[J-99-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

LUTHERAN HOME AT KANE AND SIEMON'S LAKEVIEW MANOR ESTATE	:	No. 7 MAP 2025
v.	:	Appeal from the Order of the Commonwealth Court at No. 303 CD 2023 dated June 4, 2024, Affirming the Decision of the Department of Human Services, Bureau of Hearings and Appeals at Nos. 090-08-0113, 090-08-0130, 090-08-0134, 090-08-0157, 090-08-0158, 090-08-0159, 090-08-0164, 090-08-0170, 090-08-0174, 090-08-0176, 090-08-0186, 090-08-0187, 090-08-0188, 090-08-0192, 090-08-0193, 090-08-0200 and 090-08-0213 dated March 1, 2023.
DEPARTMENT OF HUMAN SERVICES	:	
APPEAL OF: LUTHERAN HOME AT KANE AND SIEMON'S LAKEVIEW MANOR ESTATE, SUSQUEHANNA VALLEY NURSING AND REHABILITATION CENTER, RHEEMS NURSING & REHABILITATION CENTER, ELLEN MEMORIAL HEALTH CARE CENTER, AND ELIZABETHTOWN NURSING AND REHAB CENTER	:	ARGUED: November 20, 2025

OPINION

JUSTICE DOUGHERTY **DECIDED: October 1, 2026**

This case involves the Department of Human Services' (Department) interpretation of its own regulations when calculating Medical Assistance rates for long-term care skilled nursing facilities. The Bureau of Hearings and Appeals (BHA) affirmed the Department's rate calculations, and the Commonwealth Court affirmed. In doing so, the court relied on principles of agency deference, namely, what is commonly referred to as *Auer*[1] or

[1] *See Auer v. Robbins*, 519 U.S. 452 (1997).

Seminole Rock[2] deference. We affirm, albeit for different reasons. And although we reject the appellants' entreaties to adopt the United States Supreme Court's limitations for affording agency deference announced in *Kisor v. Wilkie*, 588 U.S. 558 (2019), we provide further clarity on how Pennsylvania courts should account for agency interpretations of their own regulations.

I. Background

The Medical Assistance (MA) Program is a health care payment program for the poor, elderly, and disabled, which is jointly funded by Pennsylvania and the federal government, and which includes payment for nursing facility services. To qualify for federal funds, states must satisfy requirements under federal law relating to MA State Plans. The Department is the state agency authorized to administer the MA Program, which authority includes issuing regulations and submitting Pennsylvania's MA State Plans for approval by the federal Secretary of Health and Human Services through the Centers for Medicare and Medicaid Services (CMS). Appellants (Providers)[3] are long-term care skilled nursing facilities that are licensed and certified to provide care to MA residents and receive payment from the MA Program.

a. Case-mix Rate System

Since January 1996, the MA Program has paid participating nursing facilities for MA services using an annual prospective payment rate known as the case-mix rate. The annual case-mix rate is effective from July 1st of one year through June 30th of the next (the rate year), with quarterly adjustments for resident acuity (*i.e.*, residents' sickness

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

[3] The lead appellants and intervenors were all parties in the administrative proceedings before the BHA. Appellants Lutheran Home at Kane and Siemon's Lakeview Manor Estate filed the underlying petition for review in Commonwealth Court, *see* Petition for Review, 303 CD 2023, 3/31/23, and the other providers intervened thereafter. We refer to them all as "Providers."

level). The Department's regulations establish three main stages for calculating the case-mix rate.

In the first stage, MA-participating providers report their costs for a twelve-month fiscal year that ends either on June 30 or December 31, as designated by each provider, in a cost report known as the MA-11. *See* 55 Pa. Code §§1187.71, 1187.73. The Department's Office of Long-Term Living (OLTL) audits the providers' cost reports to verify their "allowable costs"[4] for each fiscal year. *See id.* at §1187.77. Once the Department audits the cost report, it issues an audit report to the provider which identifies any adjustments to and disallowances of the provider's reported costs and states the allowable costs. The provider's audited allowable costs are then input into the Nursing Information System (NIS) database, for use in later stages of the rate calculation process. *See id.*; *see also id.* at §1187.91.

In the second stage, the Department establishes peer group prices for three general cost centers, *i.e.*, categories of allowable costs: (1) resident care costs, (2) other resident related costs, and (3) administrative costs. *See id.* at §§1187.94-95. Nursing facilities are categorized into peer groups of similarly situated facilities based on size, geographic location, and resident population. *See id.* at §1187.94. To establish peer group prices, the Department uses each nursing facility's inflated allowable costs in the three most recent audited cost reports available in the NIS database. *See id.* at §1187.95-96; *see also id.* at §1187.91. The peer group prices are used to limit an individual provider's payment rate based on the costs of the median nursing facility within its peer group. *See id.* at §§1187.96, 1187.107.

[4] "Allowable costs" are defined as "[c]osts as identified in this chapter which are necessary and reasonable for an efficiently and economically operated nursing facility to provide services to MA residents." 55 Pa. Code §1187.2.

The third stage involves the calculation of each nursing facility's individualized case-mix rate, during which the Department takes the average of the facility's inflated allowable costs, applies any peer group price limitation, and also calculates an amount for reimbursement of capital costs based on an appraisal of the facility. *See id.* §1187.96. The Department adjusts the facility's case-mix rate on a quarterly basis to allow for changes in resident acuity levels. *See id.* at §§1187.91(1)(v), 1187.96(a)(5).[5]

Central to the present litigation, the parties agree both the second and third stages require the Department to inflate costs based on what the parties refer to as an "Inflation Factor." The Inflation Factor is derived pursuant to Section 1187.91 of the Human Services Code, which states, in relevant part:

> The Department will set rates for the case-mix payment system based on the following data:
>
> (1) Net operating costs.
>
> (i) The net operating prices will be established based on the following:
>
> (A) Audited nursing facility costs for the 3 most recent years available in the NIS database **adjusted for inflation**.[6] This database includes audited MA-11 cost reports that are issued by the Department on or before March 31 of each July 1 price setting period.
>
> . . .
>
> (iv) Prior to price setting, **cost report information will be indexed forward to the 6th month of the 12-month period for which the prices are set**. The index used is the 1st

[5] At the end of each quarterly adjustment, the Department also established a Budget Adjustment Factor (BAF), which capped the rate at which nursing facility payment rates increase based on the MA Program's budget, as allocated by the General Assembly. *See* 55 Pa. Code §1187.96(e)(2)(iv) (reserved Aug. 1, 2025).

[6] The regulation further provides for procedures where the facility has fewer than three audited cost reports in the NIS database, and specifies "[a] cost report for a period of less than 12 months will not be included in the NIS database used for each price setting year." 55 Pa. Code §1187.91(1)(iii).

> Quarter issue of the CMS Nursing Home Without Capital Market Basket Index.

55 Pa. Code §1187.91 (emphasis added).

For reference, the CMS Nursing Home Without Capital Market Basket Index (CMS Index) is a federal publication that provides an index for each quarter of a calendar year, which is a metric of the costs of goods and services in certain categories at that point in time. In an issue of the CMS Index, the federal government includes both historical indices for quarters that have already occurred, as well as forecasted indices for future quarters. The federal government issues the CMS Index on a quarterly basis to update the indices. By comparing the indices assigned to two different quarters, one can determine the difference in the cost for the same mix of goods and services from the first point in time to the second point in time. For the rate setting process, the Department derives the Inflation Factor by comparing the indices from two different quarters — the dispute in this litigation centers on which quarter should be used as the starting point when calculating the Inflation Factor.

b. Administrative Proceedings

The Department issued Providers notices of their quarterly case-mix rates for the July 1, 2007 to June 30, 2008 rate year (Year 13). For instance, appellant Lutheran Home's rates were listed as follows:

Effective Date	**Final Rate**
Effective 07/01/07	$160.10
Effective 10/01/07	$167.99
Effective 01/01/08	$170.36
Effective 04/01/08	$167.99

OLTL Notice to Lutheran Home, 1/24/08, at 1 (unpaginated) (marked Ex. G in the BHA proceedings). The OLTL attached documentation showing its calculations for price

setting. *See id.* at 4 (unpaginated). The document showed Lutheran Home's three most recent audited cost reports were for the cost report years ending December 31 of 2004, 2003, and 2002. *See id.* To calculate the Inflation Factor for each of those cost report years, OLTL took the index from December 31, 2007 (the mid-point of the Year 13 rate year) — 1.66 — and divided it by the indices for December 31 of 2004, 2003, and 2002 (the end-point of each cost report year) — 1.501, 1.457, and 1.421, respectively. *See id*. The same calculations were shown for Siemons' Lakeview Manor Estate's rates, except its most recent cost report year end dates were June 30 of 2005, 2004, and 2003, and the Inflation Factor was calculated using the indices from those cost report end dates (1.525, 1.478, and 1.439, respectively). *See* OLTL Notice to Siemons' Lakeview, 1/24/08, at 4 (unpaginated) (Ex. M); *see also* First Stipulation of Facts, 7/13/18, at 9 (Ex. ALJ-1). Thus, regardless of the provider's fiscal year, OLTL calculated the Inflation Factor using the indices for the end-point of the cost report years and the mid-point of the rate year.

Providers, along with other affected nursing facilities, filed requests for hearings. Relevant to this appeal, Providers argued the Department improperly inflated costs by using its end-point to mid-point analysis.[7] Instead, they argued the Department should have inflated costs from the mid-point of the cost report year to the mid-point of the rate year. *See* BHA Order & Adjudication, 3/1/23, at 10. The parties agreed to a Stipulation of Facts, wherein they agreed to the general process required by the case-mix rate system and outlined each party's position as to the calculation of the Inflation Factor. *See* First Stipulation of Facts.[8] The parties also agreed that if the Department's method is correct, it properly calculated and applied the Inflation Factor. *See id.* at 9.

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[7] Providers raised other challenges to the Department's audit adjustments and to the BAF it applied. Those issues were resolved in other litigation.

[8] The parties also filed a Second Stipulation of Facts, which they later agreed pertained to issues not ripe for review. *See* BHA Order & Adjudication, 3/1/23, at 5.

The BHA held a hearing on July 17, 2018, before an Administrative Law Judge (ALJ),[9] at which Providers offered the testimony and reports of two Medicare/Medicaid reimbursement experts, Timothy T. Ziegler and Leon E. LeBreton. Each testified to their belief that the Department should calculate the Inflation Factor using a mid-point to mid-point methodology and that the Department's end-point to mid-point methodology is unreasonable. *See* N.T. Hearing, 7/17/18, at 33-34 (Ziegler testifying "by not [using a mid-point to mid-point methodology,] we are forfeiting that amount of inflation for that year, . . . [and] because these are averaged, each one of these years was one[-]third of the eventual rate because we're using three audit reports. So we're basically losing six months of inflation over the entire rate. . . . [I]t's just nonsensical that when . . . we're inflating to a mid[-]point, that we aren't starting with the mid[-]point"; further testifying the Department is "inflating costs that occurred over an entire year by the end date of that year[,] which eliminates the inflation that occurs during the year"); *id.* at 62-63 (LeBreton testifying "the Department's methodologies are unreasonable, are grossly inaccurate[,] and contrary to its own regulations. . . . [C]osts are not incurred at th[e] same rate throughout the year. They're lower at the beginning of the year than they are at the end of the year. So by inflating or indexing forward from the end of the year you are eliminating or omitting the inflation that occurred throughout the year. So by not using a mid[-]point, you're eliminating six months of inflation").

For its part, the Department presented fact-witness Annette Laracuente, a CPA who testified the Department hired her firm in 1992 to finish the development of software packages and databases necessary to calculate case-mix rates, and to help draft the accompanying Chapter 1187 regulations and State Plan amendments. When asked,

[9] ALJ David Dudley, Esq. presided over the hearing, but ALJ Twilah Shipley, Esq. adjudicated the administrative appeals.

Laracuente affirmed the Department "has used this [end-point to mid-point] methodology since the inception of case mix payment" in 1996. *Id.* at 88 (Laracuente testifying "[t]o the best of my knowledge, that was the process and the length of inflation time followed in the prior cost base system . . . and we continued that into the modeling process of the 1187 calculation.").

On March 1, 2023, ALJ Shipley recommended that Providers' appeals be denied. The BHA adopted the recommendation in its entirety. *See* BHA Order & Adjudication, 3/1/23, at 1-2. In the adjudication, the ALJ provided findings of fact, which mostly mirrored the parties' First Stipulation of Facts (pertaining to the workings of the MA Program and case-mix system generally) and explained the procedural posture of the appeals. *See id.* at 6-10. The ALJ also found that both Ziegler and LeBreton each "provided uncontradicted credible testimony of his opinion that the Department's end-point to mid-point methodology for indexing forward and inflating allowable costs was unreasonable and inaccurate." *Id.* at 9. The ALJ further found Laracuente "testified credibly as a fact witness to provide rebuttal evidence to support the Department's end-point to mid-point methodology." *Id.*

After reciting the relevant Code provisions, the ALJ rejected each of Providers' arguments in turn. *See id.* at 34-37. The ALJ first noted the parties "agree[d] that a court must give controlling deference to an agency's interpretation of its own regulation, with some exceptions." *Id.* at 35. She determined the Department's interpretation was due deference because it was "not plainly erroneous, inconsistent with the plain language of the regulations[,] or contrary to the statute under which the regulations are promulgated[.]" *Id.* at 36. The ALJ further explained it was not a *post hoc* rationalization contrived for litigation, citing Laracuente's testimony the Department has used the end-point to mid-point methodology since the inception of the case-mix system. *See id.*

The ALJ next determined the Department's interpretation was consistent with the regulation and reasonable, observing "[c]ost report information comprises total costs related to total resident care cost, total resident related cost and total allowable administrative cost which represents information in the database." *Id.* She clarified that Providers' "experts' opinion that their [I]nflation [F]actor methodology is more accurate and reasonable and in line with CMS'[s] methodology does not make the Department's inflation methodology unreasonable, inaccurate, inconsistent with the underlying regulation, arbitrary, an abuse of discretion[,] or [an] exercise[ ] in bad faith." *Id.*

Next, ALJ Shipley rejected Providers' argument that the Department's inflation methodology is inconsistent with federal Medicare regulations, which are incorporated as a supplement to Chapter 1187 in 55 Pa. Code §1187.51. She reasoned Section 1187.51 "speaks to allowable and nonallowable costs, which are specifically defined, not inflation." *Id.* at 37. Finally, the ALJ determined the Department properly "enacted regulations governing allowable costs and how those costs would be inflated." *Id.* Thus, the ALJ (and in turn, the BHA) determined Providers failed to meet their burden of proof that the Department improperly inflated costs using its end-point to mid-point methodology.

c. Commonwealth Court's Opinion

On appeal, a three-judge panel of the Commonwealth Court affirmed unanimously. *See Lutheran Home at Kane v. Dep't of Human Servs.*, 318 A.3d 164 (Pa. Cmwlth. 2024). Preliminarily, it explained "[p]roperly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high level of deference[.]" *Id.* at 179, *quoting Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 292 A.3d 921, 927 (Pa. 2023). It elaborated that the level of deference depends upon the type of agency interpretation at issue:

> There are three categories of an agency's interpretation: (1) an agency's interpretation of its regulation interpreting an ambiguous statute, *i.e.*,

> *Chevron*[10] deference; (2) an agency's interpretation of its own regulation, *i.e.*, *Auer* deference; and (3) an agency's interpretation of its non-legislative interpretive rules (guidance documents), *i.e.*, *Skidmore*[11] deference.

Id., *quoting Dep't of Envtl. Prot. v. Clearfield Cty.*, 283 A.3d 1275, 1284 n.16 (Pa. Cmwlth. 2022).

Under *Auer*, the Commonwealth Court explained, a court will "defer to an agency's interpretation of its own regulation unless that interpretation is plainly erroneous or inconsistent with the regulation." *Id.* (cleaned up, emphasis omitted), *quoting Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452, 485 (Pa. 2021). It noted that in evaluating whether an interpretation is plainly erroneous, our courts have examined "(1) whether the agency's interpretation of the regulation is erroneous or inconsistent with the regulation; and (2) whether the regulation as interpreted by the agency is consistent with the statute under which it was promulgated." *Id.* at 180 (cleaned up), *quoting Tire Jockey Serv., Inc. v. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1186 (Pa. 2007). It further explained deference is unwarranted when the agency's interpretation "does not reflect the agency's fair and considered judgment[,]" such as "when the agency's interpretation conflicts with a prior interpretation," when it is "nothing more than a convenient litigating position," or when it is a "*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack[.]" *Id.* (cleaned up, emphasis omitted), *quoting Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Lastly, the Commonwealth Court clarified that "Pennsylvania courts only apply *Auer* deference to agencies' reasonable interpretations of **ambiguous** regulations." *Id.* (emphasis in original).

