particular action unless it is *clearly forbidden*").

Consider an analogy. The Court has long held that Congress cannot "'indirectly control the action of the courts, by requiring of them a construction of the law according to its own views.'"[87] If Congress disagrees with how courts are interpreting an existing statute, it is free to amend the statute to establish a different rule going forward. What it cannot do is issue "a mandate . . . to compel the courts to construe and apply [existing law], not according to the judicial, but according to the legislative judgment."[88] As early as 1804, when a lawyer argued before this Court that an Act of the North Carolina legislature could not control the Court's construction of an earlier North Carolina statute because "[t]o declare what the law is, or has been, is a judicial power," not a legislative power, the Court stopped him, deeming the point too plain for argument.[89]

But if the legislature can't control a judge's interpretation of an existing statute, how can an executive agency control a judge's interpretation of an existing and equally binding regulation? *Auer* allows an agency to do exactly what this Court has always said a legislature cannot do: "compel the courts to construe and apply" a law on the books, "not according to the judicial . . . judgment," but according to the judgment of another branch.[90] When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in

[87] *Plaut*, 514 U. S., at 225 (quoting T. Cooley, Constitutional Limitations 95 (1868)).

[88] *Id.*, at 95; see also *Bank Markazi*, 578 U. S., at ___, n. 17 (slip op., at 12, n. 17).

[89] *Ogden* v. *Blackledge*, 2 Cranch 272, 277.

[90] Cooley, *supra*, at 95.

fact, no more than an exercise of raw political executive power.[91]

B

What do our colleagues have to say about these concerns? A majority has nothing to offer, and JUSTICE KAGAN dismisses them out of hand. In fact, she barely mentions the Constitution, other than to assure us that *Auer* does not allow agencies to "usur[p] the interpretive role of courts" because "courts retain a firm grip on the interpretive function" through their ability to decide whether *Auer* deference applies. *Ante*, at 25. But that is no assurance at all. The judicial power has always been understood to provide the people with a neutral arbiter who bears the responsibility and duty to "expound and interpret" the governing law, not just the power to say whether *someone else's* interpretation, let alone the interpretation of a self-interested political actor, is "reasonable."[92]

To be sure, it's conceivable that Congress might seek to limit the ability of judges to remedy an adverse agency action. It might, for example, provide that a court shall have power to set aside agency action pursuant to a regulation only if the action was based on an unreasonable interpretation of the regulation. But even assuming the constitutionality of a hypothetical statute like that, *Auer* is different. It does not *limit* the scope of the judicial power; instead, it seeks to *coopt* the judicial power by requiring an Article III judge to decide a case before him according

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[91] Cf. *Cary* v. *Curtis*, 3 How. 236, 253, 257 (1845) (Story, J., dissenting) (if the "right to interpret the laws" is taken away from courts and "confided to an executive functionary," then "the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions").

[92] *Marbury*, 1 Cranch, at 177.

to principles that he believes do not accurately reflect the law. Under *Auer*, a judge is required to lay aside his independent judgment and declare affirmatively that a regulation *means* what the agency *says* it means—and, thus, that the law *is* what the agency *says* it is. Then the judge is compelled to exercise his judicial authority to adjust private rights and obligations based on the agency's (mis)understanding of the law. If *Auer* were a statute, it would not be an exercise of Congress's "power (within limits) to tell the courts what *classes* of cases they may decide," or what relief they may supply, but a forbidden attempt "to prescribe or superintend *how* they decide those cases."[93] And in the absence of any statute like that, this Court surely should not so freely give away to the executive branch its assigned responsibility to interpret the laws. "Abdication of responsibility is not part of the constitutional design."[94]

In the end, JUSTICE KAGAN's only real reply is this: However misguided it may be to hand over our interpretive powers to executive agencies, at least there isn't a mountain of empirical evidence showing that agencies have used this power to deliberately write "vague and open-ended" regulations to maximize their interpretive leeway. *Ante*, at 24. But even this misses the point. Whether or not regulations are "'designed'" to be vague, *ibid.*, many can be read in different ways, especially when new and unanticipated applications arise; cases like that come before the courts all the time. Without *Auer*'s shadow hanging over them, parties would receive a fair hearing before an impartial judge. The agency's interpretation would sometimes be rejected; and that, in turn, might lead it to solicit public comment on possible amendments to the

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[93] *Arlington* v. *FCC*, 569 U. S. 290, 297 (2013) (emphasis added).

[94] *Clinton* v. *City of New York*, 524 U. S. 417, 452 (1998) (Kennedy, J., concurring).

regulation, which would provide an opportunity for public input that might produce better policy. But with *Auer*, there is no fair hearing and no need for the agency to amend the regulation through notice and comment. Whether purposeful or not, the agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law's meaning.

IV. Policy Arguments

Lacking support elsewhere, JUSTICE KAGAN is forced to resort to policy arguments to defend *Auer*. But even the most sensible policy argument would not empower us to ignore the plain language of the APA or the demands of the Constitution. And as we've seen, those documents reflect a very different "policy" judgment by the people and their representatives. Besides, the policy arguments offered today are not just unpersuasive, they are troubling.

Take the first and boldest offering. JUSTICE KAGAN suggests that determining the meaning of a regulation is largely a matter of figuring out what the "person who wrote it . . . intended." *Ante*, at 8. In this way, we're told, a legally binding regulation isn't all that different from "a memo or an e-mail"—if you "[w]ant to know what [it] means," you'd better "[a]sk its author." *Ante*, at 8–9. But the federal government's substantive rules are not like memos or e-mails; they are binding edicts that carry the force of law for all citizens. And if the rule of law means anything, it means that we are governed by the public meaning of the words found in statutes and regulations, not by their authors' private intentions. This is a vital part of what it means to have "a government of laws, and not of men."[95] When judges interpret a regulation, what we are trying to get at, as Justice Holmes explained long ago, is not the "particular intent" of those who wrote it, but "what [its] words would mean [to] a normal speaker of English . . . in the circumstances in which they were used."[96] If the best reading of the regulation turns out to be something other than what the agency claims to have intended, the agency is free to rewrite the regulation; but its secret intentions are not the law.

Nor does JUSTICE KAGAN's account of the interpretive process even wind up supporting *Auer*. If a court's goal in interpreting a regulation really were to determine what its author "intended," *Auer* would be an almost complete mismatch with the goal. Agency personnel change over time, and an agency's policy priorities may shift dramatically from one presidential administration to another. Yet *Auer* tells courts that they must defer to the agency's *current* view of what the regulation ought to mean, which may or may not correspond to the views of those who actually wrote it. If interpreting a regulation really were just like reading an e-mail, *Auer* would be like seeking guidance about the e-mail's meaning, years or decades later, from the latest user of the computer from which the e-mail was sent. We've repeatedly rejected that approach in the context of statutory interpretation. While Members of this Court sometimes disagree about the usefulness of *pre-enactment* legislative history, we all agree that legislators' statements about the meaning of an already-enacted statute are not "a legitimate tool of statutory interpreta-

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[95] *Marbury*, 1 Cranch, at 163.

[96] Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417–418 (1899); see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 452–453 (1987) (Scalia, J., concurring in judgment) ("Judges interpret laws rather than reconstruct legislators' intentions"); H. Hart & A. Sacks, The Legal Process 1375 (1994) ("Unenacted intentions or wishes cannot be given effect as law").

tion,'" much less a controlling one.[97] So why on earth would we give "controlling weight" to an agency's statements about the meaning of an already-promulgated regulation?

Proceeding farther down this doubtful path, JUSTICE KAGAN asserts that resolving ambiguities in a regulation "sounds more in policy than in law" and is thus a task more suited to executive officials than judges. *Ante*, at 9. But this claim, too, contradicts a basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable—if not by all members of the public, then at least by lawyers who can advise them and judges who must apply the law to individual cases guided by the neutral principles found in our traditional tools of interpretation. The text of the regulation is treated *as* the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text. If "new issues demanding new policy calls" arise that aren't addressed in existing regulations, *ante*, at 10, the solution is for the agency to promulgate new regulations using the notice-and-comment procedures set forth in the APA. But an agency has no warrant to compel judges to change the law to conform with the agency's current policy preferences.

To be sure, during the period of *Auer*'s ascendancy some suggested that the meaning of written law is always "radically indeterminate" and that judges expounding it are "for the most part, guided by policy—not text."[98] And in an environment like that it was perhaps thought a small step to conclude that, if legal disputes are going to be

[97] *United States* v. *Woods*, 571 U. S. 31, 48 (2013).

[98] O'Scannlain, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia, 91 St. John's L. Rev. 303, 304–305 (2017) (contesting the radical indeterminacy of legal texts).

resolved on political grounds, then they ought to be resolved by real politicians in the executive branch rather than ersatz politicians on the bench. But the proposed cure proved worse than the disease. Arguments like these surrendered the judgment embodied in our Constitution and the APA that courts owe the people they serve their independent legal judgment about the law's meaning. Besides, we've long since come to realize that the real cure doesn't lie in turning judges into rubber stamps for politicians, but in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning. Today it is even said that we judges are, to one degree or another, "all textualists now."[99]

Pursuing a more modest tack, JUSTICE KAGAN next suggests that *Auer* is justified by the respect due agencies' "technical" expertise. *Ante*, at 10. But no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court "would want to know what John Henry Wigmore said about an issue of evidence law [or] what Arthur Corbin thought about a matter of contract law," so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate.[100] The fact remains, however, that even agency experts "can be wrong; even Homer nodded."[101] *Skidmore* and the traditional approach it embodied recognized both of these facts of life long ago, explaining that, while courts should of course afford respectful

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[99] *Id.*, at 313; see Siegel, Textualism and Contextualism in Administrative Law, 78 B. U. L. Rev. 1023, 1057 (1998).

[100] Larkin & Slattery, 42 Harv. J. L. & Pub. Pol'y, at 647.

[101] *Ibid.*

consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting. Respect for an agency's technical expertise demands no more.

JUSTICE KAGAN's final policy argument is that *Auer* promotes "consistency" and "uniformity" in the interpretation of regulations. *Ante*, at 10–11. If we let courts decide what regulations mean, she warns, they might disagree, and it might take some time for higher courts to resolve those disagreements. But consistency and uniformity are hardly grounds on which *Auer*'s advocates should wish to fight. The judicial process is how we settle disputes about the meaning of written law, and our judicial system is more than capable of producing a single, uniform, and stable interpretation that will last until the regulation is amended or repealed. Meanwhile, under *Auer* courts often disagree about whether deference is warranted, see *supra*, at 10–11, and a regulation's "meaning" can be transformed with the stroke of a pen any time there is a new presidential administration. "Consistency," "uniformity," and stability in the law are hardly among *Auer*'s crowning achievements.

V. *Stare Decisis*

In the end, a majority declines to endorse JUSTICE KAGAN's arguments and insists only that, even if *Auer* is not "right and well-reasoned," we're stuck with it because of the respect due precedent. *Ante*, at 27.

But notice: While pretending to bow to *stare decisis*, the majority goes about reshaping our precedent in new and experimental ways. True, the majority admits, this Court has in the past accorded *Auer* deference "'reflexive[ly],'" "without significant analysis of the underlying regulation" or "careful attention to [its] nature and context," and encouraged lower courts to do the same. *Ante*, at 12–13. But no more. From now on, the majority says, not only must judges "exhaust all the 'traditional tools' of construction" to decide whether the agency's interpretation is "reasonable," they must also make "an independent inquiry into whether the character and context of the agency interpretation" justifies deference. *Ante*, at 13–15. The majority candidly admits that it finds it impossible to "reduce" this new inquiry "to any exhaustive test," so it settles for laying out some "markers." *Ante*, at 15. What are the markers? We are told that courts should often—but not always—withhold deference from an interpretation offered by mid-level agency staff; often—but not always—withhold deference from a nontechnical, "prosaic-seeming" interpretation; often—but not always—withhold deference from an interpretation advanced for the first time in an *amicus* brief; and often—but not always—withhold deference from an interpretation that conflicts with an earlier one. See *ante*, at 15–18. The only certainty in all this is that the majority isn't really much moved by *stare decisis*; everyone recognizes, to one degree or another, that *Auer* cannot stand. And between our remaining choices—continuing to make up new deference rules, or returning to the text of the APA and the approach to judicial review that prevailed for most of our history—the answer should have been easy.

