

## APPELLATE & SUPREME COURT ALERT

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### Supreme Court accepts new case challenging Auer deference to agency interpretations of ambiguous regulations



On Dec. 6, 2018, Porter Wright's Litigation Department hosted an annual continuing legal education seminar for clients, colleagues and friends. The first presentation of the day included a discussion with Ohio State University Moritz School of Law Associate Professor [Christopher Walker](#), who has [written extensively](#) regarding the various deference doctrines that courts apply to the decisions of administrative agencies. The presentation focused on the so-called *Chevron* doctrine, which pertains to the deference that courts apply to agencies' interpretations of ambiguous statutes, and addressed so-called *Auer* deference, which pertains to the deference that courts apply to agencies' interpretations of their own ambiguous **rules**. The latter doctrine is named for the case [Auer v. Robbins](#). Professor Walker has previously [summarized](#) various fundamental critiques of *Auer* deference, and at Porter Wright's recent seminar he predicted that there could now be enough votes on the Supreme Court, as currently configured, to reconsider and possibly overrule the *Auer* doctrine.

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Professor Walker's remarks proved prescient. Just four days later, the Supreme Court agreed to hear an appeal in [Kisor v. Wilkie](#), an appeal from the Federal Circuit directly presenting the question whether the Court should overrule *Auer*. The *Kisor* case concerns a Marine veteran seeking disability benefits for service-related post-traumatic stress disorder, and the Department of Veterans Affairs' (VA) interpretation of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1). This rule authorizes the VA to reconsider a previously denied claim for benefits when, at the time of the VA's original decision, "relevant" documents existed, but the VA failed to consider them. A helpful [summary](#) of the case is available on Scotusblog, which has also archived the [cert-stage briefing](#). Notably, one of Professor Walker's law review articles, [Chevron Inside the Regulatory State: An Empirical Assessment](#), was cited in Mr. Kisor's [successful Petition](#) for a Writ of Certiorari.



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If you are currently litigating a dispute in which an agency relies on *Auer* deference to support its interpretation of an ambiguous regulation, you would be well served to review the *Kisor* briefs and consider your procedural options in light of the Supreme Court's decision granting certiorari. For more information, please contact [Brad Hughes](#) or any member of Porter Wright's [Appellate and Supreme Court Practice Group](#).