The court held Section 1187.91(1)(iv) was ambiguous. It explained that although the regulation's text — requiring that "cost report information [ ] be indexed forward to the

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[10] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

[11] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

6th month of the 12-month period for which the prices are set[,]" 55 Pa. Code §1187.91(1)(iv) — clearly provides that the Department shall conclude its Inflation Factor calculation at the mid-point of the cost report year, "it does not specify where the calculations are to **begin** (*i.e.*, at the cost report mid-point, end point, or some other point)." *Lutheran Home*, 318 A.3d at 181 (emphasis in original). After considering both parties' arguments, the court determined "Section 1187.91(1)(iv) is capable of more than one reasonable interpretation," and was therefore ambiguous. *Id.*

But before the Commonwealth Court examined whether the Department's interpretation was reasonable such that *Auer* deference was warranted, it disposed of the Providers' argument that because the United States Supreme Court modified *Auer*'s framework in *Kisor*, the BHA was required to conduct a *Kisor* analysis before deferring to the Department's interpretation. The court explained that in *Kisor*, the High Court held "a court should not afford *Auer* deference unless the regulation is **genuinely ambiguous**[,]" and that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 182, *quoting Kisor*, 588 U.S. at 574.

The Commonwealth Court explained that although this Court has historically chosen to "take its cues from federal law" on matters of agency deference, we are not bound by the United States Supreme Court's administrative law decisions. *Id.*, *quoting Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 686-87 (Pa. 2020) (Wecht, J., concurring). And "while perhaps persuasive," the panel added, "U.S. Supreme Court plurality opinions are not binding or precedential for Pennsylvania state courts." *Id.* The Commonwealth Court observed that while different Justices have discussed *Kisor*, "[t]o date, neither the Pennsylvania Supreme Court nor th[e Commonwealth] Court have expressly adopted *Kisor*'s genuinely ambiguous standard." *Id.* Thus, the intermediate court concluded it could move on to the next step in the *Auer* analysis: determining

"whether the Department's interpretation is clearly erroneous or inconsistent with" the regulation, and "whether it 'reflects its fair and considered judgment,' rather than a convenient litigating position or *post hoc* rationalization." *Id.* at 183, *quoting Auer*, 519 U.S. at 462 (brackets omitted).

The Commonwealth Court started its inquiry by noting Section 30(A) of the Social Security Act "requires that state plans include methods and procedures to assure that provider payments produce efficiency, economy, quality of care, and adequate access to providers by MA beneficiaries." *Id.*, *citing* 42 U.S.C. §1396a(a)(30)(A). However, the court explained, the Social Security Act does not require any particular method to produce those required outcomes. *See id.* Instead, a state can "set a rate methodology using any process that is reasonable, considers more than simply budgetary factors, and results in payments that are sufficient to meet recipients' needs." *Id.*, *quoting Christ the King Manor, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 308 (3d Cir. 2013).

The Commonwealth Court explained the Chapter 1187 regulations were properly promulgated and included in Pennsylvania's State Plan, which CMS approved. It then emphasized that "[s]ince 1996, the Department has employed its end point to mid-point methodology on the basis that Section 1187.91(1)(iv) specifically references **cost report information**, which consists of the nursing facilities' **total costs**, *see* 55 Pa. Code §1187.96, that are not fully incurred or established until the end of each reported cost year." *Id.* (emphasis in original); *see id.* at 184 (emphasizing multiple provisions of Section 1187.96 establish the Department is to set rates by calculating **total** resident care costs, other resident related costs, and administrative costs). It further highlighted that pursuant to Section 1187.73, nursing facilities must file "cost reports listing allowable costs for each 12-month fiscal year that ends either on June 30 or December 31." *Id.* (emphasis omitted); *see id.* (further observing inflation is not listed as an allowable cost

and therefore does not constitute cost report information). Thus, the Commonwealth Court concluded, "[t]he Department reasonably interpreted that **total** data for a cost year can only be determined at the end of that year." *Id.* (emphasis in original).

The court further held the fact that Providers' experts testified that they believed a mid-point to mid-point methodology would be more reasonable and accurate did not render the Department's methodology clearly erroneous. *See id.* Instead, it accepted the BHA's conclusion "that Ziegler's and LeBreton's uncontradicted testimony, although credible, merely reflected a difference of opinion," which was in harmony with its conclusion Section 1187.91(1)(iv) is subject to more than one reasonable interpretation. *Id.* at 184-85; *see id.* at 185 n.25 (noting that, as fact-finder, ALJ is free to accept or reject any witness's testimony, in whole or in part, even if uncontradicted). Notwithstanding the experts' assertion the Department's methodology results in six months of lost inflation, the Commonwealth Court agreed with the Department that "the MA Program is not required to cover provider costs." *Id.* at 185, *citing Christ the King Manor*, 730 F.3d at 308 ("Section 30(A) . . . does not demand that payments be set at levels that are sufficient to cover provider costs, but instead requires that they be sufficient to meet recipients' needs.") (internal quotations and citation omitted); *Mulberry Square Elder Care & Rehab. Ctr. v. Dep't of Human Servs.*, 191 A.3d 952, 961 (Pa. Cmwlth. 2018) ("Should a provider wish to preserve its right to seek its entire customary charge, the provider may choose not to participate in the MA Program.") (internal quotations and citation omitted).

Additionally, the Commonwealth Court rejected Providers' argument that 55 Pa. Code §1187.51(b) requires the Department to follow federal inflation practices when applying Section 1187.91(1)(iv). Section 1187.51(b) states:

> *The Medicare Provider Reimbursement Manual* (CMS Pub. 15-1) and the Federal regulations in 42 CFR Part 489 (relating to provider and supplier agreements) appropriate to the reimbursement for nursing facility services under the Medicare Program are a supplement to this chapter. If a cost is

> included in this subchapter as allowable, the CMS Pub. 15-1 and applicable Federal regulations may be used as a source for more detailed information on that cost. The CMS Pub. 15-1 and applicable Federal regulations will not be used for a cost that is nonallowable either by a statement to that effect in this chapter or because the cost is not addressed in this chapter or in the MA-11. The CMS Pub. 15-1 or applicable Federal regulations will not be used to alter the treatment of a cost provided for in this subchapter or the MA-11.

55 Pa. Code §1187.51. The court reasoned Section 1187.51(b) "reflects that the Department and providers **may rely on** CMS Pub. 15-1 and applicable federal regulations for more detailed information, but only as to **allowable costs**, and it **may not be used to alter treatment of allowable costs** listed in a cost report. It does not address or apply to rate setting methodology." *Lutheran Home*, 318 A.3d at 186 (emphasis in original).

Wrapping up its *Auer* analysis, the Commonwealth Court reiterated that "[w]hen a court reviews a regulation issued pursuant to an agency's legislative rule-making power, the court may not substitute its own judgment for that of the agency." *Id.*, *quoting Tire Jockey*, 915 A.2d at 1186. Indeed, "great latitude is given to the states in dispensing their [MA] funds and the reviewing court's role does not extend to rethinking the political and financial concerns behind a particular payment plan[.]" *Id.* at 187, *quoting Forbes Metro. Health Sys. v. Dep't of Pub. Welfare*, 558 A.2d 159, 161 (Pa. Cmwlth. 1989). The court therefore determined Providers did not meet their burden of proving Section 1187.91(1)(iv) is subject to their interpretation only. *See id.* Instead, it held the Department's methodology reflects its fair and considered judgment rather than a convenient litigating position or *post hoc* rationalization, and it is not clearly erroneous or inconsistent with Section 1187.91(1)(iv), the Department's other regulations, the Social Security Act, the HHS's regulations, or Pennsylvania's State Plan. *See id.* "Accordingly," it concluded, "the Department's interpretation of Section 1187.91(1)(iv) is entitled to deference." *Id.*

II. Issues

Providers filed a petition for allowance of appeal. We granted *allocatur* on the following issues, as stated by Providers:

> 1. As a matter of first impression should the Supreme Court of Pennsylvania adopt the updated cabined requirement for "*Auer* Deference" from the decision of the U.S. Supreme Court in *Kisor v. Wilkie* when reviewing agency interpretations of their own regulations, that Courts may only determine a regulation is ambiguous after exhausting all available tools of construction to find the regulation is genuinely ambiguous, and update Pennsylvania law limiting deference to agency interpretations, including for the reasons recently presented by the U.S. Supreme Court's overruling of "*Chevron* Deference"?
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> 2. Did the Commonwealth Court err by failing to apply the genuinely ambiguous standard in *Kisor v. Wilkie* and by misquoting and misapplying the material regulation at 55 Pa. Code §1187.51(b) to determine that 55 Pa. Code §1187.91(1)(iv) was ambiguous and the Department's interpretation entitled to deference?
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> 3. If the genuinely ambiguous standard of *Kisor v. Wilkie* is applied in this case, do the undisputed Medicare principles in this case provide the only reasonable interpretation of 55 Pa. Code §1187.91(1)(iv) for determining the amount of cost report information to be used for price setting for Medicaid Program nursing home payments?
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> 4. Whether Commonwealth Court erred by holding that Bureau of Hearings and Appeals properly ignored uncontested and credible expert testimony that the Department's interpretation of the regulations was unreasonable, inaccurate and inconsistent with the Department's regulations incorporating applicable Medicare principles?

Lutheran Home at Kane & Siemon's Lakeview Manor Est. v. Dep't of Human Servs., 333 A.3d 305, 305-06 (Pa. 2025) (*per curiam*) (brackets omitted).

III. Discussion

"Appellate review of agency decisions is restricted to determining whether there has been a constitutional violation, an error of law, or a violation of agency procedure, and whether necessary findings of fact are supported by substantial evidence." *Shrom v.*

Pa. Underground Storage Tank Indem. Bd., 292 A.3d 894, 907 (Pa. 2023) (internal quotation and citation omitted). "Insofar as the issues raised herein implicate questions of law — particularly by requiring us to engage in [regulatory] interpretation — our standard of review is *de novo* and our scope of review is plenary." *Id.* "To the extent this appeal concerns whether there is substantial evidence to support the [BHA's] findings of fact, 'substantial evidence' means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotations, citation, and alteration omitted).

Although Providers articulated four separate questions, there is significant overlap among those issues. We therefore proceed as follows. First, we provide relevant legal background. Second, we address Providers' argument this Court should adopt the framework articulated in *Kisor*. Third, we interpret 55 Pa. Code §1187.91(1)(iv). And fourth, we address the BHA's and Commonwealth Court's handling of the expert testimony.

a. Legal Background

1. Relevant Federal Administrative Law

Deference to administrative agencies' interpretations of their own regulations is commonly traced back to the United States Supreme Court's 1945 decision in *Seminole Rock*.[12] That case involved a regulation issued by the Administrator of the Office of Price Administration pursuant to the Emergency Price Control Act of 1942. *See Seminole Rock*, 325 U.S. at 411. Specifically, the Court had to determine whether the regulation's language, "[t]he highest price which the seller charged to a purchaser of the same class

[12] *But see Kisor*, 588 U.S. at 568-69 (Kagan, J., plurality) ("*Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond."), *citing 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").

for delivery of the article or material during March, 1942[,]" *id.* at 414, applied to set the maximum price of Seminole Rock's crushed stone where Seminole Rock contracted to sell its crushed stone for 60 cents per ton in October 1941, but it delivered the crushed stone in March 1942 (the month cited by the regulation). The High Court agreed with the Administrator that it did apply. Kicking off its analysis, the Court explained:

> Since this involves an interpretation of an administrative regulation a court **must necessarily look to the administrative construction** of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But **the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation**. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of [the regulation]. Our only tools, therefore, are the plain words of the regulation **and any relevant interpretations of the Administrator**.

Id. at 413-14 (emphasis added). In accordance with this standard, after analyzing the plain text, the Court added that "[a]ny doubts concerning this interpretation of [the regulation] are removed by reference to the administrative construction[.]" *Id.* at 417-18 (collecting examples where the Administrator provided the same interpretation of the regulation). It therefore concluded "[o]ur reading of the language of [the regulation] and the **consistent administrative interpretation** . . . thus **compel the conclusion** that [Seminole Rock's] highest price charged during March for crushed stone was 60 cents per ton[.]" *Id.* at 418 (emphasis added, footnote omitted).

More than fifty years later, the United States Supreme Court famously applied *Seminole Rock*'s rule of agency deference in *Auer*. *See* 519 U.S. at 452. *Auer* involved a lawsuit brought by employees of the St. Louis Police Department, who argued they were not "salary basis" employees pursuant to a regulation promulgated by the Secretary of Labor under the Fair Labor Standards Act (FLSA), and that they were therefore not exempt from the FLSA's overtime pay requirements. The regulation provided, "[a]n

employee will be considered to be paid 'on a salary basis' . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* at 455. The employees argued they did not meet the regulatory test because their compensation could be reduced for a variety of disciplinary infractions under the terms of the police department's manual. Thus, the crux of the question on appeal was "whether, under th[e salary-basis] test, an employee's pay is 'subject to' disciplinary or other deductions whenever there exists a theoretical possibility of such deductions, or rather only when there is something more to suggest that the employee is actually vulnerable to having his pay reduced." *Id.* at 459.

To resolve that issue, the High Court turned to the Secretary of Labor's interpretation of the regulation, which he provided in an *amicus* brief filed at the Court's request. *See id.* at 461. According to the Secretary, the salary-basis test denied exempt status where employees were subject to such deductions "as a practical matter[,]" that is, "if there [was] either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." *Id.* The Court then explained "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Id.*, *quoting Seminole Rock*, 325 U.S. at 414. Considering dictionary definitions of the phrase at issue, the Supreme Court held "[t]hat deferential standard [was] easily met" as "[t]he critical phrase 'subject to' comfortably bears the meaning the Secretary assigns." *Id.*[13] The High Court further explained the

[13] Notably, while the Court in *Seminole Rock* first offered a plain text analysis of the regulation at issue before resolving "[a]ny doubts concerning this interpretation . . . by reference to the administrative construction," 325 U.S. at 417, the *Auer* Court turned (continued…)

fact the Secretary's interpretation was presented in a legal brief did not "make it unworthy of deference[,]" as it was not a "*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," and there was "no reason to suspect that the interpretation d[id] not reflect the agency's fair and considered judgment[.]" *Id.* at 462 (alteration omitted).[14]

Although the *Auer* Court applied a broad notion of agency deference, the High Court embraced various limiting principles in *Christopher*. *See* 567 U.S. at 147. Like *Auer*, *Christopher* involved an exemption from overtime requirements under the FLSA, and three relevant Department of Labor (DOL) regulations. The DOL had filed an *amicus* brief while the case was pending in the Ninth Circuit, as well as an *amicus* brief in a similar action pending in the Second Circuit. *See id.* at 153-54 (citation omitted). But after the United States Supreme Court granted *certiorari* in *Christopher*, the DOL filed another *amicus* brief, where it forwarded a different interpretation of the relevant regulations. *See id.* at 154. The Court refused to give deference to the DOL's new interpretation, explaining:

> Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, *see* . . . *Auer*, 519 U.S., at 461–462[ ], this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "'plainly erroneous or inconsistent with

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immediately to the Secretary's interpretation, *see* 519 U.S. at 461. Other than a quick citation to dictionary definitions, the Court performed very little textual analysis (although it did explain how the Secretary's approach was practical, as demonstrated by the facts of the case). *See id.*

[14] The Court further rejected employees' argument that FLSA exemptions were to be narrowly construed against employers, explaining "that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the **Secretary's power to resolve ambiguities in his own regulations**. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Auer*, 519 U.S. at 462-63 (emphasis added).

> the regulation.'" *Id.*, at 461[ ] (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359[ ] (1989)). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra*, at 462 . . . . This might occur when the agency's interpretation conflicts with a prior interpretation, *see, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515[ ] (1994), or when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213[ ] (1988), or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," *Auer*, *supra*[.]

Id. at 155.

The High Court determined there were "strong reasons for withholding" *Auer* deference, namely that it would result in "unfair surprise" and deprive parties of "fair warning of the conduct a regulation prohibits or requires." *Id.* at 155-56 (cleaned up). The Court observed its "practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Id.* at 158, *quoting Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (footnote omitted). The Court therefore held *Auer* deference was unwarranted, and instead, only accorded *Skidmore* deference, *i.e.*, a measure of deference proportional to the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 159, *quoting Skidmore*, 323 U.S. at 140.