A

There are serious questions about whether *stare decisis* should apply here at all. To be sure, *Auer*'s narrow holding about the meaning of the regulation at issue in that case may be entitled to *stare decisis* effect. The same may be true for the specific holdings in other cases where this Court has applied *Auer* deference. But does *stare decisis* extend beyond those discrete holdings and bind future Members of this Court to apply *Auer*'s broader deference framework?

It seems doubtful that *stare decisis* demands that much.

We are not dealing with a precedent that purported to settle the meaning of a single statute or regulation or resolve a particular case. The *Auer* doctrine claims to do much more than that—to prescribe an interpretive methodology governing every future dispute over the meaning of every regulation. In other contexts, we do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or legislative history in statutory cases, as binding future Justices with the full force of horizontal *stare decisis*.[102] Why, then, should we regard as binding *Auer*'s statements about the weight to afford agencies' interpretations in regulatory cases? To the extent *Auer* purports to dictate "the interpretive inferences that future Justices must draw in construing statutes and regulations that the Court has never engaged," it may well "exceed the limits of stare decisis."[103]

Even if our past expressions of support for *Auer* deference bear *some* precedential force, they certainly are not entitled (as the majority suggests, *ante*, at 26–27) to the special, heightened form of *stare decisis* we reserve for narrow statutory decisions. In contrast to precedents that fix the meaning of *particular* statutes and generate reliance interests in the process, the *Auer* doctrine is an abstract default rule of interpretive methodology that settles nothing of its own force. And this Court has recognized

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[102] See Criddle & Staszewski, Against Methodological Stare Decisis, 102 Geo. L. J. 1573, 1577, and n. 12 (2014); C. Oldfather, Methodological Stare Decisis and Constitutional Interpretation, in Precedent in the United States Supreme Court 135, 135–136 (C. Peters ed. 2013).

[103] Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 Texas L. Rev. 1125, 1159 (2019); see Raso & Eskridge, *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1765–1766 (2010) (concluding that in practice, this Court has not treated administrative-deference regimes such as *Chevron* and *Auer* as binding precedents).

that it is "inconsistent with the Court's proper role" to insist that Congress exercise its legislative power to overturn such erroneous and judicially invented "default rule[s]."[104] That should be especially so here because *Auer*'s default rule undermines judicial independence, which this Court has a special responsibility to defend.

Nor is it entirely clear that Congress *could* overturn the *Auer* doctrine legislatively. The majority describes *Auer* as a "presumption" about how courts should interpret statutes granting rulemaking power to agencies. *Ante*, at 12. Congress can, of course, *rebut* the presumption on a statute-by-statute basis, or even for all past statutes. But can Congress *eliminate* the *Auer* presumption for future statutes? Perhaps—but legislation like that would raise questions, which the majority does not address, about the ability of one Congress to entrench its preferences by attempting to control the interpretation of legislation enacted by future Congresses.[105] We should not be in the business of tossing "'balls . . . into Congress's court,'" *ante*, at 27, that would explode with constitutional questions if Congress tried to pick them up.

B

Even assuming for argument's sake that standard *stare decisis* considerations apply, they still do not require us to retain *Auer*. Even the majority implicitly recognizes this much, as it proceeds to vacate a lower court judgment that faithfully applied *Auer* and instruct that court to try again using the majority's new directions. If *stare decisis* allows us so freely to remodel *Auer*, it's hard to see on what ac-

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[104] *South Dakota* v. *Wayfair*, *Inc.*, 585 U. S. ___, ___ (2018) (slip op., at 18).

[105] See, *e.g.*, Alexander & Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97 (2003); Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2109–2110, and nn. 231–233 (2002).

count it might require us to retain it.

We do not lightly overturn precedents, and we seek always to honor the thoughtful guidance of those who have preceded us. At the same time, everyone agrees that *stare decisis* is not an "'inexorable command,'"[106] and this Court should not always remain bound to decisions whose "rationale no longer withstands 'careful analysis.'"[107] Recognizing the need for balance in this area, the Court has, over time, fashioned principles to guide our treatment of precedent. Those principles call on us to consider factors such as "the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[108] As applied to *Auer*, all of these considerations weigh strongly in favor of bidding farewell to the doctrine rather than keeping it on life support.

First, we've already seen that no persuasive rationale supports *Auer*. From its humble origins as an unexplained bit of dictum in a wartime case about emergency price controls, the *Auer* doctrine evolved into a rigid rule of deference—all without any serious attempt by this Court to rationalize it or reconcile it with the APA, the Constitution, or traditional modes of judicial review. See Part I, *supra*. Even its fiercest defenders acknowledge that "*Auer* deference has not remained static over time" and urge the Court to continue to "shape" and "refin[e]" the doctrine.[109] Today's decision attempts just such a "refinement" by hedging *Auer* with new qualifications and limitations. See *ante*, at 11–18. This shifting ground "undermin[es] the

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[106] *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009).

[107] *Arizona* v. *Gant*, 556 U. S. 332, 348 (2009) (quoting *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003)).

[108] *Janus* v. *State*, *County*, *and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35).

[109] Brief for Administrative Law Scholars as *Amici Curiae* 13.

force of *stare decisis*."[110]

Second, today's ruling all but admits that *Auer* has not proved to be a workable standard. Even before this latest overhaul, uncertainty surrounding *Auer*'s scope and application had caused many to question whether there was any "practical benefit" in continuing to apply *Auer* "rather than a less deferential but more flexible and open-ended standard like *Skidmore*."[111] See *supra*, at 10–11. Nor does the majority's kinder, gentler version of *Auer* promise to solve the problem. On the contrary, its newly mandated inquiry into the "character and context of the agency interpretation," which it admits cannot be reduced "to any exhaustive test," *ante*, at 15, seems destined only to compound the confusion. See *supra*, at 35. Many words come to mind to describe the tasks we assign lower court judges today, but "workable" is not among them.

Third, the *Auer* doctrine is, as we have also already seen, out of step with how courts normally interpret written laws. When we interpret a regulation, we typically (at least when there is no agency say-so) proceed in the same way we would when interpreting any other written law: We "begin our interpretation of the regulation with its text" and, if the text is unclear, we "turn to other canons of interpretation" and tie-breaking rules to resolve the ambiguity.[112] And when we interpret an ambiguous *statute*, we never ask what current members of Congress think it means; in fact, we've held unanimously that legislators' post-enactment views about a statute's meaning are not

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[110] *Knick* v. *Township of Scott*, *ante*, at 22; see *Janus*, 585 U. S., at ___ (slip op., at 23). See also Lost History 54–92; Knudsen & Wildermuth, 22 Geo. Mason L. Rev., at 658–664.

[111] Hickman & Thomson, 103 Minn. L. Rev. Headnotes, at 110.

[112] *Green* v. *Brennan*, 578 U. S. ___, ___ (2016) (slip op., at 5); see, *e.g.*, *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 668–669 (2007) (construing regulation in light of text, history, and canon against surplusage).

even a "'legitimate tool of statutory interpretation.'"[113] Affording "controlling weight" to regulators' post-promulgation views about the meaning of an ambiguous regulation is hard to square with these usual judicial practices.[114]

Fourth, the explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief. When the Court first uttered its dictum in *Seminole Rock*, the administrative state was new and the APA was only a gleam in Congress's eye. Even 20 years later, when the Court began reviving the *Seminole Rock* dictum and turning it into a new deference doctrine, it was not yet apparent how pervasive the administrative state would become in the lives of ordinary Americans. Now, in the 21st century, "[t]he administrative state wields vast power and touches almost every aspect of daily life."[115] Among other things, it produces "'reams of regulations'"[116]—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long,

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[113] *Woods*, 571 U. S., at 48; see also *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 242 (2011); *Jones* v. *United States*, 526 U. S. 227, 238 (1999); *United States* v. *Mine Workers*, 330 U. S. 258, 281–282 (1947).

[114] To be sure, under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*, *Inc.*, 467 U. S. 837 (1984), we sometimes defer to an agency's construction of a *statute*. But there are serious questions, too, about whether *that* doctrine comports with the APA and the Constitution. See, *e.g.*, *Pereira* v. *Sessions*, 585 U. S. ___, ___–___ (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. ___, ___–___ (2015) (THOMAS, J., concurring); *Perez*, 575 U. S., at ___–___ (Scalia, J., concurring in judgment) (slip op., at 2–3). Regardless, it would be a mistake to suppose that *Auer* is in any way a "logical corollary to *Chevron*." *Decker*, 568 U. S., at 620 (Scalia, J., concurring in part and dissenting in part).

[115] *Arlington*, 569 U. S., at 313 (ROBERTS, C. J., dissenting) (internal quotation marks omitted).

[116] *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 755 (2002).

almost quadruple the length of the most recent edition of the U. S. Code.[117] And agencies add thousands more pages of regulations every year. Whether you think this administrative fecundity is a good or a bad thing, it surely means that the cost of continuing to deny citizens an impartial judicial hearing on the meaning of disputed regulations has increased dramatically since this Court started down this road.

Fifth, *Auer* has generated no serious reliance interests. The only parties that might have relied on *Auer*'s promise of deference are agencies that use *post hoc* interpretations to bypass the APA's notice-and-comment procedures. But this Court has never suggested that the convenience of government officials should count in the balance of *stare decisis*, especially when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws. In short, "'[t]he fact that [agencies] may view [*Auer* deference] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest'" of all citizens "'in having their constitutional rights fully protected.'"[118]

Coming closer to the mark, the majority worries that "abandoning *Auer* deference would cast doubt on many settled constructions" of regulations on which regulated parties might have relied. *Ante*, at 26. But, again, decisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology. After all, decisions construing particular statutes continue to

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[117] See Office of the Federal Register, Code of Federal Regulations: Total Pages 1938–1949, and Total Volumes and Pages 1950–2018, http://www.federalregister.gov/uploads/2019/04/cfrTotalPages2018.pdf; *United States* v. *Secretary*, *Fla. Dept. of Corrections*, 778 F. 3d 1223, 1225 (CA11 2015).

[118] *Janus*, 585 U. S., at ___ (slip op., at 45) (quoting *Gant*, 556 U. S., at 349).

command respect even when the interpretive methods that led to those constructions fall out of favor. Besides, if the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the majority's revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court's lead and afforded *Auer* deference mechanically, without conducting the inquiry the Court now holds is required. Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*.

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Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and "follow [the] agency's [view] only to the extent it is persuasive."[119] By contrast, the majority's attempt to remodel *Auer*'s rule into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation. Proceeding in this convoluted way burdens our colleagues on the lower courts, who will have to spend time debating deference that they could have spent interpreting disputed regulations. It also continues to deny the people who come before us the neutral forum for their disputes that they rightly expect and deserve.

But this cloud may have a silver lining: The majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to "exhaust all the 'traditional tools' of construction" before they even consider deferring to an agency. *Ante*, at 13–14. And those tools

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[119] *Gonzales* v. *Oregon*, 546 U. S. 243, 269 (2006); see *Christopher*, 567 U. S., at 159 (applying *Skidmore* after concluding that agency's interpretation did not merit *Auer* deference).

include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases. Courts manage to make do with these tools in many other areas of the law, so one might hope they will hardly ever find them inadequate here. And if they do, they will now have to conduct a further inquiry that includes so few firm guides and so many cryptic "markers" that they will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.

But whatever happens, this case hardly promises to be this Court's last word on *Auer*. If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.

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 KAVANAUGH, with whom JUSTICE ALITO joins, concurring in the judgment.

I agree with JUSTICE GORSUCH's conclusion that the *Auer* deference doctrine should be formally retired. I write separately to emphasize two points.

First, I agree with THE CHIEF JUSTICE that "the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear." *Ante,* at 1 (opinion concurring in part). The majority's approach in Part II−B of its opinion closely resembles the argument advanced by the Solicitor General to "clarif[y] and narro[w]" *Auer*. Brief for Respondent 15. Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must "exhaust all the 'traditional tools' of construction" before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation. *Ante,* at 14 (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984)). If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations.

Formally rejecting *Auer* would have been a more direct approach, but rigorously applying footnote 9 should lead in most cases to the same general destination. Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here.

To be sure, some cases involve regulations that employ broad and open-ended terms like "reasonable," "appropriate," "feasible," or "practicable." Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm* than *Auer*. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983).

In short, after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation.