Most recently, and most pertinent to the present case, the United States Supreme Court again limited the scope of *Auer* deference in its 2019 *Kisor* decision, although it rejected a request to overrule *Auer* and *Seminole Rock* entirely. *See Kisor*, 588 U.S. at

563.[15] The Court commented that "*Auer* deference retains an important role in construing agency regulations[,]" but it "reinforce[d] its limits": *Auer* deference "is potent in its place, but cabined in its scope." *Id.* at 563-64. Although *Kisor* resulted in a split decision with portions of the lead opinion joined by four Justices only,[16] the Court reached a majority consensus on the following points: "First and foremost, a court should not afford *Auer* deference unless the regulation is **genuinely ambiguous**." *Id.* at 574 (emphasis added); *see id.* at 575 (explaining if there is no uncertainty, then the regulation "just means what it means — and the court must give it effect, as the court would any law"). The majority then explained that "before concluding that a rule is genuinely ambiguous, a court must **exhaust all the 'traditional tools' of construction**." *Id.* (emphasis added) ("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") (quotation marks and citation omitted). Specifically, 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." *Id.* (cleaned up).

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[15] *Kisor* involved a Vietnam War veteran who sought disability benefits from the Department of Veterans Affairs (VA) for his post-traumatic stress disorder. The VA initially denied him benefits, but it granted him benefits years later after he filed a motion to reopen his claim. The underlying issue in the case was whether, under one of its regulations, the VA properly granted him benefits only from the date of his motion to reopen, rather than from the date of his first application. The Board of Veterans' Appeals and the Court of Appeals for Veterans Claims both determined the benefits were retroactive to the date of the motion to reopen, and the Federal Circuit affirmed based on *Auer* deference. *See Kisor*, 588 U.S. at 564-65.

[16] In the plurality portions of her lead opinion, Justice Kagan emphasized the justifications for and benefits of *Auer* deference, including the notion that courts presume Congress knows regulations will sometimes have ambiguities, and that it intends for the agency to be the one to interpret its own ambiguous rules. *See Kisor*, 588 U.S. at 569-70 (further explaining resolution of ambiguities often implicates policy concerns).

The *Kisor* majority continued, explaining "[i]f genuine ambiguity remains, . . . the agency's reading must still be reasonable." *Id.* (quotation marks and citation omitted). That is, the agency's interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 576 (explaining the traditional tools "at least establish the outer bounds of permissible interpretation"). And even still, the majority explained, *Auer* deference might not necessarily apply. "[A] court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.*, *citing*, *inter alia*, *Christopher*, 567 U.S. at 155. It then identified three main considerations: (1) "the regulatory interpretation must be one actually made by the agency[,]" *i.e.*, "it must be the agency's 'authoritative' or 'official position,'" rather than a mere *ad hoc* statement; (2) "the agency's interpretation must in some way implicate its substantive expertise"; and (3) "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference[,]" meaning the court cannot defer to a mere "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack," nor can it defer to a new interpretation that creates "unfair surprise" to regulated parties. *Id.* at 577-79 (citations omitted). Finally, on narrow *stare decisis* grounds, the majority held *Auer* should not be overruled. *See id.* at 586-89.[17]

For additional context, we must also briefly discuss the now-defunct *Chevron* doctrine, which dictated when courts would afford deference to agency interpretations of the statutes they administered. *Chevron* involved the question of whether an

[17] In a vigorous opinion concurring in the judgment, Justice Gorsuch criticized that the Court's decision was "more a stay of execution than a pardon[,]" observing the "majority retain[ed] *Auer* only because of *stare decisis*" while imposing what he called "many new and nebulous qualifications and limitations on *Auer*[.]" *Kisor*, 588 U.S. at 592 (Gorsuch, J. concurring in judgment). According to him, "the doctrine emerge[d] maimed and enfeebled — in truth, zombified." *Id.*

Environmental Protection Agency regulation properly interpreted a term ("stationary source") used in the Clean Air Act. *See Chevron*, 467 U.S. at 840. In addressing that question, the United States Supreme Court set forth the following standard:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. **If the intent of Congress is clear, that is the end of the matter**; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[ ] as would be necessary in the absence of an administrative interpretation. Rather, **if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute**.[11]
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> [9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, **employing traditional tools of statutory construction**, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.
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> . . .
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> [11] The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. . . .

Id. at 842-43 (citations and footnote omitted, emphasis added).

The Court elaborated that administrative agencies' power to administer statutes "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (citation omitted). "If Congress has explicitly left a gap for the agency to fill," the High Court continued, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation[,]" and those regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Likewise, the Court reasoned if the legislative delegation was implicit, a court still "may not substitute its own

construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Instead, the Supreme Court held, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.]" *Id.* The Court explained it consistently deferred to administrative interpretations "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.* So long as the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care[,]" the High Court held it would "not disturb it unless it appears from the statute or its legislative history" that Congress would not have sanctioned it. *Id.* at 845 (citation omitted).

Chevron was a cornerstone of administrative law for forty years, until 2024, when the United States Supreme Court overruled it in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Looking through a historical lens, the *Loper Bright* Court first stressed that notwithstanding the respect it gives to agencies acting in their fields of expertise, it is the judiciary's role to interpret laws. *See* 603 U.S. at 384-90, *citing*, *inter alia*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also id*. at 390 ("Nothing in the New Deal era or before it [ ] resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes."). However, the Court's analysis hinged on its determination that *Chevron* deference "cannot be squared with" the federal Administrative Procedures Act (APA). *Id.* at 396. Specifically, the High Court explained, Section 706 of the APA provides "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* at 391, *quoting* 5 U.S.C. §706 (further requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law"). In light of those provisions, the Court held the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." *Id.* at 391-92. By contrast, the Court reasoned, *Chevron* "requires a court to **ignore**, not follow, 'the reading the court would have reached' had it exercised its independent judgment as required by the APA." *Id.* at 398-99 (emphasis in original), *quoting Chevron*, 467 U.S. at 843 n.11.

After determining *Chevron* was inconsistent with the APA and that its underlying presumption — that Congress implicitly delegated to agencies the task of interpreting ambiguous statutory provisions — was incorrect, the Court held the doctrine of *stare decisis* did not require adherence to *Chevron*. Instead, it reasoned the most relevant *stare decisis* considerations ("the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision") "all weigh[ed] in favor of letting *Chevron* go." *Id.* at 407 (citation omitted); *see id.* at 411-12 (concluding *Chevron* "has undermined the very 'rule of law' values that *stare decisis* exists to secure[,]" it "was a judicial invention that required judges to disregard their statutory duties[,]" and that "the only way to ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion . . . is for us to leave *Chevron* behind") (quotations and citations omitted).

With this overview of the relevant federal case law, we next review Pennsylvania law, which has been influenced, to some degree, by these precedents.

2. Relevant Pennsylvania Administrative Law

It is well established in our law that "Commonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities." *Nw. Youth Servs. v. Dep't of Pub. Welfare*, 66 A.3d 301, 310 (Pa. 2013). Instead, to properly promulgate regulations, administrative agencies must act in accordance with their authorization as laid out by the General Assembly, which typically requires adherence to the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act. *See id.* But then, "[w]hen an agency acts under the general rule and promulgates published regulations through the formal notice, comment, and review procedures prescribed in those enactments, its resulting pronouncements are accorded the force of law and are thus denominated 'legislative rules.'" *Id.*

Traditionally, our "treatment of deference to administrative agency rules has followed the United States Supreme Court's lead, at least to an interim developmental stage." *Id.* at 311. But "[t]his Court has never declared that we follow federal agency law principles in lockstep." *Marcellus Shale Coal.*, 292 A.3d at 928. In fact, we have recognized "[a]gency issues appear in a dizzying array of contexts and '[a] pervading question in this field, of course, is how much deference is due in any given context.'" *Id.*, *quoting Harmon v. Unemployment Comp. Bd. of Review*, 207 A.3d 292, 308 (Pa. 2019) (Saylor, C.J., concurring). Indeed, much of our case law has focused on whether an administrative regulatory action followed proper procedures and fell within the ambit of the agency's granted authority, because "[u]nder federal and Pennsylvania jurisprudence, properly-enacted legislative rules enjoy a presumption of reasonableness and are accorded a particularly high measure of deference — often denominated *Chevron* deference — by reviewing courts." *Nw. Youth Servs.*, 66 A.3d at 311; *see id.* at 312 (contrasting non-legislative "interpretive rules," for which "the validity of such a rule may

depend 'upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets'") (citation omitted).

But cases like this one do not implicate *Chevron* deference, as they do not pertain to an agency's interpretation of a statute. Instead, we have explained that "[a]lthough a lesser quantum of deference is afforded when an agency advances policy via an interpretive rule, this Court . . . nonetheless has allocated a higher measure of deference (approximating that afforded to legislative rules) to agencies' interpretations of their own regulations." *Id.* In other words, this Court has traditionally applied some version of *Auer/Seminole Rock* deference.

In *Department of Public Welfare v. Forbes Health System*, 422 A.2d 480 (Pa. 1980), a decision rendered four years **before** *Chevron*, this Court first adopted the High Court's standard for reviewing an agency's interpretation of its own regulations articulated in *Seminole Rock*. In *Forbes*, we explained such an inquiry is governed by a two-step analysis, the first of which incorporates *Seminole Rock*'s core holding: "in construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Forbes*, 422 A.2d at 482, *quoting Seminole Rock*, 325 U.S. at 414 (cleaned up) (elaborating the second step asks whether the regulations are "consistent with the statute under which they are promulgated"). Following *Forbes*, we solidified that standard in a handful of cases. *See Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 52 (Pa. 2006); *Pelton v. Dep't of Pub. Welfare*, 523 A.2d 1104, 1107-09 (Pa. 1987) ("we are governed by the standard of review to be applied by courts reviewing the validity of an agency's interpretation of its own regulations in [*Forbes*,] . . . *i.e.*, to determine whether the agency's interpretation of its regulation was consistent with the regulation itself, and then whether the regulation is consistent with the enabling statute"); *Wiley House v.*

Scanlon, 465 A.2d 995, 999 (Pa. 1983) ("[T]he standard of review applicable to the validity of an administrative agency's interpretation of its own regulations is found in [*Forbes*.] . . . Since the department's interpretation . . . is neither plainly erroneous nor inconsistent with the Public School Act, we cannot conclude that the Commonwealth Court's affirmance of this finding was in error.").

Indeed, we relied on the *Forbes* standard in our seminal case, *Tire Jockey Service, Inc. v. Department of Environmental Protection*, where we summarized the *Forbes* inquiry as asking "(1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and (2) whether the regulation is consistent with the statute under which it was promulgated." 915 A.2d 1165, 1186 (Pa. 2007).[18] Although *Tire Jockey* is perhaps better known for the three-part test it articulated for when legislative rules are binding,[19] the Court made clear it applies that standard in conjunction with the two-step test first announced in *Forbes*. *See id.* at 1186 n.20 ("When evaluating the deference owed to an administrative agency's interpretation of its own regulation, this Court has often applied one or the other of the two tests discussed in text above. Most recently, in *Popowsky*, we harmonized the two tests with the result being a uniform and joint application.").[20] *Tire Jockey* involved the question of whether previously used tires being stored at Tire

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[18] Parenthetically, we observe that in *Tire Jockey*, we dropped the word "plainly" from our articulation in *Forbes*: "[i]n construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is **plainly** erroneous or inconsistent with the regulation." *Forbes*, 422 A.2d at 482 (emphasis added, quotation marks and citations omitted).

[19] "[W]hen an agency adopts a regulation pursuant to its legislative rule-making power, as opposed to its interpretive rule-making power, it is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *Tire Jockey*, 915 A.2d at 1186.

[20] We have since made clear that not every case will call for analysis under both layers of the *Tire Jockey* test. *See Bucks Cty. Servs., Inc. v. Phila. Parking Auth.*, 195 A.3d 218, 227 n.15; *see also id.* at 241-42 (Wecht, J. concurring).

Jockey's facility fell within the definition of "waste" provided in environmental regulations enforced by the DEP. Since the parties did not dispute whether the regulation was consistent with the statute, adopted within the agency's power, or issued pursuant to proper procedure, we explained "we concern ourselves only with whether the DEP's interpretation of the regulation is erroneous or inconsistent with the regulation and whether the DEP's interpretation of the regulation is reasonable." *Id.* at 1187. After determining the DEP's interpretation accorded with the plain language of the relevant regulations and therefore was "not clearly erroneous[,]" *id.* at 1190, we held it was "evident that the DEP's interpretation is also reasonable[,]" because there was "no evidence that the DEP's interpretation was made in bad faith, was arbitrarily executed or constituted a manifest abuse of discretion." *Id.* "Thus," we concluded, "because the DEP's interpretation is consistent with the regulation and reasonable, the Commonwealth Court should have afforded deference to the DEP's interpretation." *Id.*

In *Northwestern Youth Services*, again following the United States Supreme Court's lead, we put up some additional guardrails for courts applying *Seminole Rock/Auer* deference. Specifically, with reference to the High Court's decision in *Christopher*, we declined to afford the Department of Public Welfare deference, rejecting its argument that it could implement an extensive cost-reporting scheme for youth service providers by way of a non-legislative rulemaking based on broader regulations it had previously promulgated. *See Nw. Youth Servs.*, 66 A.3d at 312-13 ("the High Court modified th[e] course of the federal jurisprudence in *Christopher* . . . to apply *Skidmore* deference to an agency interpretation of its own ambiguous regulation"). In doing so, we denounced the notion that "by promulgating regulations open-ended enough not to preclude cost-reporting duties, . . . or vague and general enough to sanction any type of obligation or restriction in the abstract, . . . the agency has conferred upon itself the

authority to lay down such further mandates less formally, regardless of the substantive impact on the regulated public." *Id.* at 313; *see also id.* at 316 ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'"), *quoting Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997). In line with these principles, we declined to afford deference to the agency's interpretive rules, concluding "the Legislature did not wholly relieve the Department of compliance with all of the formalities attending legislative rulemaking in the child-welfare arena, and nothing in the Public Welfare Code or the derivative regulations persuades us that the policy shift manifested in the bulletin can be fairly denominated as a mere interpretation of pre-existing legislative rules." *Id.* at 316.

To be clear, however, *Northwestern Youth Services* did not do away with *Seminole Rock* deference — instead, it was a "decision to **withhold** *Seminole* deference[.]" *Id.* at 313 (emphasis added). We specified that under the facts of that case, the preexisting regulations could not "be read reasonably to subsume a specialized, affirmative, and extensive cost-reporting requirement." *Id.* at 315 ("the suggestion that the published regulations affirmatively impose a mandatory requirement of cost-reporting to the Department is simply too attenuated"). Anticipating "that DPW might reply that this is the precise juncture at which *Seminole* deference should intervene in its favor[,]" we explained:

> The deference contemplated by the *Seminole* line of decisions (including the Pennsylvania ones)[ ] is not centered on procedural invalidity and does not serve as an antidote for it. In this regard, we consider the present matter to involve more a matter of determining the appropriate boundaries of legislative and non-legislative rulemaking (which is within the judicial purview) than one of interpreting the Public Welfare Code or the derivative regulations (to which *Skidmore* or *Seminole* deference may attach).

Id. at 315 n.19. Thus, despite the Court's adoption of the guardrails from *Christopher*, our holding in *Forbes* survived *Northwestern Youth Services*.[21]

In more recent years, however, this Court has made a point to stress that notwithstanding agency deference principles, the courts are the ultimate arbiters of what a statute or regulation means, and that we use the Statutory Construction Act of 1972 (SCA), 1 Pa.C.S. §§1501-1991, to guide our analyses. *See, e.g.*, *Crown Castle*, 234 A.3d at 677 ("A court does not defer to an administrative agency's interpretation of the plain meaning of an unambiguous statute because statutory interpretation is a question of law for the court."); *S & H Transport Inc. v. City of York*, 210 A.3d 1028, 1038 (Pa. 2019) ("the interpretation of an administrative regulation promulgated to implement a municipal ordinance" is a "question[ ] of law [for] which our standard of review is *de novo* and our scope of review is plenary[,]" and "as a general matter, we employ the interpretative principles of the SCA to construe a regulation implementing a legislative enactment"); *Harmon*, 207 A.3d at 300 ("although we have considered the[ ] varied situations where agency interpretations inform our statutory construction analysis, and have ascribed some measure of value to those interpretations under certain circumstances, we have never held the agency's opinion is binding on this Court, and of course it is not"). Our unanimous decision in *Corman* exemplified this point.

In *Corman*, the Acting Secretary of Health issued an order mandating the use of face masks in schools to mitigate the spread of COVID-19 in anticipation of the statewide return to in-person learning. Challengers of the mask mandate argued, *inter alia*, that the order was a binding regulation that was not properly promulgated. We agreed. We began our analysis by stating, in no uncertain terms, "[t]he issues raised in this case require us

[21] This was in harmony with the High Court's decision in *Christopher*, which likewise did not purport to overrule *Auer* deference.

to construe the terms of several statutes and administrative rules. For this, we look to the Statutory Construction Act." *Corman*, 266 A.3d at 471. After determining the relevant statutory provisions did not, in themselves, authorize the Acting Secretary's order, the issue hinged on whether a pre-existing regulation contemplated a mask mandate. *See id.* at 476. The Court disposed of the Acting Secretary's arguments based on the plain text of the regulation. *See id.* at 480-85. More relevantly, we also rejected the Acting Secretary's argument that the regulation was "at worst, ambiguous, thus entitling the Department's interpretation of that provision to judicial deference." *Id.* at 485. We explained the Acting Secretary sought deference pursuant to *Auer/Seminole Rock*, and we observed "[i]n *Kisor*[ ], the High Court further qualified the limits of *Auer* deference, professing that it 'is potent in its place, but cabined in its scope.'" *Id.* at 485 n.59. Given our analysis that the text of the regulation did not support the Acting Secretary's interpretation, we determined no deference was due. In concluding, we emphasized the following:

> To be clear, where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute[.] . . . Questions of efficiency and practicality in "dynamic and fact-intensive" matters of public health and disease control are policy judgments; they should be left to the policymakers and their designees. . . . **But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake.** "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). By keeping clear the line dividing the judiciary's domain from the executive's, we maintain fidelity to the separation of powers.

Id. at 486 (emphasis added).

While these more recent cases have emphasized the Court's interpretative role in spite of the deference principles that permeate our law, Justices have split on the broader question regarding the continued viability of agency deference. In *Harmon*, for example, a plurality of the Court determined the statute at issue was ambiguous, but it declined to

afford deference where the agency "never formally explained its view . . . prior to the instant litigation[.]" 207 A.3d at 300. In doing so, the plurality addressed criticisms in Justice Donohue's and Justice Wecht's concurring opinions suggesting such deference is always improper, explaining "our precedent clearly authorizes our approach and no party has presented an argument that those decisions should be overruled." *Id.* at 300 n.7. In her concurrence, Justice Donohue argued "[a]dministrative agencies, unlike courts, have no particular expertise in interpreting statutes, and [she] reject[ed] any rule of construction that would require courts to abdicate our judicial role to administrative agencies." *Id.* at 310 (Donohue, J., concurring). Instead, she explained her view that courts should simply apply the SCA, which "does not instruct courts to **defer** to agency interpretations[.]" *Id.* at 309 (emphasis in original).

For his part, Justice Wecht reiterated his view that courts should not afford "what often amounts to unqualified deference" as "the meaning of a statute is essentially a question of law for the court." *Id.* (Wecht, J., concurring), *quoting Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1083 (Pa. 2018) (Wecht, J, concurring); *see also Crown Castle*, 234 A.3d at 690 (Wecht, J., concurring) (tracing how agency deference principles have fallen into disfavor in the federal court system and referring to the *Kisor* opinion as relying on "analytical half-measures"); *id.* at 692 ("The instant case illustrates well the fundamental lack of clarity in discerning the point at which *Chevron* gives way to *Auer* gives way to *Skidmore*, however tidy the nominal distinctions might appear to be. That same lack of clarity appears in our case law.").

Given the renewed emphasis on the Court's commanding role in this sphere, as well as the doubt cast by individual Justices on agency deference more broadly, it will be helpful to clarify our law, at least as it pertains to agencies' interpretations of their own regulations. With this background, we turn to our primary issue.

b. Should the Court adopt the framework announced in Kisor?

1. Parties' Arguments

Providers urge the Court to adopt *Kisor*'s "cabining of '*Auer* deference[,]'" namely by recognizing the "genuinely ambiguous" standard. Providers' Brief at 21 (capitalization omitted). They emphasize that we recognized the United States Supreme Court's limiting of *Auer* deference in *Corman*, where we noted "[i]n *Kisor*[,] the High Court further qualified the limits of *Auer* deference, professing that it 'is potent in its place, but cabined in its scope.'" *Id.* at 22, *quoting Corman*, 266 A.3d at 485 n.59. They claim in its opinion below, the Commonwealth Court improperly characterized the relevant language in *Kisor* as a "plurality opinion" that had not been adopted by the Commonwealth Court or this Court.

Providers recognize that although Pennsylvania administrative law principles are rooted in federal precedent, we "ha[ve] never declared that we [ ] follow federal agency law principles in lockstep." *Id.* at 24-25, *quoting Marcellus Shale Coal.*, 292 A.3d at 928. But they assert the principles articulated in *Kisor* are consistent with Pennsylvania's approach to deference. They first observe that in *Northwestern Youth Services*, we recognized that federal law on this topic was evolving, and we instructed the Commonwealth Court to "remain abreast of the federal-law developments and analyze their merits relative to the Pennsylvania scheme in appropriate circumstances and in due course[,]" and that "[s]uch evaluation of the accumulating wisdom seems particularly apt, since the Pennsylvania decisions in the administrative-law field are so closely grounded upon earlier federal cases." *Id.* at 25, *quoting Nw. Youth Servs.*, 66 A.3d at 313 & n.16. Providers fault the Commonwealth Court for failing to perform such an analysis.

Providers also recount that in *Northwestern Youth Services*, we withheld deference, rejecting the notion "that, by promulgating regulations open-ended enough . . . or vague and general enough to sanction any type of" regulation, the agency could "confer[] upon itself the authority to lay down such further mandates less formally,

regardless of the substantive impact on the regulated public." *Id.* at 26, *quoting Nw. Youth Servs.*, 66 A.3d at 313. According to Providers, *Kisor* is consistent with those legal principles because it "provides tests to determine whether a regulation has sufficient content and definitiveness and . . . [it] limits agencies from, under the guise of interpretation, creating *de facto* a new regulation." *Id.* They further claim *Kisor*'s framework is consistent with our holding in *Forbes* (and in turn *Tire Jockey*), that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 27, *quoting Forbes*, 422 A.2d at 482. They argue *Kisor* instructs whether an agency's interpretation is "plainly erroneous or inconsistent with the regulation[,]" and "serves as a gatekeeper" to determine whether the *Forbes*/*Tire Jockey* framework applies. *Id.*

Providers also assert that "*Kisor* addresses how and when to use the SCA to determine the text's explicit meaning[,]" and "supports the Court's role under the SCA to say what the law is[.]" *Id.* at 28 (emphasis and formatting omitted). They recount that use of the criteria in 1 Pa.C.S. §1921(c) (including administrative interpretations) is proper only when the language in question is not explicit, *i.e.*, where an ambiguity exists. According to Providers, "[t]his is where *Kisor*'s cabining of *Auer* deference and its 'genuinely ambiguous' standard fit into this Court's interpretation principles" — to determine whether there is an ambiguity warranting application of the Section 1921(c) criteria. *Id.* at 30 ("*Kisor* is persuasive and of value to assure that the clear and unambiguous letter of the regulations are controlling as required by 1 Pa.C.S. §1921(b)[.]").

Finally, Providers argue the United States Supreme Court's overruling of *Chevron* in *Loper Bright* does not lessen the value of adopting *Kisor*'s genuinely ambiguous standard. Instead, they claim both *Kisor* and *Loper Bright* emphasize it is courts' role to

construe statutes and regulations, consistent with concerns expressed by Justices of this Court in various cases. *See id.* at 32-33 (collecting cases). In fact, Providers submit *Loper Bright* provides a persuasive argument for change. They argue "this Court should take this opportunity to also overrule its deference-based precedents — *Forbes* and *Tire Jockey* — and, as done in *Loper Bright* and consistent with Pennsylvania's statutory scope of review, the SCA, and the courts' constitutional role[,] return to the courts the determination of the 'best reading' of laws and regulations, even ambiguous ones." *Id.* at 36 (emphasis omitted).[22]

The Department responds that the Court need not adopt the rule announced in *Kisor*, because this case can be resolved using "the longstanding and uniquely Pennsylvania approach to interpreting and applying language found in statutes and regulations." Department's Brief at 21. It argues the Court recently reaffirmed those well-settled principles in *Mezzacappa v. Northampton County*, 334 A.3d 269 (Pa. 2025), including that the Court's objective in construing a statute or regulation is to determine and effectuate the intention of the drafter, and that the tools for doing so are found in Section 1921 of the SCA. Tracing the Court's analysis in *Mezzacappa*, the Department recites the familiar principle that "the best indicator of the drafter's intent is the plain language of the statute or regulation[, and w]hen words of a statute or regulation are free and clear from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* at 22. "If, after [a textual] analysis, a court concludes that the words

[22] Likewise, two sets of *amici curiae* — the Pennsylvania Chamber of Business and Industry, the Pennsylvania Manufacturers Association, the Marcellus Shale Coalition, the Pennsylvania Independent Oil & Gas Association, and the Pennsylvania Coal Alliance; and the Chamber of Commerce of the United States — argue the Court should at least cabin *Auer* deference in accordance with *Kisor*'s framework, if not do away with agency deference altogether. *Amicus* the Buckeye Institute takes a harder line, arguing "[t]he Court should abandon *Auer* deference rather than toy with it as *Kisor v. Wilkie* did." Buckeye Inst. *Amicus* Brief at 14 (formatting omitted).

can reasonably mean two different things, then and only then does a court turn to the factors established by the General Assembly through the SCA to ascertain the intent and meaning of the words[,]" *i.e.*, the considerations listed in 1 Pa.C.S. §1921(c). *Id.* at 24.

Despite its position "th[e] Court need not wade into the morass of everchanging federal case law, based on a system without the SCA," *id.* at 34, the Department argues in the alternative that *Loper Bright*'s overruling of *Chevron* deference does not bear on the framework developed under *Auer*. It first emphasizes this Court is not bound to follow the United States Supreme Court on matters of administrative law. It further asserts that because *Chevron* afforded deference to an agency's interpretation of an ambiguous statute, *Loper Bright* has no bearing on this case, where the issue relates to the Department's interpretation of its own duly promulgated regulation. Additionally, the Department argues, the reasons the High Court gave for overruling *Chevron* are unique to federal jurisprudence, and unlike in the federal scheme, "the General Assembly created a clear role for agency interpretations when statutory and regulatory text is ambiguous." *Id.* at 39 (further noting 1 Pa.C.S. §1921(c)(8) of the SCA, which allows consideration of agencies' interpretations, predates both *Auer* and *Chevron* by several years). The Department notes Pennsylvania courts are not bound to adopt *Kisor*, but it observes many of the principles underlying *Kisor* already exist in our law. *See id.* at 44-45. Thus, it asserts, we need not revisit our agency deference jurisprudence.

2. Analysis — The role of agencies' interpretations of their own regulations under Pennsylvania Law

As an initial matter, we conclude *Loper Bright* has no bearing on our decision today. This is not a *Chevron* case, since it involves an agency's interpretation of its own regulation rather than an agency's interpretation of a statute. We leave for another day the question of what impact, if any, *Loper Bright* should have on our case law applying *Chevron*-like deference. While there is perhaps some overlap between how the Court

has traditionally treated pure textual interpretation questions arising in the *Chevron* and *Auer* contexts, the High Court's unraveling of *Chevron* has more complicated consequences than the case we address today. Since *Chevron* deference applied not only when a specific term in a statute was ambiguous, but also when a statute was silent or left a gap for an agency to fill, it implicated administrative agencies' core ability to exercise their regulatory powers.[23]

With that out of the way, we turn to the question actually implicated by this case: how should courts in this Commonwealth treat agencies' interpretations of their own regulations? On this point, we decline Providers' invitation to adopt *Kisor*'s framework, as it is incompatible with Pennsylvania law (although as the Department recognizes, there exist similarities). Specifically, *Kisor*'s genuine ambiguity standard — requiring courts to exhaust all traditional tools of interpretation before relying on the agency's interpretation — does not translate onto Pennsylvania's method for interpreting the text of regulations, which, as we have emphasized in our more recent agency decisions, is provided by the General Assembly in the SCA. *Accord Corman*, 266 A.3d at 471 ("The issues raised in

[23] Indeed, even *Loper Bright* recognized "[i]n a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes expressly delegate to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'" *Loper Bright*, 603 U.S. at 394-95 (cleaned up, footnotes and citations omitted). The High Court simply explained that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* at 395. It did not elaborate, however, on how the courts are to "interpret the statute and effectuate the will of Congress" to set boundaries for the agency where the statute is silent or leaves such open-ended flexibility to the agency. *See also id.* at 404 ("[T]o stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.").

this case require us to construe the terms of . . . administrative rules. For this, we look to the [SCA]."); *S & H Transport Inc.*, 210 A.3d at 1038 ("as a general matter, we employ the interpretative principles of the SCA to construe a regulation").

The SCA is explicit, and this Court's application of its tenets is steadfast. *See* 1 Pa.C.S. §1901 ("In the construction of the statutes of this Commonwealth, the rules set forth in this chapter **shall** be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.") (emphasis added).[24] "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly[,]" or in the case of regulations, "to ascertain and effectuate the intent of" the promulgating agency. 1 Pa.C.S. §1921(a). "Every statute [or regulation] shall be construed, if possible, to give effect to all its provisions." *Id.* We have repeatedly recognized "[t]he plain language of a [text] generally provides the best indication of [the drafters'] intent." *Bell v. Wilkinsburg Sch. Dist.*, 349 A.3d 810, 819 (Pa. 2026) (citation omitted); *accord* 1 Pa.C.S. §1921(b) ("[w]hen the words of a [text] are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit"). We have explained, however, that language is ambiguous if it is "susceptible to two or more reasonable interpretations[.]" *Harmon*, 207 A.3d at 298 (citation omitted). If that is the case, courts may look to other indicia of intent to determine the meaning of the text. Specifically, the SCA provides:

[24] The same interpretive rules that "shall be observed" by courts when construing statutes, 1 Pa.C.S. §1901, also apply to a large swath of regulations codified in the Pennsylvania Code, including all regulations at issue here. *See* 1 Pa.C.S. §1502(a)(1)(ii) ("unless the General Assembly or the agency adopting the document shall provide otherwise[,]" the SCA "shall apply" to "[e]very document codified in the Pennsylvania Code except legislative, judicial and home rule charter documents"); *see also* 1 Pa. Code §1.7 (the SCA "applies to a document codified in the [Pennsylvania] Code . . . except documents codified in 101 Pa. Code – 365 Pa. Code").

> When the words of the statute [or regulation] are not explicit, the intention of the General Assembly [or promulgating agency] may be ascertained by considering, among other matters:
>
> (1) The occasion and necessity for the statute [or regulation].
>
> (2) The circumstances under which it was enacted.
>
> (3) The mischief to be remedied.
>
> (4) The object to be attained.
>
> (5) The former law, if any, including other statutes [or regulations] upon the same or similar subjects.
>
> (6) The consequences of a particular interpretation.
>
> (7) The contemporaneous legislative [or regulatory] history.
>
> (8) Legislative and administrative interpretations of such statute [or regulation].

1 Pa.C.S. §1921(c). Of course, other sections of the SCA provide additional presumptions and rules of interpretation, but Section 1921 sets forth our roadmap.

Notably, by enacting the final consideration in Section 1921(c) — "[l]egislative and administrative interpretations" — the General Assembly codified a role for agency interpretations. To be sure, Section 1921(c)(8) does not make the agency's interpretation dispositive where a statute or regulation is ambiguous; it is one of eight considerations in a non-exclusive list of factors, none of which is given prominence over the others. It is up to the reviewing court, on a case-by-case basis, to determine whether the considerations listed in Section 1921(c) are applicable, and if so, what weight should be assigned to each. But the General Assembly's explicit inclusion of "administrative interpretations" in Section 1921(c)'s list establishes (1) that an agency's interpretation can be a substantive indicium of the meaning of the text, and (2) that it can carry as much weight as other indicia of intent.

This is why *Kisor*'s "genuine ambiguity" standard cannot just be dropped into Pennsylvania law. Under *Kisor*, "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous[,] . . . [a]nd before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*, 588 U.S. at 574-75; *see also id.* at 575 ("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.") (cleaned up). *Kisor*'s prohibition on turning to the agency's interpretation until all other tools of construction have been exhausted is discordant with Section 1921(c) of the SCA, which establishes that the agency's interpretation **is** a tool of construction under Pennsylvania law that can be considered upon a determination the text is ambiguous (*i.e.*, that it is reasonably susceptible to more than one interpretation). Even though Section 1921(c)(8) is not equivalent to *Auer* deference, it plainly makes the agency's interpretation part of the equation earlier than it would under *Kisor*'s framework. Thus, although it is true that, at times, "Pennsylvania courts' treatment of deference to administrative agency rules has followed the United States Supreme Court's lead," *Nw. Youth Servs.*, 66 A.3d at 311, we decline to engraft *Kisor*'s genuine ambiguity standard onto our distinct methodology for interpreting regulations.