Second, I also agree with THE CHIEF JUSTICE that "[i]ssues 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." *Ante,* at 2. Like THE CHIEF JUSTICE, "I do not regard the Court's decision" not to formally overrule *Auer* "to touch upon the latter question." *Ibid.*

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10944

D.C. Docket Nos. 6:17-cv-00459-RBD; 6:15-bkc-01720-KSJ

In re:

KEITH A. YERIAN,

Debtor.

KEITH A. YERIAN,

Defendant-Appellant,

versus

RICHARD B. WEBBER II, as Trustee,

Plaintiff-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 26, 2019)

Before MARCUS, GRANT, and HULL, Circuit Judges.

GRANT, Circuit Judge:

Keith Yerian made some interesting choices with respect to the management of his individual retirement account. These choices included titling IRA-owned cars in his own name and his wife's name, as well as purchasing a condo in Puerto Rico with IRA funds and then using the condo for his personal travel needs. Yerian concedes that he incurred over one hundred thousand dollars in tax penalties for abusing his IRA. Ordinarily, that abuse would disqualify him from claiming the wide range of favorable treatment and exemptions typically offered to IRAs. But Yerian—now in bankruptcy proceedings—nonetheless seeks to shield the IRA from distribution to his creditors. He argues that Florida has exempted IRAs from bankruptcy administration so long as they were originally established with proper documentation. Fortunately for Yerian's creditors, and unfortunately for him, his interpretation of the text cannot be supported; he forfeited his exemption when he engaged in self-dealing transactions prohibited by the IRA's governing instruments. We therefore affirm the district court's order, which in turn upheld the bankruptcy court's decision to deny the exemption.

I.

A.

When a debtor files for Chapter 7 bankruptcy, his assets become property of the bankruptcy estate, to be distributed among his creditors. *See* 11 U.S.C. § 541(a)(1). The debtor may, however, exempt certain types of property from the estate. 11 U.S.C. § 522(b). Exempt assets are "withdrawn from the estate (and hence from the creditors) for the benefit of the debtor." *Owen v. Owen*, 500 U.S. 305, 308 (1991). A Chapter 7 debtor is not required to turn over exempt assets to the trustee and can keep them after the bankruptcy case is finished. And these carve-outs are sturdy; once a debtor invokes an exemption, a "court may not refuse to honor the exemption absent a valid statutory basis for doing so." *Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014).

The bankruptcy code provides a list of federal exemptions, but also permits a state to opt out and replace the federal blueprint with an exemption scheme of its own. 11 U.S.C. § 522(b). Florida, as an opt-out state, has accepted that invitation to substitute its own set of exemptions. *See* Fla. Stat. § 222.20; *In re Valone*, 784 F.3d 1398, 1400 n.1 (11th Cir. 2015). One of those exemptions applies to "pension money and certain tax-exempt funds or accounts"—including IRAs—so long as a debtor meets certain statutory requirements. Fla. Stat. § 222.21. It is this exemption that we consider here.

B.

The relevant facts are not in dispute. In 2012, Keith Yerian opened a self-directed IRA with IRA Services Trust Company. The IRA's primary asset was an LLC through which Yerian purchased, among other things, real estate and two used cars. Yerian established this account as an IRA, "but then treated the money as his own." He used IRA funds to buy a condominium in Puerto Rico, for example, then impermissibly stayed there "for an un-IRA-related purpose." He and his wife also took title to two cars, a Smart Car and a Suburban, both purchased with IRA funds. Yerian then spent thousands of IRA dollars on car repairs, and he allowed his wife to drive the Suburban "as her vehicle."[1] He does not contest that these acts of self-dealing constituted "prohibited transactions" under the Internal Revenue Code and thus made his IRA ineligible for federal tax-exempt status as of January 1, 2014.

On February 27, 2015, Yerian filed for Chapter 7 bankruptcy. After failing to disclose his IRA on the asset schedules originally accompanying his petition, Yerian eventually amended his filings to disclose the IRA—and also to claim a Florida-law exemption for it. Richard Webber, the bankruptcy Trustee, objected to the claim of exemption and initiated an adversary proceeding to resolve the issue.[2] After a two-day trial in late 2016, the bankruptcy court issued oral findings of fact and conclusions of law. Concluding that Florida law does not allow a debtor to claim an exemption for an IRA operated in violation of the federal tax code, the bankruptcy court issued a written order sustaining the Trustee's objection and directing the Trustee to seize the IRA on behalf of Yerian's creditors. Yerian sought review of the order denying his claim for the IRA exemption, and the district court affirmed. This appeal followed.

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[1] According to his wife, Yerian would sometimes drive the Suburban as well. As for the Smart Car, Yerian claims that he "bought it totaled" and was never able to drive it.

[2] The bankruptcy court also addressed two other issues at trial: whether the Trustee could avoid and recover as a fraudulent transfer any part of a $256,000 payment that Yerian made to his wife from their joint e-trading account, and whether Yerian's discharge should be denied because he acted with fraudulent intent in his bankruptcy proceedings. The fraudulent transfer is the subject of a separate appeal brought by Yerian's wife. *See Pak v. Webber* (*In re Yerian*), 2018 WL 4836776 (Bankr. M.D. Fla. Sept. 28, 2018). The bankruptcy court denied Yerian's bankruptcy discharge, and he has not challenged that decision in this appeal.

II.

In a bankruptcy appeal, this Court "sits as a second court of review and thus examines independently the factual and legal determinations of the bankruptcy court and employs the same standards of review as the district court." *In re Hood*, 727 F.3d 1360, 1363 (11th Cir. 2013) (internal quotation marks and citation omitted). Accordingly, we "review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo." *Id.* We may affirm the judgment below on any ground supported in the record. *See Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356 (11th Cir. 2018).

"Generally speaking, courts construe bankruptcy exemption statutes—both state and federal—liberally in favor of bankruptcy debtors." *In re McFarland*, 790 F.3d 1182, 1186 (11th Cir. 2015). The "burden is on the party objecting to exemptions to prove, by a preponderance of evidence," that the exemption cannot be claimed. *Id.* (citing Fed. R. Bankr. P. 4003(c)). It is therefore the Trustee's burden to prove that Yerian was not entitled to shield his IRA under Florida law.

III.

Yerian contends that section 222.21(2)(a)(2) of the Florida Statutes places his IRA beyond the reach of his creditors. Under that provision, a debtor may exempt from bankruptcy administration any money in "a fund or account" that is

> [m]aintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not

> exempt from taxation in a proceeding that has become final and nonappealable.

Fla. Stat. § 222.21(2)(a)(2) (footnote omitted).

Section 408 of the Internal Revenue Code is the relevant provision in this case. That statute, among other things, sets out the requirements for an IRA to receive tax-exempt status under federal law. *See* 26 U.S.C. § 408. Section 408 first sets out six minimum requirements for the terms of the "written governing instrument" that legally establishes the IRA. *See id.* § 408(a). These requirements are important, but may read as rather arcane to the uninitiated. They range from permitting only cash contributions (and only in an amount corresponding to the limit in effect for that taxable year), to mandating particular rules relating to incidental death benefits. *See id.* § 408(a)(1)–(6). We will not belabor these requirements, however, because none of them are directly at issue here.[3] The

[3] For those who are curious, the "written governing instrument" creating the IRA must include the following six requirements:

> (1) Except in the case of a rollover contribution described in subsection (d)(3) or in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A).
> (2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.
> (3) No part of the trust funds will be invested in life insurance contracts.
> (4) The interest of an individual in the balance in his account is nonforfeitable.
> (5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.
> (6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

upshot is that an IRA is only tax exempt in the first place if it satisfies "a number of requirements imposed by the Internal Revenue Code." *Rousey v. Jacoway*, 544 U.S. 320, 322 (2005).

Section 408 also sets out rules for how an IRA must be operated in order to *keep* its tax-exempt status. One way an IRA can lose its tax-exempt status is for the IRA owner to engage in "prohibited transactions"—a category that includes "abuses" placing the plan at risk of loss before retirement, as well as various acts of "self-dealing." 26 U.S.C. § 408(e)(2); *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993); *Ellis v. Comm'r*, 787 F.3d 1213, 1217 (8th Cir. 2015).[4] This provision turns out to be relevant here.

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26 U.S.C. § 408(a).

[4] Section 408 provides that if,

> during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year.

26 U.S.C. § 408(e)(2)(A). Section 4975, in turn, defines a "prohibited transaction" as any direct or indirect—

> (A) sale or exchange, or leasing, of any property between a plan and a disqualified person;
> (B) lending of money or other extension of credit between a plan and a disqualified person;
> (C) furnishing of goods, services, or facilities between a plan and a disqualified person;
> (D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;
> (E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or
> (F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

Turning to the conduct in this case, Yerian does not contest that he engaged in prohibited transactions—for instance, taking title to the IRA's car and staying in the IRA's condominium—and that when he did so, his IRA lost its tax-exempt status under § 408. Nevertheless, Yerian argues that his IRA is still *creditor* exempt under section 222.21(2)(a)(2). In his view, the Florida exemption statute shields even an IRA operated in violation of the federal tax code, so long as the form of the IRA's governing instrument satisfies the requirements of § 408(a) on paper. The Trustee disagrees, and so do we. And because we have not had occasion to interpret section 222.21(2)(a)(2) since it was amended to include the language at issue, we take this opportunity to explain the mechanics of the statute in some detail.

We start with an observation about the statute's structure. Section 222.21 of the Florida Statutes imposes different exemption requirements on different IRAs, depending on whether and how the Internal Revenue Service has signed off on the IRA's terms. Section 222.21(2)(a)(1) applies if the IRA's terms have been "*preapproved* by the Internal Revenue Service as exempt from taxation." Section 222.21(2)(a)(2) applies if the IRA's terms have been "*determined* by the Internal Revenue Service to be exempt from taxation." And if the IRS has neither preapproved nor determined that the IRA's terms comply with the tax code, the debtor must seek an exemption under section 222.21(2)(a)(3). Fla. Stat. § 222.21(2)(a)(1)–(3) (emphases added).

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26 U.S.C. § 4975(c)(1).

We are tasked with interpreting only section 222.21(2)(a)(2), the second of these three provisions. Under Florida law, Yerian would be entitled to claim an exemption for his IRA under section 222.21(2)(a)(2) if three requirements were met:

(1) The IRA's plan or governing instrument was initially "determined by the [IRS] to be exempt from taxation" under § 408;

(2) Over time, the IRA has been "maintained in accordance with" that plan or governing instrument; and

(3) No final and nonappealable proceeding has "subsequently determined" that the plan or governing instrument is no longer exempt from taxation under § 408.

As to the first requirement, the record does not indicate whether Yerian ever obtained an IRS determination that his IRA's governing instrument satisfied § 408. But it is the Trustee who must demonstrate that an exemption is inapplicable, and the Trustee has not challenged the exemption on that ground. *See McFarland*, 790 F.3d at 1186. We reiterate, however, that different subsections of section 222.21(2)(a) apply to funds that have been "determined by the [IRS] to be exempt from taxation," Fla. Stat. § 222.21(2)(a)(2), "preapproved by the [IRS] as exempt from taxation," *id.* § 222.21(2)(a)(1), or neither, *id.* § 222.21(2)(a)(3). This classification matters because a fund in the third category—that is, one that has neither been determined nor preapproved by the IRS to be tax exempt—must satisfy a different set of requirements in order to be eligible for a creditor exemption. But again, because the parties here agree that Yerian properly invoked section 222.21(2)(a)(2), we examine the matter no further.

The third requirement—that no final and nonappealable proceeding has declared that Yerian's IRA is no longer tax-exempt—is satisfied as well. It is settled law that a "claim of exemption is to be determined as of the petition date." *In re Fodor*, 339 B.R. 519, 521 (Bankr. M.D. Fla. 2006). And it is clear from the record before us that, prior to Yerian's bankruptcy petition date, no final and nonappealable proceeding—before the IRS or any court—had determined that his IRA's governing instrument was no longer exempt under the tax code.[5]

Accordingly, Yerian's claim for exemption turns on whether the second requirement is satisfied—that is, whether his IRA was "maintained in accordance with" the "plan or governing instrument" that the IRS had determined was exempt from taxation under § 408's requirements.[6] We pause here to note a misstep in the opinion of the district court. Echoing the bankruptcy court, the district court interpreted the statute to require that an IRA be "maintained in accordance with IRC § 408" in order to be exempt from creditors. But rather than focusing on congruity with federal statutory requirements, the Florida statute says that to be exempt, an IRA must be "maintained in accordance with *a plan or governing*

[5] The parties spar over whether an unfavorable determination by a bankruptcy court, as opposed to by "the IRS or a tax court," could disqualify a debtor under this prong. Because the bankruptcy court made no such determination before the petition date, we leave that hypothetical question for another day.