Nevertheless, if we have not yet made it abundantly clear, Pennsylvania courts should not reflexively adopt agencies' interpretations just because the underlying text is ambiguous. *See Corman*, 266 A.3d at 486 (rejecting notion "that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake"); *Harmon*, 207 A.3d 292 ("we have never held the agency's opinion is binding on this Court, and of course it is not"); *Woodford v. Ins. Dep't*, 243 A.3d 60, 74-77 (Pa. 2020) (turning to considerations in Section 1921(c) to interpret ambiguous statutory provision rather than simply deferring to the agency, explaining "[w]e need not determine whether the agency's

interpretation is entitled to special deference[ ] because the foregoing textual analysis reveals the Department's reading aligns with our own conclusions regarding the statute's meaning"); *Colville v. Allegheny Cty. Ret. Bd.*, 926 A.2d 424, 443 n.4 (Pa. 2007) (rejecting argument that "deference is so great that an administrative determination which is not clearly erroneous 'is binding on this Court[,]'" explaining "[t]his Court cannot be 'bound' by an inferior tribunal's resolution of a question of law without improperly abdicating its appellate role"; instead, "[d]eference to an administrative agency is not equivalent to relinquishment of our judicial role"); *Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741, 744 (Pa. 1998) (stating "the meaning of [a] statute ultimately is a question of law for the reviewing court" and citing 1 Pa.C.S. §1921(c) as "permitting courts . . . to consider administrative interpretations only '[w]hen the words of the statute are not explicit'").[25] Instead, regulatory interpretation presents a question of law, for which courts' review is *de novo* and plenary. *See S & H Transport Inc.*, 210 A.3d at 1038.

In conducting that *de novo* review to determine whether the agency's interpretation is erroneous or inconsistent with the regulation, *see Tire Jockey*, 915 A.2d at 1186,[26]

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[25] Notably, in *Forbes*, when our Court adopted the language used in *Seminole Rock*, it obviously did not consider the United States Supreme Court's later-in-time *Auer* decision. As observed above, the *Auer* opinion was more deferential to the agency's interpretation, whereas the *Seminole Rock* Court performed a textual analysis before applying deference principles. *See supra* at n.13.

[26] As noted, Providers, relying exclusively on *Loper Bright*, ask us in passing to take "this opportunity to [ ] overrule [our] deference-based precedents — *Forbes* and *Tire Jockey*[.]" Providers' Brief at 36. We decline the invitation. For starters, "overturning a decision requires a '**special justification**, over and above the belief that the precedent was wrongly decided.'" *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 850 (Pa. 2024) (emphasis added), *quoting Commonwealth v. Alexander*, 243 A.3d 177, 195-96 (Pa. 2020). Providers have not convincingly explained why the High Court's decision in *Loper Bright* — where the High Court overruled *Chevron* primarily because of a conflict with the federal APA, which has no application to Pennsylvania law — raises a special justification for overruling *Forbes* and *Tire Jockey*, both of which, like the present case, do not even implicate *Chevron*.

(continued…)

courts are to use the process mandated in the SCA. *See Corman*, 266 A.3d at 471 ("The issues raised in this case require us to construe the terms of . . . administrative rules. For this, we look to the [SCA]."); *S & H Transport, Inc.*, 210 A.3d at 1038 ("as a general matter, we employ the interpretive principles of the SCA to construe a regulation implementing a legislative enactment[, and i]n situations where the language of the . . . regulation is ambiguous, the additional factors enumerated in Section 1921(c) of the SCA may be employed to ascertain the meaning of its provisions"); *Colville*, 926 A.2d at 432-34 (applying factors in Section 1921(c) and other provisions of the SCA after acknowledging agency deference principles and determining statute was arguably ambiguous).

Using this process, if the text of the regulation is plain, then it is dispositive. *See* 1 Pa.C.S. §1921(a)-(b). If the text of the regulation is ambiguous, the court should consider other indicia of intent — including the nonexclusive list of factors in Section 1921(c) of the SCA — to ascertain its meaning, as it would for any other interpretive analysis. *See id.* at §1921(c). This may include consideration of an agency's interpretation of the regulation, which can be offered for more than persuasive value and regardless of whether the agency is a party to the litigation. *See id*. at §1921(c)(8). Whether this factor applies in a given case, however, is context dependent. And, most importantly, the weight to be afforded to this factor falls exclusively within the province of the reviewing court, whose ultimate objective is "to ascertain and effectuate the intention of" the promulgating agency. 1 Pa.C.S. §1921(a); *cf. Harmon*, 207 A.3d at 300 (declining "to accord **any** deference to an agency's interpretation of a statute where there is nothing

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In any event, we see no need to overrule *Forbes* and *Tire Jockey* as we believe they can be harmonized with our more recent precedents. The first step of *Tire Jockey*'s "two-step analysis" merely asks "whether the [agency's] interpretation of the regulation is erroneous or inconsistent with the regulation[.]" 915 A.2d at 1186. In making that initial assessment, our more recent precedents clarify, courts must "employ the interpretative principles of the SCA[.]" *S & H Transport, Inc.*, 210 A.3d at 1038.

in the record indicating that the agency had considered and decided the issue at a point prior to the instant litigation") (cleaned up, emphasis in original); *Christopher*, 567 U.S. at 155 (discounting agency interpretation that "is nothing more than a convenient litigating position . . . or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack") (cleaned up).

In sum, we reiterate that courts in this Commonwealth must apply the SCA when determining whether an agency's interpretation of its regulation is erroneous or inconsistent with the regulation. *See* 1 Pa.C.S. §1502; 1 Pa. Code §1.7. In doing so, the courts fulfill their "duty . . . to say what the law is." *Marbury*, 5 U.S. at 177. Having clarified our jurisprudence in this arena, we turn, finally, to the regulation at issue in this case.

c. Interpretation of Section 1187.91(1)(iv)

> For ease of reference, we reproduce the relevant regulatory text here:
>
> The Department will set rates for the case-mix payment system based on the following data:
>
> (1) Net operating costs.
>
> > (i) The net operating prices will be established based on the following:
> >
> > > (A) Audited nursing facility costs for the 3 most recent years available in the NIS database **adjusted for inflation**. This database includes audited MA-11 cost reports that are issued by the Department on or before March 31 of each July 1 price setting period.
> >
> > . . .
> >
> > (iv) Prior to price setting, **cost report information will be indexed forward** to the 6th month of the 12-month period for which the prices are set. The index used is the 1st Quarter issue of the CMS Nursing Home Without Capital Market Basket Index.

55 Pa. Code §1187.91 (emphasis added). Also relevant to Providers' argument that the CMS Pub. 15-1 controls the proper inflation methodology, Section 1187.51 provides:

> (b) *The Medicare Provider Reimbursement Manual* (CMS Pub. 15-1) and the Federal regulations in 42 CFR Part 489 (relating to provider and supplier agreements) appropriate to the reimbursement for nursing facility services

> under the Medicare Program are a supplement to this chapter. If a cost is included in this subchapter as allowable, the CMS Pub. 15-1 and applicable Federal regulations may be used as a source for more detailed information on that cost. The CMS Pub. 15-1 and applicable Federal regulations will not be used for a cost that is nonallowable either by a statement to that effect in this chapter or because the cost is not addressed in this chapter or in the MA-11. The CMS Pub. 15-1 or applicable Federal regulations will not be used to alter the treatment of a cost provided for in this subchapter or the MA-11.

55 Pa. Code §1187.51(b).

1. Parties' Arguments

Providers argue the Commonwealth Court "erred by misquoting and misapplying 55 Pa. Code §1187.51(b)[.]" Providers' Brief at 40.[27] Although Providers recognize the Commonwealth Court recited the full text of the regulation, they take issue with the lower court's assertion Section 1187.51(b) "says the Medicare Provider Reimbursement Manual and applicable Federal regulations ('the Manual') may not be used to alter treatment of allowable costs 'listed in a cost report[.]'" *Id.* at 41, *quoting Lutheran Home*, 318 A.3d at 185. Instead, they emphasize the regulation says the federal materials "may not be used to alter the treatment of a cost 'provided for in this subchapter [E] or the MA-11.'" *Id.*, *quoting* 55 Pa. Code §1187.51(b).

Providers claim Section 1187.51(b) expressly provides that the Manual is to be a supplement to all the provisions in Chapter 1187. They challenge the Commonwealth Court's reasoning that Section 1187.51(b)'s prohibition on using the federal materials "to alter the treatment of a cost provided for in this subchapter [E] or the MA-11" means that the Manual does not inform how cost report information is inflated pursuant to Section 1187.91(1)(iv). They argue that neither Subchapter E nor F (which deals with cost

[27] We observe that although Providers purport to mount their argument around *Kisor*'s framework, they essentially just raise a text-based argument. *See* Providers' Brief at 46 ("the text of the regulations provides for only one reasonable meaning") (capitalization and formatting omitted). Thus, we can still consider their textual arguments, despite our rejection of *Kisor*'s framework.

reporting in MA-11s) mandates how much allowable cost is to be used for price setting pursuant to Section 1187.91(1)(iv), which is in Subchapter G's provisions for rate setting. Thus, the argument goes, there is no reason that using the Manual to supplement Section 1187.91(1)(iv) would alter the treatment of a cost in Subchapter E or in the MA-11. *See id.* (noting costs used for price-setting in Subchapter G have already been reported for complete fiscal years on the MA-11 and have either been audited or are adjusted reported costs); *see also id.* at 43 ("While 55 Pa. Code §1187.51(b) may preclude the Manual being a supplement to the treatment of allowable costs provided in the instructions for the preparation of the MA-11 cost report, its reach to the entire chapter of the 1187 regulations permits the Manual to be a supplement to the determination of the method to increase the amount of the audited allowable costs from the cost report information thereafter placed in the Database as provided for in 55 Pa. Code §1187.91(1)(iv).").

Additionally, Providers emphasize, 55 Pa. Code §1187.52(a) requires the Department to incorporate allowable costs into the NIS Database and consider those allowable costs in setting prices. *See id.* at 46.[28] In the same vein, they argue "price" is defined as "[a] derivative of [the] allowable costs[.]" *Id.*, *quoting* 55 Pa. Code §1187.2.[29] Thus, Providers argue, Section 1187.52(a) "requires the Department to consider those allowable costs in the setting of prices," including before price setting under Section 1187.91(1)(iv). *Id.* In sum, "[t]he **input** prior to price setting in 55 Pa. Code

[28] *See also* 55 Pa. Code §1187.52(a) ("The Department will incorporate a nursing facility's direct and indirect allowable costs related to the care of residents into the NIS database. The Department will consider these costs in the setting of prices.").

[29] In full, "[p]rice" is defined as "[a] derivative of the allowable costs of the net operating cost centers which has been adjusted by 117% for resident care costs; 112% for other resident related costs; and 104% for administrative costs." 55 Pa. Code §1187.2. Providers also observe "allowable costs" are defined as "[c]osts as identified in this chapter which are necessary and reasonable for an efficiently and economically operated nursing facility to provide services to MA residents." *Id.*

§1187.91(1)(iv) is the allowable cost information in the Database and the **output**, when that is forwarded to price setting in 55 Pa. Code §§1187.95, 1187.96, is still allowable cost information." *Id.* at 46-47 (emphasis in original). Because under Section 1187.51, "the [CMS Pub. 15-1] Manual can be used to determine the allowable costs of nursing facilities[,]"[30] and is a "supplement to **all** parts of the Chapter 1187 regulations, including 55 Pa. Code §1187.91(1)(iv)," the CMS Pub. 15-1 (which uses a mid-point to mid-point methodology) "provides the method to determine the allowable costs that become the **output** for price setting." *Id.* at 47 (emphasis in original); *see id.* at 50 ("The [CMS Pub. 15-1] Manual provides the 'how to' for determining the output of allowable costs from the 55 Pa. Code §1187.91(1)(iv) computation for consideration in setting [p]rices.").

Providers add that the other textual limitations on the use of the CMS Pub. 15-1 Manual do not apply to the inflation of costs under Section 1187.91(1)(iv). First, they note Section 1187.91(1)(iv) does not involve costs that are "nonallowable" (for which Section 1187.51(b) prohibits use of the CMS Pub. 15-1). Providers observe "[t]he costs involved here are [ ] expressly addressed in 55 Pa. Code §1187.91(1) as the net operating costs and total costs that are subject to indexing." *Id.* at 48 (citing the Department's argument that "cost report information" in Section 1187.91(1)(iv) refers to "total costs"). Providers further argue the initial language in Section 1187.51(a) — "[t]his subchapter sets forth principles for determining the allowable costs of nursing facilities" — does not mean use of the CMS Pub. 15-1 is limited to Subchapter E. *Id.* at 48-49, *quoting* 55 Pa. Code §1187.51(a) (formatting omitted). They reason that holding otherwise would render superfluous the language in Section 1187.51(b), that the CMS Pub. 15-1 is "a supplement to this chapter." Finally, Providers explain that pursuant to Section 1187.103(b),

[30] "If a cost is included in this subchapter as **allowable**, the CMS Pub. 15-1 and applicable Federal regulations may be used as a source for more detailed information on that cost." 55 Pa. Code §1187.51(b) (emphasis added).

"[a]llowable operating cost for nursing facilities will be determined subject to this chapter and the *Medicare Provider Reimbursement Manual*, CMS Pub. 15-1, except that if this chapter and CMS Pub. 15-1 differ, this chapter applies." 55 Pa. Code §1187.103(b). However, they argue, "[t]here is nothing in Chapter 1187 that is inconsistent with the [CMS Pub. 15-1] Manual's uncontested method for increasing the amount of allowable costs in the Database for the price-setting step in 55 Pa. Code §1187.91(1)(iv)." Providers' Brief at 42-43. For these reasons, Providers believe the CMS Pub. 15-1 controls how costs are to be indexed under Section 1187.91(1)(iv), and the only reasonable interpretation of that provision requires a mid-point to mid-point methodology. They therefore argue the Department's contrary interpretation should not be accorded deference.

In response — and in a shift from its position below[31] — the Department argues Section 1187.91(1)(iv) is unambiguous. Reciting the relevant text — "[p]rior to price setting, **cost report information** will be indexed forward to the 6th month of the 12-month period for which the prices are set[,]" Department's Brief at 25, *quoting* 55 Pa. Code §1187.91(1)(iv) (emphasis supplied by Department) — it claims "[t]he key to resolving this dispute[ ] is the meaning of the phrase 'cost report information.'" *Id.* It observes "cost report information" is not defined in Chapter 1187. But according to the Department, consistent with the other regulations providing the case-mix rate setting methodology, "the cost report information used to set 'prices' (*i.e.*, Providers' reimbursement rates) is 'total' costs: 'the **total** resident care cost;' 'the **total** resident related cost;' and 'the **total** allowable administrative cost.'" *Id.* at 26, *quoting* 55 Pa. Code §§1187.96(a)(1)(i), (b)(1)(i), and (c)(1)(ii) (emphasis supplied by Department). "To that end," it continues, "those **total** costs are not fully incurred or established until the end date of the cost report

[31] *See* Department's Commonwealth Court Brief at 12 ("Any reasonable person can observe [an] ambiguity through a natural reading of 55 Pa. Code § 1187.91(1)(iv).").

year." *Id.* (emphasis in original). Consequently, it reasons "[b]ecause those costs are not fully incurred or established until the end-date of the cost report year . . . , the starting point of the inflation factor adjustment being the end-date of the cost report year is consistent with the plain language of the regulation and general framework of [Chapter 1187.]" *Id.* at 27. It therefore concludes "'cost report information' is unambiguous," and it asks the Court to affirm on that basis. *Id.* at 28.

The Department further refutes Providers' argument that Section 1187.51(b) controls. In addition to asserting Providers' experts' testimony is "materially irrelevant[,]" *id.* at 28 (discussed in more detail *infra*), it argues the Commonwealth Court correctly interpreted Section 1187.51(b). According to the Department, pursuant to that regulation, the CMS Pub. 15-1 and applicable federal regulations apply to "allowable costs" only, and "**may not be used to alter treatment of allowable costs** listed in a cost report." *Id.* at 29, *quoting Lutheran Home*, 318 A.3d at 186 (emphasis in original). It argues Section 1187.51(b) does not apply to the rate setting methodology or Inflation Factor calculations. *See id.*; *see also id.* at 53 ("If [the Department] had intended to apply Medicare standards to the MA rate setting subchapter, it clearly knew how to do so since it had already applied Medicare standards under the allowable program costs subchapter."). Thus, the Department asks the Court to hold Section 1187.91(1)(iv) is unambiguous and that Section 1187.51(b) has no relevance to the Inflation Factor calculation.