[6] The tax code uses the word "plan" in the context of some types of funds and accounts, and "governing instrument" in the context of others. Section 408, which sets out the requirements for IRAs, refers to a "governing instrument." 26 U.S.C. § 408(a).

instrument that has been determined by the [IRS] to be exempt from taxation under . . . s. 408." Fla. Stat. § 222.21(2)(a)(2) (emphasis added). So the object of the phrase "maintained in accordance with" is "a plan or governing instrument"—not § 408 of the Internal Revenue Code. The Florida exemption thus turns on whether the IRA has been maintained in accordance *with its own governing instrument*, not on whether the IRA has been maintained in compliance with § 408 in the first instance.

This will often be a distinction without a difference where (as we will see is the case here) the IRA owner engages in behavior that turns out to be prohibited by both the governing instrument and the tax code. But it is "the duty of the court to give effect, if possible, to every clause and word of a statute." *In re Failla*, 838 F.3d 1170, 1175 (11th Cir. 2016) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Moreover, the distinction drawn by Florida law can be a meaningful one. We provide a few examples to highlight the practical implications of our statutory reading, as well as to properly direct our own inquiry.

On the one hand, federal laws governing retirement accounts change frequently, meaning that amendments to the tax code may require changes to a retirement plan's terms. The Tax Reform Act of 1986, for example, required employers to remove a formerly "common" type of "benefit formula" from their pension plans by January 1, 1989. *See Scott v. Admin. Comm. of the Allstate Agents Pension Plan*, 113 F.3d 1193, 1195 (11th Cir. 1997). If a pensioner's employer had refused to change its plan and continued to dole out improper benefits, the pensioner would have been a participant in a fund maintained in accordance with its own plan or governing instruments, but *not* maintained in accordance with § 401(a) of the Internal Revenue Code. The Florida exemption statute would likely allow such a pensioner to shield his retirement fund from creditors, even though the fund was not maintained in compliance with the tax code—at least until it was "subsequently determined" that the governing instrument was not exempt. Fla. Stat. § 222.21(2)(a)(2). The Florida exemption thus contains somewhat of a safe harbor, allowing IRAs to maintain creditor-exempt status for a period of time after the law changes.

Conversely, because an IRA's plan or governing instrument may contain requirements that go *beyond* the law, an IRA could be operated in a way that satisfies the tax code, yet violates additional restrictions set out in its own governing instruments. For example, "IRAs are, as a statutory matter, permitted to hold real property." *Dabney v. Comm'r*, 107 T.C.M. (CCH) 1535, at *4 (2014). But an IRA custodian is not required to offer "the option to invest IRA funds in *any* asset that is not prohibited by statute," and has "the power to prohibit the purchase and holding of real property" through the terms of the governing instrument. *Id.* (emphasis added). In other words, IRA governing instruments can impose requirements that go beyond the law—and section 222.21(2)(a)(2) demands compliance with those additional requirements. Florida law thus would not shield an IRA owner who violated the terms of his governing instrument, even in the absence of a tax code violation.

Our sole task, then, is to determine whether Yerian maintained his IRA in accordance with its own plan or governing instruments. The parties have identified as the governing instruments of this IRA two contracts between Yerian and IRA Services Trust Company: a Traditional IRA Agreement, and an IRA LLC Agreement.[7] The Trustee argues that Yerian violated the terms of the latter document, and we agree. The IRA LLC Agreement was the contract under which IRA Services Trust Company permitted Yerian to make his own IRA investments through an LLC. The Agreement, which Yerian signed on June 1, 2012, contained the following language: "I acknowledge that I have not and will not engage in any prohibited transactions within my retirement account or its asset holdings." The Agreement further stated, in bold: "A prohibited transaction is a transaction between a plan (the LLC) and a disqualified person that is prohibited by law." It explained that a prohibited transaction included any "act of a fiduciary by which plan income or assets are used for his or her own interest," and any "transfer of plan income or assets to, or use of them by or for the benefit of, a disqualified person." A "disqualified person," in turn, explicitly included "the owner" of the IRA as well as the owner's "spouse."

Yerian admits that he engaged in self-dealing transactions "prohibited by law." Yerian used the condominium in Puerto Rico, an asset of the IRA LLC, for his own benefit. He and his wife took title to two cars purchased by the IRA LLC, and even drove one of them as a personal vehicle. It is plain to us that Yerian violated the express terms of the IRA LLC Agreement. Based on these facts, it is similarly plain that he failed to maintain his IRA in accordance with its governing

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[7] Because the parties do not dispute that these two documents are the IRA's governing instruments, we do not attempt to define the term "governing instrument" as used in section 222.21(2)(a)(1)–(3).

instrument—and as a consequence forfeited his creditor exemption under section 222.21(2)(a)(2).

Yerian tries to avoid the statute's "maintained in accordance with" requirement, but his efforts are in vain. First, Yerian argues that every section 222.21(2)(a)(2) inquiry should turn on whether an IRA has lost its tax-exempt status in an unfavorable final and nonappealable proceeding. He asserts that once "it is established that an account is governed by proper documents, the account is exempt from creditors unless and until the account is determined to have lost its tax-exempt status" in a final proceeding. Not so. Recall that the statute contains three requirements: (1) an initial determination by the IRS that the terms of a plan or governing instrument established a tax-exempt IRA; (2) maintenance of the IRA in accordance with those terms; and (3) no subsequent determination in a final proceeding that the terms did *not* establish a lawful exemption. Fla. Stat. § 222.21(2)(a)(2). An unfavorable final proceeding and an owner's failure to properly maintain his IRA are two *different* ways to forfeit a section 222.21(2)(a)(2) exemption. Yerian's argument fails to give any effect at all to the requirement that an IRA be "maintained in accordance with" its governing documents.

Alternatively, Yerian argues that an IRA satisfies the "maintained in accordance with" prong so long as it continues to exist after being "opened pursuant to an approved plan" or governing instrument. He would thus have us confine our inquiry to the moment he signed the governing instruments and read "*maintained* in accordance with" a proper governing instrument to mean "*established* in accordance with" a proper governing instrument. But those words of course are not interchangeable. To "establish" is to "set up (a government, nation, business, etc.); found; institute." Webster's New World College Dictionary 497 (5th ed. 2014). To "maintain," by contrast, is to "continue" or "keep in a certain condition." *Id.* at 880; Black's Law Dictionary 1097 (10th ed. 2014). So the words in the statute compel us to look beyond the moment of establishment to examine how Yerian operated his IRA over time. Although Yerian may have set up his IRA properly at the start, his later infractions disqualified him from claiming the exemption.

Finally, as the analysis in this opinion shows, our decision is not guided by the Trustee's argument that it would be "absurd" or "inconsistent with the principles behind the bankruptcy code" for Florida law to have the effect of shielding even some IRAs operated in violation of federal tax law. This Court applies an "exacting standard for finding absurdity," *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001), lest we impose "the policy predilections of judges" on legitimate legislative choices, *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997). And in any event, Congress has specifically authorized states to craft their own creditor exemptions—which may be as generous or as austere as the state deems appropriate. *See* 11 U.S.C. § 522(b); *In re Gamble*, 168 F.3d 442, 444 (11th Cir. 1999). It is not our role to second-guess the mercy Florida chooses to show its debtors, and we will decline the invitation to do so. We rest our decision on the plain text of the statute alone.

IV.

Yerian failed to maintain his IRA in accordance with its governing instruments, which explicitly prohibited the acts of self-dealing he engaged in with his IRA funds. As a consequence, he is not entitled to claim a creditor exemption for his IRA under section 222.21(2)(a)(2). The judgment of the district court is **AFFIRMED**.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3130

LINDA COTY BULLOCK,

Appellant,

v.

BAYVIEW LOAN SERVICING, LLC,

Appellee.

On appeal from the Circuit Court for Bay County.
Keith Brace, Judge.

June 28, 2019

WETHERELL, J.

Linda Coty Bullock (the borrower) appeals the final judgment of foreclosure entered in favor of Bayview Loan Servicing, LLC (the servicer). The borrower argues that res judicata barred this foreclosure action because the servicer had unsuccessfully prosecuted a prior foreclosure action against the borrower. We reject this argument and affirm the foreclosure judgment.

Facts

In 2003, the borrower obtained a $112,450 loan from Yale Mortgage Company. The loan was evidenced by a promissory note and secured by a mortgage on residential real property owned by the borrower. The servicer is the current owner and holder of the note and mortgage.

In 2010, the servicer filed a foreclosure action against the borrower based on the borrower's failure to make the loan payments due in February 2008 and thereafter. After a non-jury trial, the trial court entered final judgment in favor of the borrower. The final judgment stated in pertinent part: "On the evidence presented, the Court finds that [the servicer] has failed to prove that it has standing to enforce the note sued upon and has failed to prove by competent evidence the amount allegedly due on said note." The judgement ordered that the servicer "take nothing and that [the borrower] shall go hence without day." The servicer did not appeal the final judgment.

In 2015, the servicer filed another foreclosure action against the borrower based on the borrower's failure to make the loan payments due in July 2010 and thereafter. The borrower filed an answer raising affirmative defenses, including res judicata based on the final judgment in the prior foreclosure case. The trial court rejected the res judicata defense, and after a non-jury trial, the court entered a final judgment of foreclosure in favor of the servicer.

This appeal followed.

Analysis

As she did below, the borrower argues on appeal that the current foreclosure action is barred by res judicata.[1] The servicer responds that res judicata does not apply here because the current foreclosure action was based on a different period of default than

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[1] We reject the servicer's argument that this issue was not properly preserved for review. The issue was pled as an affirmative defense, framed in the pre-trial stipulation, and raised in a motion in limine that was denied by trial court. The fact that the borrower did not also raise the issue in its closing argument does not, under the circumstances, amount to a waiver or abandonment of the issue.

the prior action. Based on our de novo review,[2] we agree with the servicer.

The servicer's position is amply supported by settled case law, including *Bartram v. U.S. Bank National Association* in which the Florida Supreme Court reaffirmed that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." 211 So. 3d 1009, 1016 (Fla. 2016) (quoting *Singleton v. Greymar Assoc.*, 882 So. 2d 1004, 1006-07 (Fla. 2004)). The borrower acknowledges this holding, but argues that the "not necessarily barred" language used by the Court means that there are circumstances where subsequent foreclosure actions are barred by res judicata and that this case is one of those circumstances.

Specifically, the borrower argues the "take nothing" disposition of the prior foreclosure action equates to a determination that there was nothing due on the loan. This argument finds no support in the prior final judgment because the trial court did not affirmatively find that the borrower no longer owed anything on the loan; instead, the court simply found that the servicer failed to adequately prove the amount due based on the default alleged in that case.

On this record, it strains credibility to argue that the failure-of-proof finding in the prior foreclosure action equates to a finding that the borrower owes nothing on the loan. Indeed, the unrebutted evidence presented at the non-jury trial in this case established that the borrower has not made any payments on the loan for **more than a decade**. Accordingly, even if the borrower's interpretation of the prior final judgment was correct, it would be inequitable to apply the doctrine of res judicata to bar the foreclosure action in this case. *See Bartram*, 211 So. 3d at 1017 ("Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.") (quoting *Singleton*,

[2] *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1259 (Fla. 2006) ("[W]hether the application of res judicata was proper is a question of law. We therefore apply a de novo standard of review.") (internal citation omitted).

882 So.2d at 1007-08); *Provident Funding Assoc., L.P. v. MDTR*, 257 So. 3d 1114, 1117 (Fla. 2d DCA 2018) ("[C]ourts may decline to apply the doctrine [of res judicata] in limited circumstances when it would 'defeat the ends of justice.'") (quoting *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003)).

Conclusion

For the foregoing reasons, we affirm the final judgment of foreclosure.

AFFIRMED.

OSTERHAUS and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jeffrey P. Whitton, Panama City, for Appellant.

Alexis Fields of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Fort Lauderdale, for Appellee.

Third District Court of Appeal

State of Florida

Opinion filed June 26, 2019.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-1051
Lower Tribunal No. 13-25997

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Cascar, LLC,
Appellant,

vs.

City of Coral Gables, etc., et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Hall, Lamb, Hall & Leto, P.A., and Andrew C. Hall, Matthew P. Leto, and Roarke Maxwell, for appellant.

John C. Lukacs, P.A., and John C. Lukacs, Sr.; Weiss Serota Helfman Cole & Bierman, P.L., and Laura K. Wendell and Susan L. Trevarthen, for appellees.

Before LOGUE, SCALES, and HENDON, JJ.

LOGUE, J.

Cascar, LLC, appeals the summary final judgment entered in favor of the City of Coral Gables, the City of Coral Gables Commission, and the Historic Preservation Board of the City of Coral Gables (collectively, the "City"). On appeal, we review whether the City's 2012 application of a 1984 ordinance to the subject property gives rise to a cause of action under the Bert J. Harris, Jr., Private Property Rights Protection Act. § 70.001, Fla. Stat. Because the grandfather provision of the Harris Act expressly bars claims that arise from the application of an ordinance enacted on or before May 11, 1995, including when the application of the ordinance occurs after that date, we affirm the trial court's grant of summary judgment finding that Cascar did not have a cause of action under the Harris Act.

Background

At the heart of this controversy is a historic residence located on two acres of waterfront property in Coral Gables, Florida. The residence was designed by architect Alfred Browning Parker and the owner, noted philanthropist Beulah Carlin, in 1966. Several years after Ms. Carlin built her residence, the City Commission created the Historic Preservation Board and vested it with the power to designate properties as historic landmarks. On August 28, 1984, in furtherance of its preservation efforts, the City Commission enacted Ordinance No. 2508. Coral Gables, Fla., Ordinance No. 2508 (Aug. 28, 1984), codified at Coral Gables Zoning Code, Art. III, §§ 3-1103 & 3-1107(D). Ordinance No. 2508 promulgated preservation standards, review procedures, and the criteria to determine, among other things, whether to designate a landmark historic or to issue a demolition permit.

Ms. Carlin passed away in 2007 and title to the property transferred to Cascar. In 2012, the residence was designated a historic landmark by resolution pursuant to Section 3-1103. Cascar asserted that modern buyers found the residence undesirable and requested a permit to demolish the residence, but its request was denied by resolution pursuant Section 3-1107(D). The denial was based primarily on the residence's designation as a historic landmark.

Cascar filed a Harris Act claim to recover for diminution of the property's value allegedly caused by the refusal to allow demolition of the historic residence. The City moved for summary judgment and submitted the affidavit of Historic Preservation Officer Donna Spain, in support of its motion. Her uncontested affidavit stated the designation and the denial of the application to demolish were based on Ordinance 2508 as codified:

> 6. In designating the property as a local historic landmark, the Historic Preservation Board and the City Commission applied the criteria for designation of historic landmarks which appear in the Coral Gables Zoning Code at Article III, Section 3-1103.
>
> 7. The criteria that appear in Section 3-1103 were in effect in the City since the City enacted Ordinance No. 2508 on August 28, 1984.
>
> . . . .

> 9. In denying Cascar's application [for a demolition permit], the Historic Preservation Board and the City Commission considered the record and applied the criteria set forth in the Coral Gables Zoning Code, Article III, Section 3-1107(D). . . . These criteria have been in effect since 1984.

Cascar did not present contradictory evidence.

After a hearing, the trial court granted the City's motion for summary judgment, finding that because Ordinance No. 2508 was enacted in 1984, Cascar did not have a viable cause of action under section 70.001(12). This appeal followed.

Standard of Review

This Court reviews a trial court's ruling on a motion for summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Id. Summary judgment "is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings." The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). Because summary judgment tests the sufficiency of the evidence to justify a trial, it "is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law." Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015).

A court considering summary judgment must avoid two extremes. On one hand, a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." Perez-Rios v. Graham Cos., 183 So. 3d 478, 479 (Fla. 3d DCA 2016) (quoting Martin Petroleum Corp. v. Amerada Hess Corp., 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000)). On the other hand, "a motion for summary judgment is not a trial by affidavit or deposition. Summary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist. If there is disputed evidence on a material issue of fact, summary judgment must be denied and the issue submitted to the trier of fact." Perez–Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017).

Analysis

Florida's legislature enacted the Harris Act to provide a remedy for private landowners where their property has been inordinately burdened by government action, but the government action does not amount to a constitutional taking. See § 70.001(1), Fla. Stat. "The Act filled a void in then-existing Florida law because, prior to its enactment, there was no means by which a property owner could receive compensation for adverse financial effects of government regulation of his land without satisfying the constitutional standards for a taking . . . ." City of Jacksonville

v. Smith, 159 So. 3d 888, 892 (Fla. 1st DCA 2015). To do so, the legislature provided a limited waiver of sovereign immunity. § 70.001(13), Fla. Stat.

The legislature, however, also provided a grandfather provision. The Harris Act expressly states that its provisions do not apply "to the application of any law enacted on or before May 11, 1995." The grandfather provision reads:

> No cause of action exists under this section as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date.

§ 70.001(12), Fla. Stat. The question in this case is whether the grandfather provision bars claims when the ordinance at issue was enacted prior to May 11, 1995, but the application of the ordinance took place after that date.

In Bair v. City of Clearwater, 196 So. 3d 577, 581 (Fla. 2d DCA 2016), the Second District considered this issue and held that the grandfather provision does bar claims in this circumstance:

> The reference to the enactment of an ordinance or the adoption or formal notice for adoption of an ordinance on or before May 11, 1995, makes it clear that the legislature intended to bar claims based on the application of grandfathered legislation, i.e., any law, rule, regulation, or ordinance that was in effect or formally noticed to be in effect on or before the specified date. If the legislature intended merely to preclude claims based on a governmental entity's application of an ordinance that occurred prior to May 11, 1995, it could have specified that no cause of action existed for any application of a law, rule, regulation, or ordinance that occurred prior to that

> date. But by its terms, section 70.001(12) precludes claims for the application of an ordinance that was in effect prior to May 11, 1995, without regard to when the application of the ordinance occurred.

Bair, 196 So. 3d at 583 (original emphasis omitted; emphases added). Because Bair properly interprets the plain and obvious meaning of the statute, we are bound to follow it: "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Atwater v. Kortum, 95 So. 3d 85, 90 (Fla. 2012) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

Applying Bair to this case, the undisputed evidence reveals that Ordinance No. 2508 was enacted on August 28, 1984 – more than ten years before the statutory cut-off date of May 11, 1995. When the City designated the residence a historic landmark in 2012, it merely applied the grandfathered-in Ordinance as codified in Section 3-1103. For the same reason, when the City denied Cascar's request for a demolition permit, it merely applied the grandfathered-in Ordinance as codified in Section 3-1107(D). Under Bair, therefore, the application of the Ordinance to the subject property does not give rise to a cause of action under the Harris Act.

Cascar argues that a different result is mandated by the cases of Wendler v. City of St. Augustine, 108 So. 3d 1141 (Fla. 5th DCA 2013), Citrus County v. Halls River Development, Inc., 8 So. 3d 413 (Fla. 5th DCA 2009), and Brevard County v.

Stack, 932 So. 3d 1258 (Fla. 5th DCA 2006). But these cases are inapposite. They do not deal with the grandfather provision of section 70.001(12). They deal instead with section 70.001(11), which establishes when a Harris Act claim is ripe and creates a one-year time limit for bringing a Harris claim.[1] Obviously, whether a regulation was grandfathered-in is separate and distinct from whether a Harris Act claim is ripe. Cascar's argument improperly confounds these different issues and sections.

Affirmed.

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[1] Subsection 11 provides, in pertinent part:

> (11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue.
>
> (a) For purposes of determining when this 1-year claim period accrues:
>
> 1. A law or regulation is first applied upon enactment and notice as provided for in this subparagraph if the impact of the law or regulation on the real property is clear and unequivocal in its terms and notice is provided by mail to the affected property owner or registered agent at the address referenced in the jurisdiction's most current ad valorem tax records. . . .
>
> 2. Otherwise, the law or regulation is first applied to the property when there is a formal denial of a written request for development or variance.

§ 70.001(11), Fla. Stat.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SHORELINE FOUNDATION, INC.,
Appellant,

v.

VICTOR BRISK,
Appellee.

No. 4D18-1605

[June 26, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sandra Perlman, Judge; L.T. Case Nos. CACE 14-020494 (02), CACE 14-020793 (04).

Steven H. Osber of Conrad & Scherer LLP, Fort Lauderdale and Elliot B. Kula, W. Aaron Daniel, and Ashley P. Singrossi of Kula & Associates, P.A., Miami, for appellant.

Jeffrey A. Rynor and Loren H. Cohen of Mitrani, Rynor, Adamsky & Toland, P.A., Miami Beach, for appellee.

KLINGENSMITH, J.

Appellant Shoreline Foundation, Inc., ("Shoreline") appeals an Amended Final Judgment entered following a jury verdict in favor of appellee Victor Brisk. Brisk brought several claims against Shoreline, his former employer, but prevailed only on his count alleging breach of fiduciary duty stemming from what he claims was a joint venture with Shoreline to develop property in the Bahamas. Shoreline contends that the evidence was insufficient to establish that a joint venture existed, and also challenges the trial court's order denying entitlement to attorneys' fees under Florida's Blue Sky Law.[1] We agree on both issues and reverse. We affirm all other issues raised on appeal and cross-appeal without comment.

In October 2003, one of Shoreline's principals approached Brisk with an opportunity to invest in Hidden Hills, a townhome development in the

[1] Chapter 517, Florida Statutes (2015).

Bahamas. Shoreline was developing Hidden Hills in conjunction with a Bahamian entity called P&P. Brisk was given the opportunity to purchase: (1) a 15% ownership interest in seven of the townhome units Shoreline would own; and (2) 15% ownership interest in the 50% of P&P's shares in the Hidden Hills Project that Shoreline would own. The parties entered into a written agreement called a "Partial Assignment" that assigned Brisk the above ownership interests. Brisk was not a party to the Hidden Hills Contract between Shoreline and P&P, but the Partial Assignment established Brisk knew about the Hidden Hills Contract:

> 5. Acknowledgement. Brisk acknowledges that he is fully acquainted with the condominium project which is the subject of this agreement and that he will *actively participate* in the development of the project.

(Emphasis added).

The record shows Brisk was indeed aware of the Hidden Hills Project's status because he was employed by Shoreline as its Controller. There is no mention of Brisk's duties or authority, nor is there any mention of a joint venture or partnership between Brisk and Shoreline contained in the Partial Assignment.[2]

Over the next five years, Brisk continued to invest in the project, making contributions toward his share[3] totaling $219,600 while remaining employed as Shoreline's Controller. However, Brisk never controlled the Hidden Hills Project, and never met with the P&P principals. According to the evidence, Brisk's involvement in the project, aside from his financial investment, was limited to occasionally performing accounting duties, verifying and paying invoices, and entering those expense allocations into the accounting software.

Unfortunately for the parties, the Hidden Hills Project fell victim to the 2008 recession. P&P's construction went into foreclosure, and the development went unfinished and unsold. While Shoreline continued to make payments on the various mortgages to which Shoreline's principals remained obligated, Brisk was under no such personal obligation for these mortgages.

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[2] The Hidden Hills Contract between Shoreline and P&P specifically designated the relationship between those two entities as a joint venture.

[3] Under the terms of the Partial Agreement, Brisk's interest in the Hidden Hills Project was proportionate to his actual investment. If Brisk failed to pay the total valuation of his 15% share, then his percentage interest would also be reduced.

Soon after, the relationship between Brisk and Shoreline soured, and Brisk was terminated from his position as Controller. When Brisk correspondingly stopped making payments toward his 15% interest and requested a refund of his investment in the Hidden Hills Project, Shoreline refused. Brisk then filed a multi-count suit against Shoreline and the Shoreline principals (collectively "defendants") alleging breach of contract, fraud, misrepresentation in violation of section 517.301(1), Florida Statutes (2015), (the "Blue Sky Law"), breach of fiduciary duty, and civil theft, among other claims. Shoreline filed a separate declaratory judgment claim to establish Brisk's continuing duty to make payments under the terms of the Partial Assignment. Shoreline's declaratory judgment claim was consolidated with Brisk's suit for trial.