But even if the Court holds "cost report information" is ambiguous, the Department continues, the other factors in Section 1921(c) of the SCA support its interpretation. The Department explains the "occasion or necessity for" and "object to be obtained" by Section 1187.91(1)(iv) is "to set MA-participating nursing facility reimbursement rates." *Id.* at 30. In doing so, the Department notes, "the law 'does not demand that payments be set at levels that are sufficient to cover provider costs.'" *Id.*, *quoting Christ the King*

Manor, 730 F.3d at 308. Although the Department recognizes the "consequence of [its] particular interpretation" of Section 1187.91(1)(iv) may be that reimbursement rates do not cover all costs, it argues "that interpretive result is entirely consistent with case law[.]" *Id.* at 32.

Moreover, the Department stresses its interpretation of Section 1187.91(1)(iv) finds support in the last SCA factor, allowing consideration of "administrative interpretations[.]" 1 Pa.C.S. §1921(c)(8). The Department emphasizes that it has interpreted the regulation as providing for an end-point to mid-point methodology "since the entire case-mix rate setting methodology found in Title 55, Chapter 1187 was promulgated in January, 1996." Department's Brief at 32. It underscores that its interpretation has been in effect for almost thirty years, under both democratic and republican administrations, and it has not been changed by either the federal government or the General Assembly. The Department further notes it applied this interpretation to Providers' rates for over ten years before they brought the underlying challenge. Accordingly, it argues the factors in Section 1921(c) of the SCA support its interpretation, even if the Court holds that "cost report information" is ambiguous.[32]

[32] The Department further argues that even if the Court applied *Kisor*, its interpretation would carry the day. *See* Department's Brief at 47-52. Because we do not adopt *Kisor*, we mention these arguments only briefly because they provide additional color to the Department's position. Specifically, it argues (1) its interpretation is reasonable, given its grounding in the text, and another reasonable interpretation does not render its interpretation unreasonable; (2) its interpretation is authoritative and official, given its longstanding application; (3) its interpretation touches on the Department's substantive expertise; and (4) its interpretation reflects its fair and considered judgment, as it is not a *post hoc* rationalization or convenient litigating position. Moreover, the Department maintains that while its interpretation is grounded appropriately in Section 1187.91(1)(iv)'s text, Providers' interpretation relies primarily on their experts' opinions and a regulation that has no application in this context. *See id.* at 52-53.

2. Analysis

As explained above, to determine whether the Department's "interpretation of the regulation is erroneous or inconsistent with the regulation[,]" *Tire Jockey*, 915 A.2d at 1186, we apply the SCA.[33] We begin our analysis as we always do, with the relevant text: "Prior to price setting, cost report information will be indexed forward to the 6th month of the 12-month period for which the prices are set." 55 Pa. Code §1187.91(1)(iv). As is undisputed by the parties, we agree Section 1187.91(1)(iv) clearly provides an end-point for the Inflation Factor calculation — the mid-point of the rate year — but it is less clear about the starting point. Both sides assert that the regulation is unambiguous and clearly supports their (divergent) interpretations. We are not so sure.

Preliminarily, we dispose of Providers' argument that, by its text, Section 1187.51(b) compels application of federal Medicare principles and, in turn, a mid-point to mid-point methodology for calculating the Inflation Factor under Section 1187.91. To be sure, Providers are correct that in its first sentence, Section 1187.51(b) refers to the entire Chapter 1187: "*The Medicare Provider Reimbursement Manual* (CMS Pub. 15-1) and the Federal regulations in 42 CFR Part 489 . . . are a supplement to this **chapter**." 55 Pa. Code §1187.51(b) (emphasis added). But to their detriment, Providers seem to assume that because the CMS Pub. 15-1 is a "supplement" to Chapter 1187, it controls all aspects of MA payments to nursing facilities that are not otherwise clear from the Department's regulations. They make this logical leap without attempting to explain the extent to which the CMS Pub. 15-1 and federal regulations act as a "supplement."

[33] Since Providers do not challenge "whether the regulation is consistent with the statute under which it was promulgated[,]" *Tire Jockey*, 915 A.2d at 1186, and our analysis does not raise concerns about an inconsistency with the statute, we do not separately address that prong of the *Tire Jockey* standard.

Unfortunately for Providers, the remaining text in Section 1187.51(b) plainly clarifies that the scope of its first sentence is narrower than they suggest:

> [The CMS Pub. 15-1 and relevant federal regulations] are a supplement to this chapter. **If a cost is included in this subchapter as allowable, the CMS Pub. 15-1 and applicable Federal regulations may be used as a source for more detailed information on that cost.** The CMS Pub. 15-1 and applicable Federal regulations will not be used for a cost that is nonallowable either by a statement to that effect in this chapter or because the cost is not addressed in this chapter or in the MA-11. The CMS Pub. 15-1 or applicable Federal regulations will not be used to alter the treatment of a cost provided for in this subchapter or the MA-11.

Id. (emphasis added).

The first sentence on which Providers hang their hat is clearly limited by the text that follows. "Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.'" *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (quotation and citation omitted). Here, the explicit specification for how the CMS Pub. 15-1 **may**[34] be used — "as a source for more detailed information on [an allowable] cost" — makes clear the Department is not required to apply those federal resources for other unspecified purposes. Indeed, if the first sentence of Section 1187.51(b) were read as requiring that the CMS Pub. 15-1 and federal regulations be used to fill every conceivable gap left open by the Chapter 1187 regulations, the second sentence of Section 1187.51(b) would be rendered surplusage; there would be no need to state that those federal resources may be used to provide more information on allowable costs. This same reasoning undermines Providers' argument that Section 1187.103's reference to the CMS Pub. 15-1 supports its mandatory application to the entirety of Chapter 1187; if Section 1187.51(b) establishes the CMS

[34] To the extent Section 1187.51(b) provides the CMS Pub. 15-1 Manual does apply, the regulation uses the permissive "may," undermining Providers' argument it **must** be used by the Department when calculating the Inflation Factor under a completely different provision. *See Lorino v. Workers' Comp. Appeal Bd.*, 266 A.3d 487, 493 (Pa. 2021) ("the term 'may' connotates an act that is permissive, but not mandated or required").

Pub. 15-1 must be applied to the whole chapter, the Department would not need to specify that "[a]llowable operating cost for nursing facilities will be determined subject to this chapter and the *Medicare Provider Reimbursement Manual*, CMS Pub. 15-1[.]" 55 Pa. Code §1187.103(b).

In the same vein, "this Court has long recognized that as a matter of statutory interpretation, 'although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.'" *Thompson*, 233 A.3d at 1277, *quoting Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001). "Thus," our courts have explained, "when a statute contains a given provision, the omission of such a provision from a similar section is significant to demonstrate a different legislative intent." *Commonwealth v. Henck*, 342 A.3d 726, 734 (Pa. Super. 2025); *see also Sivick v. State Ethics Comm'n*, 238 A.3d 1250, 1263 (Pa. 2020) (agreeing with appellant that "[i]n importing [a] phrase" from one definition into a different statute "and adding it to [a] less expansive reference[,] the [lower] court committed the cardinal sin of adding language that the legislature presumably omitted deliberately"). The fact that Sections 1187.51(b) and 1187.103(b) specifically permit or require use of the CMS Pub. 15-1 — while the Department omitted any reference to the CMS Pub. 15-1 in Section 1187.91(1)(iv) — suggests the Department did not intend for the federal publication to control the methodology for calculating the Inflation Factor.

Nor are we persuaded by the Providers' argument that because allowable costs are input into the NIS database pursuant to Section 1187.52 — and the NIS database is the source of information eventually used for the inflation process in Section 1187.91(1)(iv) — the CMS Pub. 15-1 controls the inflation methodology. Section 1187.51 plainly references the use of the CMS Pub. 15-1 for details about **individual** costs. *See* 55 Pa. Code §1187.51(b) ("If **a cost** is included in this subchapter as allowable, the CMS

Pub. 15-1 . . . may be used as a source for more detailed information on **that cost**.") (emphasis added). But it simply does **not** provide that the CMS Pub. 15-1 must be used to determine inflation methodologies later in the rate setting process, nor does it equate "allowable costs" to the "cost report information" referenced in Section 1187.91(1)(iv).

Moreover, contrary to Providers' arguments, this interpretation does not conflict with the fact Section 1187.51(b) references the entire "chapter" rather than a specific subchapter. Certainly, Sections 1187.51(b) and 1187.103(b) live within Chapter 1187, so the CMS Pub. 15-1 and federal regulations can still be considered a "supplement" to Chapter 1187, even if their mandatory application is otherwise limited by the regulatory text. For all of these reasons, we agree with the Commonwealth Court's determination Section 1187.51(b) "does not address or apply to rate setting methodology" and "the Department did not intend for [it] to apply in any way to supplement its Inflation Factor calculations." *Lutheran Home*, 318 A.3d at 186.

Unbound by the CMS Pub. 15-1, we turn back to the text of Section 1187.91 itself. Here, we agree with the Department that the meaning of "cost report information" necessarily informs what it means for "cost report information [to] be indexed forward[.]" 55 Pa. Code §1187.91(1)(iv). If, as the Department argues, "cost report information" refers to year-end totals, then its interpretation (applying the index assigned to the end of the cost report year) makes some sense, and it would be a reasonable interpretation.

The term "cost report information" is not defined, but its meaning is clarified by the additional context given in Section 1187.91: "[t]he net operating prices will be established based on . . . [a]udited nursing facility costs for the 3 most recent years available in the NIS database adjusted for inflation. This database includes audited MA-11 cost reports that are issued by the Department on or before March 31 of each July 1 price setting period." 55 Pa. Code §1187.91(1)(i)(A). On this point, even Providers seem to agree the

"cost report information" the Department uses for this step comes from the NIS Database (which in turn reflects the audited allowable costs[35]), and that they are total costs. *See* Providers' Brief at 48 ("[t]he costs involved here are also expressly addressed in 55 Pa. Code §1187.91(1) as the net operating costs and total costs that are subject to indexing[,]" and "[t]he Department's own Position Paper below states that it defines 'cost report information,' the term used in 55 Pa. Code §1187.91(1)(iv), as 'total costs'").

Indeed, this conclusion is supported by the interplay between Sections 1187.91 and 1187.96. *See* Department's Brief at 26 (arguing this is "[c]onsistent with the regulations that set forth the broader case-mix rate setting methodology"). Section 1187.96, which sets out "[p]rice- and rate-setting computations[,]" provides that "[u]sing the NIS database **in accordance with** this subsection and **§1187.91**, the Department will set prices" for each of the relevant cost centers, applying calculations that use "**total** resident care cost[,]" "**total** other resident related cost[,]" and "**total** allowable administrative cost[.]" 55 Pa. Code §1187.96(a)(1)(i), (b)(1)(i), (c)(1)(2) (emphasis added). Considering Section 1187.96's cross-reference to Section 1187.91's treatment of the NIS database, it makes sense the information actually used for the calculations employed in Section 1187.96 (total costs) would inform the meaning of the "cost report information" being indexed pursuant to Section 1187.91. Given this support in the regulatory text — in addition to the lack of any argument or evidence to the contrary — we proceed with the understanding that "cost report information" reflects year-end totals.

From there, it follows that the Department's interpretation is a reasonable reading of the text; if "cost report information" represents year-end totals, it makes sense to apply the index from the end of that year, once those totals are finalized. But just because the

[35] *See* 55 Pa. Code §1187.77(d)-(e) ("The Department will conduct an audit of each acceptable cost report . . . . The auditor will certify to the Department the allowable cost for the nursing facility to be input into the NIS database . . . .").

Department's interpretation is reasonable does not mean it is the **only** reasonable way to inflate the total costs comprising "cost report information." Notwithstanding our holding above that Section 1187.51(b) does not require the inflation methodology in the CMS Pub. 15-1, in the absence of clearer language in Section 1187.91(1)(iv), we do not foreclose the possibility that the regulation could otherwise require another inflation calculation methodology, such as a mid-point to mid-point methodology, to inflate those total costs. Thus, Section 1187.91(1)(iv) is ambiguous, and we must look for other indicia of the Department's intent. For that, we turn to the factors in 1 Pa.C.S. §1921(c).

Regarding the "occasion and necessity for" the regulation and the "object to be attained[,]" 1 Pa.C.S. §1921(c)(1) and (4), it is clear the specific purpose of Section 1187.91(1)(iv) is to inflate costs from prior years so those costs can be used to set prices/rates prospectively for the rate year. More broadly, however, since Section 1187.91(1)(iv) is part of the case-mix rate system established to effectuate Pennsylvania's state plan, it must also be read in light of the Social Security Act's requirement that state plans include methods and procedures to assure that provider payment rates are consistent with efficiency, economy, quality of care, and adequate access to providers by MA beneficiaries. *See* 42 U.S.C. §1396a(a)(30)(A); *Christ the King Manor*, 730 F.3d at 297. The crux of Providers' argument is that the Department's interpretation of Section 1187.91(1)(iv) is not the most accurate way to inflate costs because it fails to account for inflation that occurs throughout the year by leaving out six months of inflation. *See* Providers' Brief at 12 (citing their experts' testimony). Even if we agreed the Department's interpretation does not use the method that will most

accurately predict a provider's costs for the rate year,[36] it is apparent that accuracy is not the countervailing goal of the case-mix rate system.

As the Department explains, "[i]n setting MA-participating nursing facility reimbursement rates, the law 'does not demand that payments be set at levels that are sufficient to cover provider costs.'" Department's Brief at 30, *quoting Christ the King Manor*, 730 F.3d at 308. Providers offer no persuasive rebuttal to this point. Regarding the goals in Section 30(A), the Department's methodology appears to be both efficient and economic, choosing one point at which to inflate total costs for the year, presumably without over-inflating those costs. To the extent Providers argue the Department's inflation methodology results in an underestimation of future costs, they fail to demonstrate such an underestimation negatively impacts quality of care or results in inadequate access to providers by MA beneficiaries. *See* 42 U.S.C. §1396a(a)(30)(A).[37]

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[36] We observe some gaps in Providers' argument on this point. First, although we recognize some costs are incurred steadily throughout the year (salaries, for example), Providers have not pointed us to anything in the record showing that all costs are incurred at such regular intervals. For instance, if costs in a certain category were all incurred at the end of the year, then it is unclear why it would matter that the Department did not account for inflation in the beginning of the year. And even if accuracy were the prevailing goal, Providers do not explain why their mid-year to mid-year approach would provide the most accuracy. If the CMS Index provides indices quarterly, why wouldn't individual costs have to be inflated based on the index for the quarter in which they were incurred?

[37] On this point, we acknowledge the Department's argument that in *Christ the King Manor II*, the Third Circuit affirmed that CMS's approval of Pennsylvania's 2014 plan amendment adopting the BAF was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Christ the King Manor v. Sec'y U.S. Dep't of Health and Human Servs.*, 673 Fed. App'x 164, 170-72 (3d Cir. 2016) (applying APA's standard of review). Although the Third Circuit did not perform an in-depth evidentiary review in its non-precedential decision (the relevant issue was whether CMS could look at information gathered when Pennsylvania previously applied the BAF, even though the court held approval of that prior plan amendment was arbitrary and capricious), the Department's point is well-taken: If Pennsylvania's reimbursement rates were sufficient for Section 30(A)'s purposes after the BAF was applied to lower rates, then the calculations occurring prior to application of the BAF presumably derived a sufficient result as well.

For similar reasons, Providers have failed to develop a compelling argument concerning the consequences of the Department's interpretation. *See* 1 Pa.C.S. §1921(c)(6). Certainly, they offered expert testimony demonstrating they would be reimbursed more under a mid-point to mid-point methodology, but they have not established negative consequences impacting the goals of the MA Program if the Department's interpretation were to continue. Nor do they demonstrate the positive consequences of a mid-point to mid-point methodology, or how it would promote the regulation's purposes.[38] Thus, the considerations in Sections 1921(c)(1), (4), and (6) weigh slightly in the Department's favor (or at the very least, they do not undermine the Department's interpretation).

Regarding "[t]he former law, if any," 1 Pa.C.S. §1921(c)(5), we observe the BHA found "[t]he Department's end-point to mid-point inflation methodology was a hold over from the prior cost-based system and has been applied since the beginning of the case-mix payment system's inception in 1996." BHA Order & Adjudication, 3/1/23, at 36, *citing* N.T. Hearing, 7/18/18, at 88 (Laracuente testifying "[t]o the best of my knowledge, that was the process and the length of inflation time followed in the prior cost base system . . . and we continued that into the modeling process of the 1187 calculation").[39] If the

[38] Indeed, despite advocating that the Court use all the tools in the interpretive toolbox, Providers do not develop any arguments pertaining to the specific considerations listed in 1 Pa.C.S. 1921(c).