At trial Brisk alleged the defendants owed him a fiduciary duty, stemming from what he claimed was his role as a joint venturer, to develop the Hidden Hills Project. Brisk claimed a joint venture existed because he was a "partner" with Shoreline in the Hidden Hills Project and stipulated that the only basis for his breach of fiduciary duty claim stemmed from this alleged joint venture. Shoreline asserted they did not owe Brisk a fiduciary duty because he was not a joint venturer in the Hidden Hills Project since the parties merely entered into an "arms-length transaction." All parties agreed that without the existence of a joint venture there could be no claim for breach of fiduciary duty.

At the close of Brisk's case, Shoreline moved for a directed verdict arguing there was no evidence to support the existence of a joint venture. The trial court denied the motion and ruled that the question of whether the parties were engaged in a joint venture was an issue of fact for the jury.

The jury found in favor of the defendants on all claims except for the breach of fiduciary duty claim under Count IV of Brisk's complaint. While the jury found that a joint venture did exist between Shoreline, the Shoreline principals, and Brisk, they only found that Shoreline and one of its principals had breached their fiduciary duty. The jury awarded Brisk damages in the amount of $219,600—an amount equal to Brisk's investment in the Hidden Hills Project. As to Shoreline's declaratory judgment claim, the jury found Brisk in breach of the Partial Assignment for failing to make the required payments, but did not reduce Brisk's percentage of interest, finding Shoreline had waived the right to any reduction by failing to demand the payments per the terms of the Partial Assignment.

After the verdict, the parties filed various post-trial motions. Shoreline renewed their arguments on the existence of a joint venture by way of a motion for judgment notwithstanding the verdict (JNOV). The court denied the JNOV and ruled that Brisk would be awarded $219,600 plus prejudgment interest and confirmed he would also retain his 15% interest in the project. Final judgment was entered accordingly.

Shoreline also moved for determination of entitlement to attorneys' fees as the prevailing party on Brisk's Blue Sky Law claim. Brisk argued such an award would be "unjust" because he prevailed on the fiduciary duty claim, which he alleged was "inextricably intertwined" with the Blue Sky Law claim. Because of the related nature of the claims, Brisk argued that he was the prevailing party under the "significant issues test." Persuaded by this argument, the trial court denied Shoreline's request for attorneys' fees under the statute.[4] An Amended Final Judgment was later entered incorporating the amount of the prejudgment interest awarded to Brisk for prevailing on the breach of fiduciary claim and stating "Brisk owns a 15% interest in Shoreline's interest in the Hidden Hills Project pursuant to the Partial Assignment," and specifically noting that Shoreline's principals were not liable to Brisk. This appeal follows.

1. Shoreline's Motion For JNOV

"We review the court's denial of a motion for JNOV *de novo*. A JNOV is appropriate only when there is no evidence upon which the jury could rely in finding for the non-moving party." *Mulvey v. Stephens*, 250 So. 3d 106, 109 (Fla. 4th DCA 2018) (citations omitted). A motion for JNOV is the substantive equivalent of a motion for directed verdict. *See Hall v. Ricardo*, 331 So. 2d 375, 376 (Fla. 3d DCA 1976).

Under Florida law, a joint venture occurs "when two or more persons combine their property or time or a combination thereof in conducting some particular line of trade or for some particular business deal." *Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957). This relationship must arise out of a contract. *See id.*

> In order to create a joint venture, a contract must contain the following elements: "(1) a community of interest in the performance of the common purpose, (2) joint control or right

[4] Section 517.211(6), Florida Statutes (2015), provides that "[i]n any action brought under this section, including an appeal, the court shall award reasonable attorneys' fees to the prevailing party unless the court finds that the award of such fees would be unjust."

> of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits and (5) a duty to share in any losses which may be sustained."

Jackson–Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1089 (Fla. 2008) (quoting *Kislak*, 95 So. 2d at 515). "The absence of one of the elements precludes a finding of a joint venture. Moreover, in a joint venture, the parties have the right and authority to bind the others with reference to the subject matter of the joint venture." *Id.* (citations omitted).

Joint control "exists when a contract specifically allows both parties to control the operations of the venture." *MDVIP, Inc. v. Beber*, 222 So. 3d 555, 564 (Fla. 4th DCA 2017). "A contract of joint adventure is in effect one of mutual agency, each adventurer acting as a principal in his own behalf and as agent for his co-adventurer." *Marriott Int'l, Inc. v. American Bridge Bah. Ltd.*, 193 So. 3d 902, 906 (Fla. 3d 2015) (quoting *Deal Farms, Inc. v. Farm & Ranch Supply, Inc.*, 382 So. 2d 888, 891 (Fla. 1st DCA 1980)). Thus, "[w]here the actions of one party do not bind the other, joint control does not exist." *In re Cuenant*, 339 B.R. 262, 276 (Bankr. M.D. Fla. 2006).

Although joint ventures and partnerships are separate legal entities, both are governed by the same rules of law. *See Sheridan Healthcorp, Inc. v. Amko*, 993 So. 2d 167, 170 (Fla. 4th DCA 2008). "The ultimate determination, however, turns upon the intent of the parties." *Fla. Trading and Inv. Co., v. River Constr. Servs., Inc.*, 537 So. 2d 600, 602 (Fla. 2d DCA 1988). "Whether two or more persons have created a joint venture between themselves depends on their intent, 'which is to be determined in accordance with the ordinary rules governing the interpretation of contracts.'" *A & A Elec. Servs., Inc. v. Jurado*, 198 So. 3d 37, 41 (Fla. 2d DCA 2015) (quoting *Willis v. Fowler*, 136 So. 358, 365 (Fla. 1931)).

Here, the parties have a written agreement that is unambiguous in establishing their relationship. It is evident from the plain language of the Partial Agreement that Brisk's role was that of an investor, not a co-manager. Mere contribution of capital, absent the exercise of joint control, does not establish a joint venture. *See, e.g., Pinnacle Port Cmty. Ass'n, Inc. v. Orenstein*, 872 F.2d 1536, 1539-40 (11th Cir. 1989) (no joint venture where lender "would fund [condominium development] on an 'as needed' basis" and developer and lender "each had agents on site who had independent areas of control," and "the actions of one did not bind the other") (applying Florida law); *cf. Arango v. Reyka*, 507 So. 2d 1211, 1213-14 (Fla. 4th DCA 1987) (holding that sufficient evidence of joint control existed to send the issue to the jury where a hospital maintained control over day-to-day operations such as patient scheduling and group assignments).

Brisk alleges there was competent substantial evidence presented at trial from which the jury could have found the existence of a joint venture. We disagree. As evidence of joint control, Brisk points to the fact that he ran the payroll and cut the checks for the Hidden Hills employees. But such duties were within the scope of his employment as Controller—Brisk ran payroll and cut checks for the employees of *all* Shoreline projects—regardless of whether some work was done on his own time. The evidence was clear that when performing bookkeeping and accounting functions, Brisk had no real authority to control any of the management or day-to-day operation decisions relating to the Hidden Hills Project. The fact that he made entries into accounting software for Hidden Hills does not equate to joint control for the purposes of creating a joint venture. The evidence shows Brisk was subject to Shoreline's control when completing his Controller tasks and did so pursuant to authorization from the Shoreline principals. Even when Brisk was actively participating in the Hidden Hills Project outside his role as Controller, he was directed entirely by Shoreline's principals. For instance, although Brisk personally met with and extended an offer to a potential investor, this only occurred after one of Shoreline's principals approached Brisk with the idea, approved extending the offer, and directed Brisk entirely in the process.

Brisk's also argues a joint venture was created based on the trial testimony of some Shoreline principals referencing Brisk as a "partner" in the Hidden Hills project, or that this evidence at least created a question of fact for the jury. While describing Brisk as a "partner" in conversation might be sufficient to create "apparent authority" vis-à-vis any dealings with third parties, it is insufficient to create either a partnership or a joint venture where the intent of the parties and the scope of their relationship has been outlined in a formal written agreement between them. *See Kislak*, 95 So. 2d at 514 ("[I]t is now understood that [partnerships and joint ventures] are not identical and that decisions defining and describing partnerships are not necessarily controlling upon the question of whether parties to a particular contract are joint adventurers.").

Brisk's reliance on *Barwick v. Alderman*, 35 So. 13, 15 (Fla. 1903), to establish the creation of a partnership is misplaced. There, the Florida Supreme Court held that testimony that an individual was held out as a partner is "competent evidence tending to prove the partnership in fact." *Id.* However, that case dealt with a written contract between the parties which was left unexecuted, thus requiring consideration of parol evidence. *Id.* at 16. Here, the parties formalized their intentions with an unambiguous written contract, making *Barwick* inapplicable to this situation. Moreover, *Barwick* pertains to the creation of a partnership, not a joint venture; it is unclear how referencing an individual as a "partner" establishes any of the five elements necessary to create a joint venture.

Based on the foregoing, we conclude that the evidence overwhelmingly fails to support the existence of a joint venture between Brisk, Shoreline or its principals. Shoreline never intended for Brisk to share equal control in the Hidden Hills Project. On the contrary, the evidence establishes that Shoreline—along with P&P—at all times exercised full management control over Hidden Hills. Shoreline principals held weekly meetings to manage the daily decisions and progress of the Hidden Hills Project; Brisk was never invited to attend these meetings and was merely informed of those decisions by the Shoreline principals. Shoreline principals also directed Shoreline's employee staffing at the Hidden Hills Project site, including the hiring of independent contractors and an attorney. Again, Brisk did not participate in these decisions. At best, the evidence shows Brisk was an employee of Shoreline, who later became an investor in the project with no defined responsibilities or managerial duties.

The Partial Assignment did not grant Brisk the authority to control or bind Shoreline in the Hidden Hills Project, and as such, neither the contract nor these statements establish a right to joint control. *See, e.g.*, *E & H Cruises, Ltd. v. Baker*, 88 So. 3d 291, 295 (Fla. 3d DCA 2012) (no joint venture where plain language of agreement revealed one party could not control the other). There was no competent substantial evidence to support the existence of joint control, thus precluding the existence of a joint venture. Therefore, Shoreline and its principals were entitled to a directed verdict, or alternatively, to a JNOV on Brisk's fiduciary duty claim.

2. Shoreline's Motion for Fees under Section 517.211(6)

A trial court's determination of whether a party prevails on the "significant issues" in litigation so as to designate that party as the prevailing party for the purpose of awarding attorneys' fees is reviewed for abuse of discretion. *See Olson v. Pickett Downs Unit IV Homeowner's Ass'n, Inc.*, 205 So. 3d 869, 872 (Fla. 5th DCA 2016) (quoting *Moritz v. Hoyt Enters, Inc.*, 604 So. 2d 807, 810 (Fla. 1992)). However, "[t]he determination of whether multiple claims within a lawsuit are separate and distinct for purposes of attorney's fees is a matter of law to be reviewed de novo." *Leon F. Cohn, M.D., P.A. v. Visual Health & Surgical Ctr., Inc.*, 125 So. 3d 860, 863 (Fla. 4th DCA 2013) (quoting *Avatar Dev. Corp. v. DePani Constr., Inc.*, 883 So. 2d 344, 345 (Fla. 4th DCA 2004)).

"It is well-settled that attorneys' fees can derive only from either a statutory basis or an agreement between the parties." *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386, 389 (Fla. 4th DCA 2012) (quoting *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010)). "Florida law permits more than one prevailing party in a single lawsuit where each of the claims that support a fee award is 'separate and distinct and would support an independent action, as opposed to being an alternative theory of liability for the same wrong.'" *Leon F. Cohn, M.D., P.A.*, 125 So. 3d at 863 (quoting *Fid. Warranty Servs., Inc. v. Firstate Ins. Holdings, Inc.*, 98 So. 3d 672, 677 (Fla. 4th DCA 2012); *accord Fid. Warranty Servs.*, 98 So. 3d at 677 (reversing denial of fees to defendant that prevailed on one distinct claim). Claims are separate and distinct if "they could support an independent action and are not simply alternative theories of liability for the same wrong." *Padgett v. Kessinger*, 190 So. 3d 105, 108 (Fla. 4th DCA 2015) (quoting *Avatar Dev. Corp. v. DePani Constr., Inc.*, 883 So. 2d 344, 346 (Fla. 4th DCA 2004)).

"Chapter 517, commonly known as the Blue Sky Law, governs securities transactions." *Citizens Fed. Sav. & Loan Ass'n of St. Lucie Cty. v. Loeb Rhoades, Hornblower & Co.*, 473 So. 2d 679, 682 (Fla. 4th DCA 1984). Section 517.211(6), Florida Statutes (2015), allows a court to decline an award of attorneys' fees to a prevailing party if the court finds that the award of such fees would be "unjust."

However, "[t]here is little Florida authority construing what the word 'unjust' means within the context of this statute . . . ." *Newsom v. Dean Witter Reynolds, Inc.*, 558 So. 2d 1076, 1077 (Fla. 1st DCA 1990). Black's Law Dictionary defines "unjust" as "[c]ontrary to right and justice, or to the enjoyment of his rights by another, or to the standards of conduct furnished by the laws." BLACK'S LAW DICTIONARY 1535 (6th ed. 1995). The American Heritage Dictionary defines "unjust" as: "1. Being in violation of principles of justice or fairness; unfair. 2. Acting in violation of such principles; unfair in one's dealings and actions." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1323 (2nd ed. 1985). Webster's Third New International Dictionary defines "unjust" as, "deficient in justice and fairness." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2501 (2002). Although equitable considerations should inform a court's decision in this area, it cannot be said that an award of fees to Shoreline is "unjust" under any of these definitions.

The record shows the trial court declined to award fees under the Blue Sky Law to Shoreline for successfully defending against Count III primarily because it was persuaded by Brisk's argument that Count IV, the breach of fiduciary claim, was "inextricably intertwined" with the Blue Sky Law violation and made Brisk the prevailing party on a "significant issue" in the case. However, the mere fact that Brisk recovered under only one claim in his multi-count suit—and, incidentally, did not prevail on any of the eight other separate counts he filed—is insufficient to find that an award of fees under Section 517.211(6) was "unfair" or "contrary to standards of conduct furnished by the laws." THE AMERICAN HERITAGE DICTIONARY 1323 (2d ed. 1985); BLACK'S LAW DICTIONARY 1535 (6th ed. 1995).

Here, the claims of breach of fiduciary duty and violation of the Blue Sky Law,[5] counts upon which each opposing party prevailed, were separate and distinct claims requiring different allegations of wrongdoing and different elements of proof. We therefore reverse the denial of Shoreline's motion for fees and remand with instructions to enter an order awarding appellee statutory attorney fees under section 517.211(6), and to determine a reasonable amount thereto.

Affirmed in part; reversed in part and remanded with instructions.

MAY and CIKLIN, JJ., concur.

*   *   *

Not final until disposition of timely filed motion for rehearing.

[5] Section 517.301(1)(a), Fla. Stat.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FLORIDA HOLDING 4800, LLC,
Appellant,

v.

LAUDERHILL LENDING, LLC and **LAUDERHILL MALL INVESTMENT, LLC,**
Appellees.

No. 4D18-1948

[June 26, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Raag Singhal, Judge; L.T. Case No. CACE16-012986.

Robert J. Hauser of Pankauski Hauser PLLC, West Palm Beach, for appellant.

Todd L. Wallen of Wallen Kelley, Coral Gables, for appellee Lauderhill Lending.

KLINGENSMITH, J.

Florida Holding 4800, LLC appeals the trial court's order granting Lauderhill Lending, LLC's motion for summary judgment for foreclosure. The property that is the subject of the foreclosure dispute was originally owned by Lauderhill Mall Investment (LMI), who then sold it to Florida Holding. Florida Holding raises several points on appeal claiming the trial court erred in granting the summary judgment, but we affirm as to all issues.

LMI filed a complaint to foreclose on the commercial mortgage, alleging that Florida Holding was in default of the promissory note. Florida Holding answered the complaint asserting affirmative defenses, as well as a compulsory counterclaim for rescission, fraud, negligent misrepresentation, and unjust enrichment among other things. In its counterclaim, Florida Holding alleged that LMI fraudulently misrepresented zoning requirements and their effect on leases with its tenant, the Broward Sheriff's Office (BSO). Florida Holding further alleged that these misrepresentations induced it to purchase the property and execute the promissory note and mortgage in question.

LMI moved for summary judgment, supported by an affidavit from LMI's representative Carlos Segrera who stated that LMI was in physical possession of the note, that the note was endorsed in blank, and that he was prepared to present the note at the summary judgment hearing. Segrera also confirmed that Florida Holding was in default under the note and mortgage. Before the trial court heard the motion, LMI assigned the note and mortgage to Lauderhill Lending who was substituted as the new plaintiff "for all purposes."

Lauderhill Lending then filed its own amended complaint for foreclosure while also seeking to re-establish the promissory note, which had been lost. Regarding the note, Lauderhill Lending alleged that LMI assigned the note to Ocean Bank, a non-party, who then assigned the note back to LMI. LMI in turn assigned the note to Lauderhill Lending, but Ocean Bank "lost or misplaced" the original note while it was in its possession. These allegations were corroborated by an affidavit from Rogelio Villarreal of Ocean Bank attesting to those facts.

Florida Holding answered Lauderhill Lending's amended complaint with the same affirmative defenses and counterclaim that had been directed against LMI, asserting that LMI procured the mortgage and note by false pretenses and misrepresentations relating to BSO's lease on the mortgaged property. Since LMI was no longer a party following its assignment of the note to Lauderhill Lending, the trial court determined that this counterclaim would be considered a third-party claim.

While the third-party claim against LMI was still pending, Lauderhill Lending moved for summary judgment on both the foreclosure and re-establishment of the lost note.[1] The motion stated in part:

> 2. Plaintiff relies on The Affidavits Filed in Support of this Motion for Summary Judgment, which establish the execution of the note and mortgage, the note's maturity, the existence and loss of the note, the defaults thereon and the balance presently due.
>
> 3. In further support of this Motion, Plaintiff relies on the pleadings of record.

[1] Along with this motion, Lauderhill Lending filed an affidavit of indebtedness, among other things.

Florida Holding responded to Lauderhill Lending's motion claiming: the amount owed was in dispute, its affirmative defenses were unresolved and precluded summary judgment, and that Lauderhill Lending did not produce the original note. Florida Holding submitted an affidavit by its manager, Harry Dorvilier, who claimed LMI made various false representations about the condition of the property during the purchase negotiations. Specifically, Dorvilier claimed LMI stated the BSO leases were "true and correct and have not been modified," but he later learned those leases had been modified by a 2009 ordinance which required BSO to leave the property before the end of its lease. According to Dorvilier, LMI also stated that the building had a new roof when it was in fact just made to look like the roof had been repaired.

Lauderhill Lending responded in turn by filing the affidavit of David Scharf, a BSO representative, opposing Florida Holding's allegations. Scharf stated that BSO executed estoppel letters, which were filed with the affidavit, confirming its obligation to remain as a tenant through the duration of its lease. However, Scharf stated the conditions of the property were "deplorable," and BSO previously notified Florida Holding of "its obligation to repair water leaks, mold and other physical conditions that were causing [BSO's] constructive eviction from the property."[2] Scharf alleged that BSO would have fulfilled its contractual obligations under the lease but for the above defects and its alleged constructive eviction. He also affirmatively stated that BSO's decision to vacate the property had nothing to do with the 2009 ordinance mentioned by Dorvilier in his affidavit.

Lauderhill Lending also pointed out that under the initial contract between Florida Holding and LMI, Florida Holding acknowledged it was purchasing the property "as is" and LMI made "absolutely no warranties, representations or covenants . . . regarding the Property or the condition or quality thereof . . . ." Lauderhill Lending highlighted the provision of the contract wherein Florida Holding stipulated to performing and relying on its own inspections.

At the hearing on Lauderhill Lending's motion for summary judgment of foreclosure, Florida Holding argued that Lauderhill Lending's "three sentence" motion was inadequate and that, as a result, it was "confounded as to how to respond." Lauderhill Lending responded to these alleged inadequacies and ambiguities by setting out in detail what materials it was

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[2] Ultimately, BSO sued Florida Holding, and the parties entered into a mediated settlement agreement allowing BSO to break its lease and vacate the premises.

relying on for the motion. Lauderhill Lending also confirmed that it was not seeking summary judgment on the "factual claims in the third-party complaint against [LMI]," but only on the issues of foreclosure and the lost note.

Due to Florida Holding's claim that it could not properly respond to Lauderhill Lending's motion, the trial court elected to continue the hearing to allow Florida Holding time to respond. As to whether Lauderhill Lending would have to file another motion for summary judgment to correct its alleged lack of specificity, the trial court and Florida Holding's counsel had the following discussion:

> [FLORIDA HOLDING]: Your Honor, could we — you know, part of the problem is that in order for me to be able to recall everything —
>
> THE COURT: I think we are going to make the court reporter happy.
>
> [FLORIDA HOLDING]: — I think that is probably what is going to have to be required. I don't know that I should bear the entirety of that expense. Maybe we split the expense if he wants to I mean, it saves some money actually than to have to redraw his summary judgment. **I'm willing to go off of what the court reporter has transcribed** or alternatively, I would suggest that a proper motion for summary judgment be filed in this case with a proper statement of undisputed facts and the case law that he's going to rely upon and the record citations that he's going to point to for the places for his motion. If I receive a proper motion, Your Honor, I promise you will receive a proper response. And I think then we could have a more informed discussion at a hearing.
>
> THE COURT: I think at this point, [Lauderhill Lending] has laid it all out on the record. I don't know that necessarily, [Lauderhill Lending], you need to go back and draft a motion that reiterates what you said here today. If you guys can agree on splitting the transcript that would be great, and I would love a copy of that too, so I could be prepared. And then you get your response and we will just keep moving forward.

(Alterations and emphasis added).

In line with this discussion, the parties ordered a transcript of the hearing. Because of Florida Holdings' agreement with this proposed plan, Lauderhill Lending never submitted an amended motion for summary judgment.

Two months after that initial hearing, the trial court reconvened on Lauderhill Lending's motion and heard arguments from both parties. Again, Florida Holding complained Lauderhill Lending's written motion and its testimony in support of that motion at the initial hearing were insufficient to support summary judgment:

> [FLORIDA HOLDING]: We looked at, we ordered the transcript from the last hearing so we could kind of apprise ourselves of all the arguments that were made and we received the hearing transcript. I went through it and frankly, there's not much more that's in the transcript other than just kind of more of [the] same thing; that everything is kind of before your Honor and there's no genuine issue of material fact.

After considering the arguments and submissions of counsel, the trial court granted summary judgment in favor of Lauderhill Lending on both the foreclosure and lost note counts. This appeal follows.

This court reviews orders granting summary judgment *de novo*. *See Craven-Lazarus v. Pennymac Holdings, LLC*, 199 So. 3d 1029, 1030 (Fla. 4th DCA 2016).

Under Florida Rule of Civil Procedure 1.510, a motion for summary judgment "must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ('summary judgment evidence') on which the movant relies." Fla. R. Civ. P. 1.510(c). Rule 1.510(c) "is designed to prevent 'ambush' by allowing the nonmoving party to be prepared for the issues that will be argued at the summary judgment hearing." *City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So. 2d 283, 284 (Fla. 4th DCA 1995) (quoting *Swift Indep. Packing Co. v. Basic Food Int'l, Inc.*, 461 So. 2d 1017, 1018 (Fla. 4th DCA 1984)). Where a motion states "only in general terms that no material issues of fact or law existed" and that its movant is entitled to relief, such motion is insufficient to place the nonmoving party on notice of the issues that will be argued. *Locke v. State Farm Fire & Cas. Co.*, 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987).

Florida Holding contends Lauderhill Lending's motion for summary judgment did not meet the requirements of rule 1.510. However, the record shows Florida Holding waived the right to require Lauderhill Lending to refile its motion with more specificity at the first hearing when it stated—on the record—that Lauderhill Lending did not have to "redraw its summary judgment motion" if Florida Holding received the hearing transcript. As stated in *Millsaps v. Kaltenbach*, 152 So. 3d 803, 805 (Fla. 4th DCA 2014), "[a] party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make." A plaintiff may "waive[] any procedural irregularity in [a] motion for summary judgment." *Wong v. Crown Equip. Corp.*, 676 So. 2d 981, 982 (Fla. 3d DCA 1996); *accord Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274, 1276 (Fla. 4th DCA 2013). And if an "issue [i]s waived, it cannot be grounds for reversal on appeal." *Vidal*, 104 So. 3d at 1276. Therefore, Florida Holding cannot now complain that the trial court opted to proceed down one of the roads it agreed to travel.