[39] We acknowledge Providers previously argued "Laracuente's memory was accurate as to the starting point for the inflation of costs under the cost-based system being the end point of each cost report but her testimony is not correct as to the 'length of inflation time' used." Providers' Reply Brief in Support of Sustaining Their Appeals, 2/7/19, at 4. Providers pointed to 55 Pa. Code §1181.66(a), a regulation for setting ceilings on allowable net operating costs, arguing it was "[t]he only applicable regulation[ ] for inflation of this cost report data" under the cost-based system. *Id.* at 3. They acknowledged Section 1181.66(a) used an end-date as the starting point, *see* 55 Pa. Code 1181.66(a)(2) ("This factor will adjust for inflation for the period from the end-date of each cost report to the common date."), but they argued the Department "**specifically** provide[d] for the last six months of inflation time 'to account for the period from the common date to the end date for which these ceilings will be in effect[,]'" thereby establishing an end-point to end-
(continued…)

Department wanted to change course when it implemented the case-mix rate system, it would have known to do so clearly. It did not, suggesting an intent to maintain the status quo. This factor therefore weighs in favor of the Department's interpretation.

Finally, we find the "administrative interpretation[ ] of" Section 1187.91(1)(iv) also supports the Department. 1 Pa.C.S. §1921(c)(8). As we just explained, the "end-point to mid-point inflation methodology . . . has been applied since the beginning of the case-mix payment system's inception in 1996." BHA Order & Adjudication, 3/1/23, at 36. The Department's consistent application of the end-point to mid-point methodology is indicative of the substantive meaning of Section 1187.91(1)(i), and not just because it has been so longstanding (although thirty years of consistent application is nothing to sneeze

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point length of inflation. Providers' Reply Brief in Support of Sustaining Their Appeals, 2/7/19, at 4 (emphasis in original), *quoting* 55 Pa. Code §1181.66(a)(3). There is an obvious retort: If the Department knew how to account for inflation over those extra six months, wouldn't its decision not to include such language in Section 1187.91 suggest it did not intend to account for those extra six months? Moreover, before this Court, Providers again point to Section 1181.66, arguing it provides for "more than a full-year of inflation[,]" and that the Department "provided no other testimony or exhibits during the hearing to explain or justify its interpreting the regulation in question to index for less than a full year of inflation." Providers' Brief at 13. This argument seems to misapprehend how Section 1187.91(1)(iv) operates. To establish net operating prices under Section 1187, the Department generally uses "[a]udited nursing facility costs for the **3 most recent years** available in the NIS database adjusted for inflation." 55 Pa. Code §1187.91(1)(i)(A). Thus, the general rule provides a baseline of three years of cost report information, all of which is being inflated (just not using the index Providers would prefer). Moreover, the NIS database "includes audited MA-11 cost reports that are issued by the Department on or before March 31 of each July 1 price setting period[,]" *id.*, and the Department gets one year to audit each cost report, *see id.* at §1187.77(d) ("The Department will conduct an audit of each acceptable cost report . . . within 1 year of the Department's acceptance of the cost report."). In this case, for instance, Lutheran Home's most recent audited cost report as of 3/31/07 was cost report year end 12/31/04, and it went back to cost report year end 12/31/02. OLTL Notice to Lutheran Home, 1/24/08, at 4 (unpaginated) (Ex. G). For Siemons' Lakeview, the most recent audited cost report as of 3/31/07 was cost report year end 6/30/05, and it went back to cost report year end 6/30/03. *See* OLTL Notice to Siemons' Lakeview, 1/24/08, at 4 (unpaginated) (Ex. M). It is therefore unclear why Providers argue the Department's interpretation "index[es] for less than a full year of inflation." Providers' Brief at 13.

at). As well, it is significant that the Department has applied this methodology from the get-go. To spell it out even more clearly, when the Department promulgated Section 1187.91 (and the case-mix rate system as a whole), it applied its regulation as requiring the end-point to mid-point methodology. As a matter of common sense, this strongly suggests that when the Department promulgated Section 1187.91(1)(i), it intended the use of that methodology. This is not some *post hoc* rationalization or merely convenient litigating position, *see Harmon*, 207 A.3d at 300, it is the Department's well-established practice, which it started contemporaneously with its enactment of the regulation at issue. And in this case, where our object "is to ascertain and effectuate the intention of the" Department as the drafter, 1 Pa.C.S. §1921(a), the Department's actions speak loudly. Thus, 1 Pa.C.S. §1921(c)(8) weighs heavily in favor of the Department's interpretation.

In sum, despite the fact 55 Pa. Code §1187.91(1)(iv) is ambiguous, on balance, the relevant factors in 1 Pa.C.S. §§1921(c) support the use of an end-point to mid-point methodology. We therefore hold the Department's interpretation of 55 Pa. Code §1187.91(1)(i) is correct.[40] Because our application of the SCA provides an answer, there is no need to turn to deference principles.[41]

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[40] The dissent suggests we should vacate and remand this case for "further proceedings" to "flesh[ ] out the record . . . consistently with a standard that 'defers' to no party[.]" Dissenting Opinion at 4 (Wecht, J.). Respectfully, it is unclear why the dissent believes additional record development is necessary to resolve this legal issue. If anything, the belief it was entitled to deference would have prompted the **Department** to rest on its laurels, not Providers. But the Department did not do so, and as explained above, a regulatory construction analysis confirms the Department's position is correct. Moreover, Providers argued (both in this Court and in the Commonwealth Court) that deference principles should not apply to this case. They have had ample opportunity to develop their arguments as to why Section 1187.91(1)(iv) should be interpreted in their favor in the absence of deference principles.

[41] According to the dissent, we "affirm[ ] the Commonwealth Court's decision to give deference to DHS's interpretation of its own rule." Dissenting Opinion at 4 (Wecht, J.). We expressly do not. As illustrated at length above, we have not given the Department (continued…)

d. The BHA's and Commonwealth Court's treatment of the expert testimony

1. Parties' Arguments

Providers argue the Commonwealth Court erred by discounting the BHA's findings of fact pertaining to the expert witnesses. They assert that "[u]ncontested findings of fact, where supported by the record, are conclusive on appeal[.]" Providers' Brief at 52, *citing Obimak Enter. v. Dep't of Health*, 200 A.3d 119, 128 (Pa. Cmwlth. 2018). They further explain the "BHA's conclusions of law must be consistent with the findings of fact on which those conclusions are based[.]" *Id.*, *citing*, *inter alia*, *Oriole Chem. Carriers, Inc. v. W.C.A.B. (Ambler)*, 720 A.2d 842, 844 n.3 (Pa. Cmwlth. 1998). Providers also observe the Commonwealth Court has previously held an agency abused its discretion when it "ignored substantial, uncontradicted evidence in the record and the strong inferences drawn from them." *Id.* at 53, *citing Philly Int'l Bar, Inc. v. Pa. Liquor Control Bd.*, 973 A.2d 1, 3 (Pa. Cmwlth. 2008). Accordingly, they argue, because the BHA's findings of fact established Ziegler and LeBreton provided "uncontradicted credible testimony," the Commonwealth Court should have accepted the experts' testimony that the Department's methodology was unreasonable and inaccurate, as well as LeBreton's testimony that the Medicare Principles in the CMS Pub. 15-1 should apply (meaning a mid-point to mid-point methodology should be used to measure inflation).

In response, the Department insists the Commonwealth Court correctly decided that the experts' testimony need not be afforded controlling weight. It agrees with the lower court that "a mere difference of opinion does not render [the Department's] interpretation unreasonable[,]" and that the factfinder is free to accept or reject the testimony of any witness, even an expert. Department's Brief at 54. "In sum," the

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deference in this case because it was not needed. Our interpretation of Section 1187.91(1)(iv) rests solely on our analysis of the factors in Section 1921(c).

Department concludes, "while those Providers' experts may have been sincere in their conclusions, that sincerity does not compel BHA or Commonwealth Court or this Court to adopt those experts' conclusions wholesale, particularly when the ultimate question presented is one of regulatory interpretation, which is legal in nature and beyond the purview of expert opinion." *Id.* at 55.

2. Analysis

We need not spill much ink over this argument. As the Commonwealth Court aptly emphasized, "[t]he ALJ, and, by extension, the BHA, found Ziegler's and LeBreton's **opinions** uncontradicted and credible[.]" *Lutheran Home*, 318 A.3d at 185 n.25 (emphasis in original). To be sure, the BHA's findings of fact stated that each expert "provided uncontradicted credible testimony of his **opinion** that the Department's end-point to mid-point methodology for indexing forward and inflating allowable costs was unreasonable and inaccurate." BHA Order & Adjudication, 3/1/23, at 9 (emphasis added). But the BHA did not find as fact that the experts offered uncontradicted and credible testimony establishing Section 1187.91(1)(i) requires a mid-point to mid-point methodology. Nor could it have, since, clearly, such a question is an issue of law. We have no doubt Providers' experts testified truthfully to their opinions and that they sincerely disagreed with the Department's methodology. But such testimony does not necessitate holding in Providers' favor.[42]

IV. Conclusion

In sum, we affirm the Commonwealth Court's determination that the Department's end-point to mid-point inflation methodology is correct, albeit pursuant to a slightly

[42] Indeed, there is a marked irony in the fact Providers spend much of their brief asking the Court to step away from agency deference principles because courts should "determin[e] the 'best reading' of laws and regulations," Providers' Brief at 36 (emphasis omitted), while simultaneously arguing their experts' opinions should control the outcome of this case.

different analysis. Although we decline to adopt the United States Supreme Court's standard announced in *Kisor*, we clarify how courts are to consider agencies' interpretations of their own ambiguous regulations in conformance with our case law and the SCA. In this case, although 55 Pa. Code §1187.91(1)(i) is ambiguous as to the starting point for calculating the Inflation Factor, the considerations in Section 1921(c) of the SCA lead to the conclusion that the Department's interpretation is correct. We affirm.

Chief Justice Todd and Justices Mundy and Brobson join the opinion.

Justice McCaffery concurs in the result.

Justice Donohue files a concurring and dissenting opinion.

Justice Wecht files a dissenting opinion.

[J-99-2025] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LUTHERAN HOME AT KANE AND SIEMON'S LAKEVIEW MANOR ESTATE	:	No. 7 MAP 2025
	:	Appeal from the Order of the Commonwealth Court at No. 303 CD 2023 dated June 4, 2024, Affirming the Decision of the Department of Human Services, Bureau of Hearings and Appeals at Nos. 090-08-0113, 090-08-0130, 090-08-0134, 090-08-0157, 090-08-0158, 090-08-0159, 090-08-0164, 090-08-0170, 090-08-0174, 090-08-0176, 090-08-0186, 090-08-0187, 090-08-0188, 090-08-0192, 090-08-0193, 090-08-0200 and 090-08-0213 dated March 1, 2023
v.	:	
DEPARTMENT OF HUMAN SERVICES	:	
APPEAL OF: LUTHERAN HOME AT KANE AND SIEMON'S LAKEVIEW MANOR ESTATE, SUSQUEHANNA VALLEY NURSING AND REHABILITATION CENTER, RHEEMS NURSING & REHABILITATION CENTER, ELLEN MEMORIAL HEALTH CARE CENTER, AND ELIZABETHTOWN NURSING AND REHAB CENTER	:	
	:	ARGUED: November 20, 2025

CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: October 1, 2026**

I agree with the result reached by the learned Majority based on its thorough interpretation of the text of 55 Pa. Code §1187.91(1)(iv) (the "Regulation").[1] It correctly identifies an ambiguity in the Regulation which is designed to, among other things, set

[1] The provision states, in relevant part:

> (iv) Prior to price setting, cost report information will be indexed forward to the 6th month of the 12-month period for which the prices are set. The index used is the 1st Quarter issue of the CMS Nursing Home Without Capital Market Basket Index.

55 Pa. Code § 1187.91(1)(iv).

forth the calculation of medical assistance reimbursement rates for long-term care skilled nursing facilities to include an inflation factor. "Cost report information" as used in the Regulation is an undefined term capable of at least two reasonable interpretations and, as such, it is ambiguous. *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905-06 (Pa. 2016). Applying the Statutory Construction Act[2] to discern the meaning of the term, Majority Op. at 6-61, the Majority concludes that "cost report information" as used in the Regulation reflects year end totals reported by the providers. *Id*. at 55. As a result, the Majority holds that the Department's interpretation of the Regulation is correct. *Id*. at 61.

I depart from the Majority because despite its recognition that the Statutory Construction Act must be used to interpret administrative rules,[3] the Majority insists that there continues to be a role for deference to an administrative agency's interpretation of its own regulation and that our precedent requiring agency deference is not inconsistent with application of the Statutory Construction Act because the two can be harmonized. *Id*. at 42-43 n.26. So here, the Majority states that "because our application of the SCA provides the answer, **there is no need to turn to deference principles**." *Id*. at 61 (emphasis added). Since the Majority makes clear its view that deference principles must remain a part of our jurisprudence, I can only read this statement to mean that if a regulation remains ambiguous after application of all of the tools in the Statutory Construction Act, then deference is to be afforded to the agency's interpretation of its own regulation.

If I am correct in my reading of the Majority opinion, this treatment of the role for deference to an agency's interpretation of its own regulation is strikingly similar to the role for such deference announced by consensus of the majority in *Kisor v. Wilkie*, 588 U.S.

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[2] 1 Pa.C.S. §§ 1501-1991 ("Statutory Construction Act" or "SCA").

[3] *Id*. at 44.

558 (2019). *Kisor* requires that deference not be afforded to the agency interpretation unless the regulation is genuinely ambiguous. *Id*. at 574. So it seems does the Majority.

The Majority declines to adopt *Kisor*'s framework because it "does not translate onto Pennsylvania's method for interpreting the text of regulations which [ ] is provided by the General Assembly in the SCA." Majority Op. at 38. The Majority recognizes that the *Kisor* method for determining genuine ambiguity is incompatible because it requires a court, before considering the agency interpretation, "to exhaust all the traditional tools of construction." Majority Op. at 41 (quoting *Kisor*, 588 U.S. 574-75) ("To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, **in all ways it would if it had no agency to fall back on**.") (emphasis added). Because Section 1921(c)(8) of our Statutory Construction Act makes consideration of the agency's interpretation a tool to discern the meaning of a regulation and that treatment is not equivalent to *Auer* deference,[4] it plays an earlier role in interpretating an ambiguous regulation. *Id*. This rejection of *Kisor* and the reason for doing so is right on the money. However, the Majority's conclusions in this regard are irreconcilable with its later suggestion that when all of tools of statutory construction fail, the fallback is to give deference to the agency's interpretation of its own regulation. *Id*. at 61.

Section 1921(c) of the Statutory Construction Act, which delineates interpretive rules to discern the intent of the legislature when a statute is ambiguous, is equally applicable to discerning the intent of the drafters of ambiguous administrative regulations. 1 Pa.C.S. § 1502(a)(1)(ii); 1 Pa. Code § 1.7. The Statutory Construction Act offers eight points of analysis for discerning the intent of the drafters[5] and, as noted by the Majority,

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[4] *Auer v. Robbins*, 519 U.S. 452 (1997).

[5] According to the Statutory Construction Act,

(continued…)

the factors are not prioritized one over another. Majority Op. at 40. One of the factors to be considered is the "administrative interpretations of such [regulation.]" 1 Pa.C.S. § 1921(c)(8), 1502(a)(1)(ii).

Contrary to the Majority's view, the Statutory Construction Act and agency deference cannot be harmonized. The insistence on shoehorning the two-step analysis articulated in *Tire Jockey*[6] into regulatory interpretation under the Statutory Construction Act[7] lies at the heart of my disagreement with the Majority because it continues to embed agency deference in our judicial function of interpreting the law expressed in agency regulations.

The Majority recognizes that regulatory interpretation presents a question of law for which our review is plenary and de novo but, in contradiction, insists on conducting that review in the context of the two-part analysis' articulated in *Tire Jockey*: (1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and

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> (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
>
> > (1) The occasion and necessity for the statute.
> > (2) The circumstances under which it was enacted.
> > (3) The mischief to be remedied.
> > (4) The object to be attained.
> > (5) The former law, if any, including other statutes upon the same or similar subjects.
> > (6) The consequences of a particular interpretation.
> > (7) The contemporaneous legislative history.
> > (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921(c).

[6] *Tire Jockey Serv., Inc. v. Dep't of Env't Prot.*, 915 A.2d 1165, 1186 (Pa. 2007).

[7] Majority Op. at 42-43 n.26.

(2) whether the regulation is consistent with statute under which it was promulgated. Majority Op. at 42-43 (internal citations omitted). According to the Majority, in addressing the first factor, the only one at issue in this case, courts are to use the process mandated by the Statutory Construction Act and specifically Section 1921(c) where the language is ambiguous. Majority Op. at 43. This means that the focus of the interpretative process is the agency's interpretation, not the regulation itself. In support of this proposition, the Majority relies on *Corman v. Acting Secretary of Pennsylvania, Department of Health*, 266 A.3d 452 (Pa. 2021), and *S & H Transport Inc. v. City of York*, 210 A.3d 1028 (Pa. 2019). However, both of these cases simply stand for the proposition that the Statutory Construction Act is used to construe the terms of an ambiguous administrative regulation. Obviously, the focus of the analysis is not on the agency's interpretation of a regulation since that is one of the factors considered in discerning the drafter's intent in the Section 1921(c) analysis. Our role is to determine the meaning of the text of the regulation.

The Majority's ability to discern the meaning of the text of the regulation without resort to deference principles highlights the problem with the Majority's insistence on maintaining deference to an agency as part of our jurisprudence in interpreting regulations. The Majority is forced to create a role for deference in some type of case and implies that it comes into play where the application of the Statutory Construction Act fails to give meaning to a regulation. In other words, when the agency's interpretation of its regulation as one of the interpretive factors under Section 1921(c)(8) does not shed light on the intent of the agency in promulgating the regulation so as to assist in interpreting the text of the regulation, the court should then elevate the agency's interpretation by giving it deference in saying what the regulation means. This is nonsensical and contrary to our established law when encountering indecipherable

language after engaging in the interpretation process.[8] The Statutory Construction Act and deference to an agency's interpretation of its own regulation cannot be harmonized because to do so requires elevating an agency's interpretation to an outcome determinative status in the interpretive process in contravention of the Statutory Construction Act which gives no such status to an agency's interpretation.

This Court's opinion in *Department of Public Welfare v. Forbes Health System*, 422 A.2d 480 (Pa. 1980), where we decided to follow the lead of the United States Supreme

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[8] The Statutory Construction Act does not speak to a situation where the tools of construction fail, but we have. When a statute, or by extension, a regulation involves enforcement under the criminal law, it will be found unconstitutional if it's "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Commonwealth v. Davidson*, 938 A.2d 198, 207 (Pa. 2007) (quoting *Commonwealth v. Cotto*, 753 A.2d 217, 220 (Pa. 2000)). The doctrine is premised on "due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning." *Commonwealth v. Ludwig*, 874 A.2d 623, 628 (Pa. 2005) (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974)). A void-for-vagueness challenge flows from both the Fourteenth Amendment of the U.S. Constitution and Article I, Section 9 of the Pennsylvania Constitution. *See Commonwealth v. Barud*, 681 A.2d 162, 163 (Pa. 1996).

More generally, the Court has articulated the following general principle with regard to indiscernible statutory language: "Where a statute is 'so vague, indefinite, and uncertain that the courts are unable to determine, with any reasonable degree of certainty what the Legislature intended, or is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, it will be declared inoperative.'" *Willcox v. Penn Mut. Life Ins. Co*., 55 A.2d 521, 528 (Pa. 1947) (quoting *Miller v. Belmont Packing & Rubber Co*., 268 Pa. 51, 63, 110 A. 802, 806 (Pa. 1920)). In *Wilcox*, the Court attempted to interpret the Community Property Law of 1947 but concluded that the Law was inoperative and void because the Court could not rationally derive meaning from the terms of the Law. *Id*. at 531 ("It follows, therefore, that the Community Property Law is not only vague, indefinite and uncertain but so incomplete, conflicting and inconsistent in its provisions that it is incapable either of rational interpretation or of judicial enforcement and consequently, under the principle previously referred to, it must be held to be inoperative and void.").

Wilcox was decided under the Statutory Construction Act of 1937, which was later repealed and replaced with the current Act in 1972. However, the factors for resolving ambiguity in the 1937 Act were the same as the factors currently set forth in the Act. *See Clearfield Borough v. Clearfield Borough Park Auth*., 285 A.2d 532, 534 (Pa. Commw. 1971), *aff'd*, 301 A.2d 372 (Pa. 1973) (citing 46 P.S. § 551).

Court in affording deference to an administrative agency's interpretation of its own regulation was a late coming and unexplained departure from our prior adherence to the application of the Statutory Construction Act for such interpretations. As reported by the Majority, deference to administrative agencies' interpretations of their own regulations is commonly traced back to the United State Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co*.[9] Majority Op. at 16. It took thirty-five years for this Court to reference *Seminole Rock* and, without any articulated reason, it adopted its holding as enunciated in *United States v. Larinoff*, 431 U.S. 864, 872 (1977).[10]

In contrast, in 1979, one year prior to *Forbes*, this Court, without reference to agency deference, decided *Department of Environmental Resources v. Locust Point Quarries*, 396 A.2d 1205 (Pa. 1979), a case involving the interpretation of a Department of Environmental Resources regulation relating to fugitive air emissions under the Air Pollution Control Act. Instead, this Court relied on the Statutory Construction Act in its interpretative analysis noting its application to regulations codified in the Pennsylvania

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[9] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (explaining that when interpreting an administrative regulation, "the ultimate criterion is the administrative agency's interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

[10] The *Forbes* Court held:

> In reviewing an administrative agency's interpretation of its own regulations, courts are governed by a two-step analysis. First, "[i]n considering administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" [*Larinoff*, 431 U.S. at 872 (quoting *Seminole Rock*, 325 U.S. at 414)]. Second, the regulations "must be consistent with the statute under which they are promulgated." *Id*. at 873. See also, *Commonwealth v. Beck Electric Constr*[.]*, Inc.*, 403 A.2d 553 (Pa. 1979).

Forbes, 422 A.2d at 482. This is the two-step analysis repeated in *Tire Jockey*.

Code. *Id*. at 1208 & n.8. This Court considered the Agency's interpretation of the regulation but did not elevate it in the interpretative process. *Id*. at 1209-10.[11] As for our current regime, the Majority recognizes that in recent cases, this Court has stressed the point that courts are the ultimate arbiters of what a regulation means and that we use the Statutory Construction Act to guide our analysis. Majority Op. at 31 (collecting cases). This is precisely the interpretive framework we used prior to *Forbes* as reflected in *Locust Point Quarries*.

And yet today, in a case where the ambiguity in the Regulation was resolved without affording any deference to the agency's interpretation of it, the Majority, hellbent on salvaging agency deference, implies that deference is due an agency's interpretation when the meaning of a regulation cannot be determined using the Statutory Construction Act. The Majority Opinion, like all of our precedents upon which it relies, does not answer the core question of why deference should be afforded to the agency's interpretation of an ambiguous (or hopelessly ambiguous) regulation. If one accepts the fundamental proposition that it is the obligation of the courts to declare the meaning of laws,[12] there is

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[11] The *Locust Point Quarries*' Court distinguished a challenge to the reasonableness of the regulation. Noting that regulations implementing the Air Pollution Control Act are promulgated pursuant to a grant of legislative power, the Court explained that they enjoy a presumption of reasonableness such that courts refuse to substitute their own judgment for that of agencies possessing technical expertise absent a showing that the agency arbitrarily and unreasonably exercised the police power. *Locust Point Quarries*, 396 A.2d at 1210. To prevail in such a challenge, it required establishing that the regulation at issue was not related to the objective of the Air Pollution Control Act, a burden not undertaken by the challenger.

[12] *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Hubley's Lessee v. White*, 2 Yeates 133, 146 (Pa. 1796) ("We cheerfully disclaim all legislative power; but it will not be denied that we possess the right of putting such construction on the acts of the legislature, as appears to us best to accord with their intention, either express or implied. We cannot construe a law differently from the plain clear words of it, under any ideas of convenience or equity.") (internal citations omitted).

no role for deference to the interpretation of the law by an administrative agency. Deference is antithetical to our responsibility to resolve the ambiguity in the language and declare what the text means.

It is clear that our deference jurisprudence is derived from United States Supreme Court precedent so one would think that our extension of deference to administrative interpretations is for the same reasons as the federal high court. Justice Kagan, in her opinion in *Kisor*, clearly articulated the source of *Seminole Rock/Auer* deference: it is 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. *Id*. at 569. Of course, this cannot be this Court's basis for extending deference to an agency's interpretation of its own regulation. We cannot make such a presumption because our General Assembly has explicitly enunciated rules for construing agency regulations and deference to an agency's interpretation is not one of them. In fact, it is no more persuasive than a variety of other factors articulated in Section 1921(c).

Deference means respect due a superior or elder, "respectful submission or yielding to the judgment, opinion, will, etc., of another[,]" "respect shown for another person, esp[ecially] because of that person's experience, knowledge, age or power[.]"[13] There is obviously no place for deference when a court engages in deciding, as a matter of law, what a regulation means. Our review is de novo and plenary. And while agencies, by definition, are subject matter experts, the subject matter of agency expertise is not in the interpretation of the law as codified. This is the expertise of courts, and it is our obligation to apply it in the interpretive process.

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[13] *Deference*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/deference (last visited July 21, 2026); *Deference*, DICTIONARY.COM, https://www.dictionary.com/browse/deference (last visited July 21, 2026); *Deference*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/deference (last visited July 21, 2026).

As for the role for deference as envisioned by the Majority, I am not aware of any case in which we were unable to discern the meaning of the text of a regulation after employing the Statutory Construction Act and the Majority does not cite to any. However, in the rare instance where this might occur, it is our obligation to declare the regulation void for vagueness or unenforceable.[14] If the Majority is correct that in such an instance we defer to the agency's interpretation, it is inviting agencies to write incomprehensible regulations because its interpretation will ultimately prevail.

For these reasons, I would take this opportunity to dispel the notion that an agency's interpretation of its own regulation is owed any deference in discerning the meaning of the regulation. Thus, while I agree with the result reached by the Majority, I dissent from its suggestion that courts should give deference to an agency's interpretation of its own regulations.[15]

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[14] *See* supra note 8.

[15] The Majority affirms the decision of the Commonwealth Court and states that it does so for "slightly different reasons." Majority Op. at 2. It is worth noting that the Commonwealth Court's opinion does not mention the Statutory Construction Act. It does not pretend to interpret the language of the regulation. Once concluding that the regulation was ambiguous, it held that the Department's interpretation was entitled to *Auer* deference. *Lutheran Home at Kane v. Dep't of Human Servs.*, 318 A.3d 164, 183 (Pa. Commw. 2024). Having so concluded, it viewed its task as whether the Department's interpretation is clearly erroneous or inconsistent with the regulation and whether it "reflect[s] [its] fair and considered judgment." *Id*. (citations omitted). Regarding the providers' experts' different methodology and rationale for computing inflation, the Commonwealth Court stated that even if the methodology may be more reasonable and accurate, that does not render the Department's methodology clearly erroneous. *Id*. at 184. Finding the Department's interpretation not clearly erroneous or inconsistent with the statute, it was entitled to deference. *Id*. at 187.

The beginning, middle and end of the intermediate appellate court's rationale was based on deference to the agency's interpretation. If the Majority's intent is to clarify the law, Majority Op. at 2, it is not helpful to suggest that its decision is based on "slightly different reasons" than that of this lower court opinion.

[J-99-2025] [MO: Dougherty, J.]
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MIDDLE DISTRICT

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	:	ARGUED: November 20, 2025

DISSENTING OPINION

JUSTICE WECHT **DECIDED: October 1, 2026**

This case is not about *Chevron* deference,[1] which never bound us and rightly has been entombed by the Supreme Court of the United States.[2] Nor is it about *Skidmore*

[1] *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that, where "legislative delegation to an agency on a particular question is implicit," "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

[2] *See Loper Bright Enterps. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron*, and holding that courts may not under the Administrative Procedure Act defer to an agency's interpretation of the law simply because a statute is ambiguous). I have often expressed my skepticism and disagreement with core aspects of *Chevron* deference, as well as with this Court's tendency to lean on that case and its progeny. *See, e.g., Snyder Bros., Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1083 (Wecht, J., concurring) (continued…)

deference,[3] which again never bound us and is essentially meaningless in any event.[4] This case is about *Auer* deference,[5] which also never bound us and now is on life support in the U.S. Supreme Court— "zombified," in Justice Gorsuch's parlance.[6]

(Pa. 2018) ("The General Assembly tells us what a law is. When that law is less than clear, we must perform our interpretive duty. In cases involving ambiguous statutory language, the interpretation suggested by an agency charged with administering the statute may be considered, but 'the meaning of a statute is essentially a question of law for the court.'"); *see also Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 710 (Pa. 2020) (Wecht, J., concurring) ("I question whether and to what extent this Court should rely upon federal law for purposes of assessing whether, when, and to what extent Pennsylvania courts should defer to Pennsylvania agency interpretations of their Pennsylvania enabling statutes."); *accord, Harmon v. Unemployment Comp. Bd. of Rev.*, 207 A.3d 292, 310 (Pa. 2019) (Wecht, J., concurring).

[3] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon 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 . . . .").

[4] *Crown Castle*, 234 A.3d at 692-93 (Wecht, J., concurring) (describing *Skidmore* as "a hopeless muddle" and observing that, "[u]npacked, [its] grand language describes nothing more than courts' approach to appellate arguments generally, an enterprise that entails no deference at all," and noting that I could "identify no Pennsylvania or federal case in which I can conclude with confidence that application of *Skidmore* deference *clearly* led to an agency-advocated ruling that the court would have rejected but for its deference" (emphasis in original)). Justice Scalia perhaps said it best when he called *Skidmore* deference "incoherent, both linguistically and practically," and observed that "[i]f one has been persuaded by another, . . . there is no room for deferral—only for agreement." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 24 n.6 (2011) (Scalia, J., dissenting).

[5] *See Auer v. Robbins,* 519 U.S. 452 (1997) (prescribing judicial deference to agencies' interpretations of their own regulations).

[6] *See Kisor v. Wilkie*, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring) ("[T]he 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." (capitalization in original)).

Should courts "defer" to agency interpretations of their own rules or regulations? No, they should not "defer." Here's what courts should do: They should interpret. They should reason. They should adjudicate. As I have previously written, when called upon to decide questions arising from apparently ambiguous agency rules, courts should respond to agency demands for "deference" by saying "Don't command me. Convince me."[7] Of course we are interested, very interested indeed, in what an agency thinks its own rule means. But the matter having been brought to court, the court will now decide. And that decision will not be made by agency fiat or by giving an agency a leg up or tiebreaker leverage. Once a bona fide question earns our discretionary review, issue is joined and the Justices' attention is focused on a matter of interpretation. It demeans the process, and the Court, to interpose in that deliberation a command for "deference," which imports a flavor of obedience to superior wisdom. Presumably, if the agency was so superior and so wise, it would have promulgated a rule that was clear and unambiguous, obviating the need for expensive and time-consuming litigation that quarrels over the terms and meaning of that rule.

Today's Majority has offered a workmanlike and fair-minded survey of the law in this area,[8] but it ultimately allows agencies to preserve their preferred litigation status,[9] a class distinction that is not supportable. All parties are invited freely and fully to press their claims before our courts. Those claims rise and fall according to their merits, not according to the identity of the speaker. I can no longer countenance agency demands

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[7] *Crown Castle*, 234 A.3d at 693 (Wecht, J., concurring).

[8] *See* Maj. Op. at 16-33.

[9] *See*, *e.g.*, *id*. at 43 (asserting that if the text of a regulation is ambiguous, the agency's interpretation "can be offered for more than persuasive value"); *cf. id*. at 60 ("1 Pa.C.S. § 1921(c)(8) [prescribing consideration of administrative interpretations] weighs heavily in favor of [DHS's] interpretation").

for elevated status. They should win or lose according to reason, not rank. With a hat tip to Justice Blackmun, "I no longer shall tinker with the machinery of" deference.[10]

In today's case, the Majority affirms the Commonwealth Court's decision to give deference to DHS's interpretation of its own rule. Perhaps DHS was right. Perhaps DHS was wrong. I express no view on that. What I do express a view on is the framework that this Court should use for decision. We should not affirm the lower court here. Given the extent to which the Commonwealth Court relied on administrative deference in this case, we cannot assume that the existing record would suffice to inform the lower court's application of the test I would prescribe. Accordingly, I would vacate and remand for further proceedings. These might reasonably include fleshing out the record to the extent deemed necessary, consistently with a standard that "defers" to no party, but rather invites all parties to muster their evidence and their advocacy to persuade the court why their view of the challenged rule is correct.[11]

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[10] *See Callin v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of writ of *certiorari*) ("From this day forward, I no longer shall tinker with the machinery of death.").

[11] The Majority's selective quotation of the above language is fashioned to suggest that I take for granted that further record development would be required on remand. *See* Maj. Op. at 60 n.40 (ascribing to me the belief that "additional record development is necessary to resolve this legal issue" (emphasis added)). But it is clear on a fair reading that I merely would not *foreclose* that prospect; I would leave it to the sound judgment of the Commonwealth Court, applying a non-deferential standard. And while Providers may "have had ample opportunity to develop their arguments" in furtherance of their own interpretation, *id*., what neither they nor we have had is the benefit of a lower court decision applying a deference-free rubric to the question.