Regarding Lauderhill Lending's motion for summary judgment on the lost note issue, this court stated in *U.S. Bank National Ass'n v. Benoit*, 190 So. 3d 235, 237 (Fla. 4th DCA 2016), that:

> [A] judgment of foreclosure does not always require surrender of the original note. For example, where a plaintiff satisfies the requirements for the enforcement of a lost, destroyed, or stolen instrument, the plaintiff may foreclose on a property even where the plaintiff no longer has possession of the original note.

The requirements to enforce a lost note are set forth in Section 673.3091, Florida Statutes (2017), which provides:

> (1) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> > (a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
> >
> > (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

When a party relies on an affidavit to reestablish a lost note, "the affidavit must establish that whoever lost the note 'was entitled to enforce it when the loss of possession occurred; the loss of the note was not the result of a transfer or lawful seizure; and [the bank] cannot reasonably obtain possession of the note because of the loss.'" *Sabido v. Bank of N.Y. Mellon*, 241 So. 3d 865, 867 (Fla. 4th DCA 2017) (alteration in original) (quoting *Home Outlet, LLC v. U.S. Bank Nat'l Ass'n*, 194 So. 3d 1075, 1078 (Fla. 5th DCA 2016)), *clarified on denial of reconsideration*, 238 So. 3d 867 (Fla. 4th DCA 2018). Here, Villarreal's unrebutted affidavit attested to the fact that Ocean Bank had rightful possession of the original promissory note which served as security for its previous loans to LMI. When Ocean Bank sought to retrieve the original note to deliver it back to LMI, the location of the note "could not be determined despite OCEAN BANK's diligent search and inquiry." Villarreal's affidavit confirmed that although the original note had either been "lost, misplaced or otherwise destroyed," LMI was entitled to enforce the instrument after it acquired possession from Ocean Bank. *See* § 673.3091(1)(a). The affidavit also verified that the location of the note could not be determined, but "to the best of [his] knowledge" this loss of possession was not the result of a transfer or seizure since it had not been "endorsed, pledged, transferred, sold, encumbered, conveyed or hypothecated" to anyone else. *See* § 673.3091(1)(b) & (c).

Based on the pleadings, depositions, answers to interrogatories, and admissions on file together with the unrebutted lost note affidavit of Villarreal of Ocean Bank, Lauderhill Lending met the requirements for the enforcement of the lost note, and the trial court properly granted summary judgment on this issue. Florida Holding's failure to explicitly contest the alleged discrepancies between Villarreal's and Segrera's affidavits at the summary judgment hearing precludes it from doing so here on appeal. *See Wildwood Props., Inc. v. Archer of Vero Beach, Inc.*, 621 So. 2d 691, 692 (Fla. 4th DCA 1993) ("As to the granting of summary judgment on appellant's lien foreclosure against appellee, we affirm because the grounds now raised were not brought to the attention of the trial court in opposition to the summary judgment.").

As to the issue of summary judgment on the count seeking foreclosure on the note and mortgage, we also find no error. Lauderhill Lending represented to the trial court that it was not seeking summary judgment on Florida Holding's third-party claims against LMI. To the extent that those claims for fraud or misrepresentation are viable, and that material issues of fact remain as to those issues, they were not disposed by the foreclosure or lost-note judgment. In fact, Lauderhill Lending conceded at trial that those third-party claims would still be left for resolution by the court separate and apart from the foreclosure action. Therefore, Lauderhill Lending's final judgment, as to the foreclosure and lost note issues, still allows Florida Holding to proceed on its related third-party claims for relief against LMI. *See, e.g.*, *Penmont Enters., Inc. v. Dysart*, 340 So. 2d 1285, 1286 (Fla. 3d DCA 1977) (stating that the issues of cancellation and rescission of contract are "severable and do not affect the right to foreclosure").

For these reasons, we affirm the trial court's summary judgment entered in favor of Lauderhill Lending as to its claims for foreclosure and re-establishing the lost note.

Affirmed.

DAMOORGIAN, J., concurs.

WARNER, J., concurs in part and dissents in part with opinion.

WARNER, J., concurring in part, dissenting in part.

I concur with that part of the majority opinion which holds that Florida Holding waived the right to require Lauderhill Lending to refile its motion for summary judgment to allege more specifically its grounds for summary judgment. I would reverse, however, on the merits as to the claim to re-establish the lost note, as I think the evidence is not conclusive that Ocean Bank was entitled to possession of the note when its loss occurred. There were two conflicting affidavits filed in this case as to who had possession of the note. LMI had filed an affidavit of its representative, Carlos Segrera, in which he stated that LMI was in physical possession of the note in September 2016. The affidavit of Rogelio Villarreal of Ocean Bank, filed with Lauderdale Lending's motion for summary judgment, stated that Ocean Bank had possession of the note from 2013 to 2017. The two affidavits conflict. Therefore, a material issue of fact remained on the lost note issue, on which the foreclosure depended.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MATTHEW STAMER AND
BROKERAGE FIRM, LLC,

Appellants,

v.

Case No. 5D17-3016

FREE FLY, INC D/B/A EXIT
REALTY FLORIDA,

Appellee.

_________________________________/

Opinion filed June 28, 2019

Appeal from the Circuit Court
for Orange County,
Donald A. Myers, Jr., Judge.

Eric Charles Boughman, Teresa N. Phillips,
and Charles W. Sell, of Forster Boughman
Lefkowitz & Lowe, Maitland, for Appellants.

Carrie Ann Wozniak and Sara A. Brubaker,
of Akerman LLP, Orlando, for Appellee.

SASSO, J.

Appellants, Matthew Stamer and Brokerage Firm, LLC, appeal from a final judgment on Appellee's, Free Fly, Inc. d/b/a Exit Realty Florida, eight-count complaint against them, alleging breach of two real estate franchise agreements and their associated personal guaranties, fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and unjust enrichment. Appellants raise several issues on appeal. We agree with Appellants that Appellee's claims for fraudulent misrepresentation and promissory estoppel are barred by the statute of frauds. Thus, we reverse the judgment in favor of Appellee on those claims. In all other respects, we affirm.

In 2004, Appellants and Appellee entered into a franchise agreement and personal guaranty to operate an EXIT real estate franchise in Maitland, Florida. They renewed the agreement in 2009 for a five-year period, ending on October 31, 2014. In January 2014, Appellants and Appellee entered into a second franchise agreement and personal guaranty to operate an EXIT real estate franchise on Rosalind Avenue in Orlando, Florida.

In September 2014, Appellee approached Appellant Stamer, a real estate broker and sole member of Brokerage Firm, LLC, about renewing the Maitland franchise agreement. Unbeknownst to Appellee, Stamer was already in negotiations with a competing real estate company, Coldwell Banker, for the sale of the Maitland business assets. Also unbeknownst to Appellee, Stamer was negotiating with a former office manager of the Rosalind franchise, Gil Ramos, to sell the Rosalind business assets and assign the Rosalind franchise agreement to him.

For two-and-a-half months, Stamer assured Appellee of Appellants' intent to renew the Maitland franchise agreement for another five-year term and not to sell the Rosalind franchise to Ramos, while stating the exact opposite during negotiations with Coldwell Banker and Ramos. Believing that Stamer intended to remain in the EXIT system, Appellee allowed Appellants to continue operating the Maitland EXIT franchise after the Maitland franchise agreement expired on October 31, 2014.

In November 2014, instead of returning renewal paperwork as expected, Stamer sent Appellee an email enumerating additional terms he wanted to negotiate prior to renewing the Maitland franchise agreement. Throughout negotiations with Appellee, Stamer expressed his intention to sign on for at least another five years, and the parties discussed the terms of the anticipated five-year renewal agreement. Yet, the record reflects that Stamer's "negotiations" were a veiled attempt to draw out the renewal process until he could close his pending deal with Coldwell Banker. To that end, Stamer continued negotiations with Appellee until December 18, 2014, when he sold all of Brokerage Firm's Maitland business assets and part of Brokerage Firm's Rosalind business assets to Coldwell Banker.

Thereafter, Appellee filed suit against Appellants, alleging breach of the Maitland and Rosalind franchise agreements and their associated personal guaranties, fraudulent misrepresentation, negligent misrepresentation, promissory estoppel, and unjust enrichment. The trial court rendered a judgment in favor of Appellee on all counts, except the negligent misrepresentation and unjust enrichment counts, and awarded damages totaling $748,255.38. In awarding judgment in favor of Appellee on its fraudulent misrepresentation and promissory estoppel claims, the trial court found that Stamer's representations on behalf of himself and Brokerage Firm were "fraudulent promises to enter into a five-year renewal with [Appellee], made with a specific intent not to perform the promises at the time the promises were made."

On appeal, Appellants argue that the trial court erred in finding in favor of Appellee on the fraudulent misrepresentation and promissory estoppel claims because the oral agreement giving rise to those claims was not intended to be performed within one year, and therefore, was barred by Florida's statute of frauds, section 725.01, Florida Statutes. Appellee counters, arguing that the oral agreement was only one to renew the Maitland agreement for an additional five years, and because the renewal could have been accomplished within a year, the statute of frauds does not apply. We agree with Appellants.

The statute of frauds precludes actions brought on any agreement or promise that cannot be performed within one year unless the agreement or promise is in writing and signed by the party to be charged therewith. § 725.01, Fla. Stat. (2014). Whether an oral agreement is unenforceable under the statute of frauds is a question of law, reviewable de novo. *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 91 (Fla. 2013); *see Cascella v. Canaveral Port Auth.*, 827 So. 2d 308, 309 (Fla. 5th DCA 2002) (noting that contract and statutory interpretation are questions of law reviewed de novo).

It is well-settled that a party cannot avoid the writing requirement of the statute of frauds by reformulating what amounts to a breach of an oral contract into a fraud claim. *See, e.g.*, *Cohen v. Corbitt*, 135 So. 3d 527, 530 (Fla. 1st DCA 2014) ("Appellee cannot avoid the statute of frauds simply by couching her claim in terms of the tort of fraudulent misrepresentation rather than breach of an oral contract."). If It is apparent that the parties intended an oral agreement to extend for longer than one year, the statute of frauds bars its enforcement. *See Loper v. Weather Shield Mfg., Inc.*, 203 So. 3d 898, 906 (Fla. 1st DCA 2015).

Here, it is evident from the nature of the oral agreement, as well as the circumstances surrounding it, that the parties intended to execute a renewal, the obligations under which would mutually continue for five years. *See Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d 318, 319 (Fla. 5th DCA 2002) (holding that oral contract to enter into joint venture to replace, operate, and lease 400 manufactured housing units for not less than twelve years violated statute of frauds because "the development project and the associated responsibilities of the parties were to continue for at least twelve years"). For example, before either party would execute the renewal, they first needed to agree on the terms of the five-year contract. In addition, Appellee's corporate representative testified that EXIT Florida would not have sent Stamer renewal paperwork unless it believed Stamer intended to remain in the EXIT system.

Appellee's characterization of the oral agreement as one to simply renew the Maitland agreement for an additional five years does not remove the agreement from the scope of the statute of frauds. *See* 72 Am. Jur. 2d *Statute of Frauds* § 5 (2019) ("[A]n oral agreement to execute an agreement that is within the Statute of Frauds is itself within the statute."). To be sure, the agreement to enter into a renewal was not distinct from the renewal of the franchise agreement itself.

As such, Appellee's reliance on *Loper* is misplaced. The agreement in that case—refraining from suing in exchange for replacement of defective windows and the issuance of a new ten-year warranty—could be performed within a year. Specifically, the parties fully performed the negotiated terms of that agreement, and the parties' respective obligations thereunder were satisfied, upon delivery of the warranty.

Because we determine that the statute of frauds bars Appellee's fraudulent misrepresentation claim, we also reverse the trial court's judgment in favor of Appellee on the promissory estoppel claim. Florida law is clear that promissory estoppel is not an exception to the statute of frauds. *See DK Arena, Inc.*, 112 So. 3d at 97 ("As we explained in *Tanenbaum*,[1] application of the Statute of Frauds is a matter of legislative prerogative;

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[1] *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777 (Fla. 1966).

the judicial doctrine of promissory estoppel may not be used to circumvent its requirements.”).

AFFIRMED in part, REVERSED in part, and REMANDED.

COHEN and LAMBERT, JJ., concur.