SUPREME COURT OF PENNSYLVANIA

7 MAP 2025

**LUTHERAN HOME AT KANE and SIEMON'S LAKEVIEW MANOR ESTATE**

**v.**

**DEPARTMENT OF HUMAN SERVICES**

Appeal of: Lutheran Home at Kate 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

# Brief of Amicus Curiae the Chamber of Commerce of the United States of America in Support of Neither Side

Appeal from the Order of the Commonwealth Court entered June 4, 2024, at No. 303 CD 2023, affirming the March 1, 2023 Order of the Department of Human Services' Bureau of Hearings and Appeals

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## STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The U.S. Chamber's members have a particular interest in the interpretive principles applied to regulations. Given the breadth of regulation in this Commonwealth, virtually every business operating in the Commonwealth, large or small, has at least some portion of its work regulated by Commonwealth agencies. These businesses have a strong interest in the proper interpretation of agency regulations. Moreover, the U.S. Chamber's members have a strong interest in reaffirming the duty of courts to engage in independent and robust agency regulatory interpretations, thus ensuring that each branch of government stays in its respective lane.

No one other than the U.S. Chamber, its members, or its counsel paid for the preparation of this brief or authored this brief, in whole or in part.[1]

[1] The U.S. Chamber addresses only the first question that this Court accepted for appeal.

## SUMMARY OF THE ARGUMENT

"It is emphatically the province and duty of the judicial department to say what the law is." *Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452, 486 (Pa. 2021) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). However, for far too long, courts have abdicated this responsibility in the name of reflexive deference to administrative interpretations of law.

The U.S. Supreme Court has started to reverse that trend. When it comes to agency statutory interpretations, in its last Term that Court decisively rejected *Chevron* deference, instructing reviewing courts to exercise their "independent judgment" when it comes to the meaning of statutes that govern a federal agency. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron v. NRDC*, 467 U.S. 837 (1984)). When it comes to a federal agency's interpretation of its own regulations, the U.S. Supreme Court has narrowed *Auer* deference by recognizing critical safeguards. *See Kisor v. Wilkie*, 588 U.S. 558 (2019) (narrowing *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the *Kisor* majority, Justice Kagan announced a new framework that returns courts to the primary role of determining whether deference is even appropriate and, if so, whether it is appropriate to defer to the agency in a particular situation.

In *Kisor*, the U.S. Chamber urged the U.S. Supreme Court to overrule *Auer* and abandon judicial deference to agency regulatory interpretations. *See* Brief of U.S. Chamber of Commerce et al., *Kisor v. Wilkie*, No. 18-15 (Jan. 2019)[2]; *see also Kisor*, 588 U.S. at 630 (Gorsuch, J., concurring in the judgment) (arguing that *Auer* should be overruled and that courts should exercise their "independent judgment and follow the agency's view only to the extent it is persuasive" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (cleaned up)). The U.S. Supreme Court instead decided to adopt a set of important safeguards that would meaningfully constrain judicial deference to agency regulatory interpretations. *See Kisor*, 588 U.S. at 574-80. The Court has not revisited that issue since its landmark decision in *Loper Bright*.

The Pennsylvania Chamber of Business and Industry and other *amici* offer good reasons for this Court to eliminate *Auer*-like deference in this case. *See* Brief of *Amici Curiae* Pennsylvania Chamber of Business and Industry, et al., No. 7 MAP 2025 (March 2025). Short of that, however, this Court should at least adopt the same guardrails that Justice Kagan announced for the Court in *Kisor*.

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[2] Available at U.S.20Chamber20Amicus20Brief20-20Kisor20v.20Wilkie2028U.S.20Supreme20Court2920.pdf.

In particular, the *Kisor* framework ensures that courts are deferring to agency interpretations only when the regulation at issue is deemed genuinely ambiguous—a searching inquiry that looks to all the typical statutory interpretation tools. *Kisor* also mandates a real and thorough, rather than merely surface-level, inquiry into whether the agency's interpretation is reasonable. Even if both the ambiguity and reasonableness criteria are satisfied, *Kisor* cautions that deference still may not be appropriate based on a number of other, real-world considerations.

This Court should answer the first question presented by at least adopting the *Kisor* framework into Pennsylvania's jurisprudence for determining whether a court should defer to an agency's interpretation of its own regulation. Doing so would benefit Pennsylvania's business community and positively impact the Commonwealth's regulations and associated body of law. It would promote clarity by administrative agencies and prevent *post hoc* and informal statements that are then weaponized against regulated entities. Most importantly, cabining administrative deference within the *Kisor* framework would provide needed predictability and stability for the business community so that they can operate legally and efficiently in the Commonwealth.

## ARGUMENT

### At a Minimum, This Court Should Adopt the U.S. Supreme Court's Interpretive Guardrails from *Kisor* When Deciding Whether to Defer to an Agency's Interpretation of its Regulations.

"In matters of agency deference, this Court historically has chosen (by volition rather than by command) to take its cues from federal law." *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665, 686 (Pa. 2020) (Wecht, J., concurring) (citing *Wirth v. Commonwealth*, 95 A.3d 822, 841 n.18 (2014)); *see also Nw. Youth Servs., Inc. v. Dep't of Pub. Welfare*, 66 A.3d 301, 311 (Pa. 2013) (noting that "Pennsylvania courts' treatment of deference to administrative agency rules has followed the United States Supreme Court's lead"); *Marcellus Shale Coalition v. Dep't of Envtl. Prot.*, 292 A.3d 921, 927-28 (Pa. 2023) (acknowledging that "Pennsylvania administrative law principles are rooted in federal precedents").

This Court should continue this trend and should at least adopt the limitations and cabined approach to *Auer* deference announced by the U.S. Supreme Court in *Kisor*. Doing so would better ensure that judges—rather than administrative agencies—are appropriately at the forefront of interpreting regulations.

### A. The *Kisor* framework limits when courts should defer to agencies' interpretation of their own regulations.

In her majority opinion for the U.S. Supreme Court in *Kisor*, Justice Kagan took "the opportunity to restate, and somewhat expand on, . . . . some of the limits inherent in the *Auer* doctrine." *Kisor*, 588 U.S. at 574. To help secure the crucial role that the courts must play when interpreting agency regulations, Justice Kagan announced a three-step analysis. Under this framework, deference is no longer "reflexive," and courts are no longer instructed to consider only whether the agency's construction is "plainly erroneous or inconsistent with the regulation." *Id.* (quotation omitted).

#### 1. Actual ambiguity

The first guiding principle under *Kisor* is that a court should not afford an agency's interpretation of a regulation any deference "unless the regulation is genuinely ambiguous." *Id.* "If uncertainty does not exist, there is no plausible reason for deference." *Id.* at 574-75. Moreover, deferring to an agency's interpretation of an unambiguous regulation "permit[s] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 575 (quotation omitted). Allowing this kind of *de facto* rulemaking violates this Court's admonition that an agency's only power to make law or bind regulated entities comes "by way of

recourse to procedures prescribed in the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act." *Nw. Youth Servs.*, 66 A.3d at 310.

To ensure that an agency is abiding by the limits on its power, a court should not reflexively declare a regulation ambiguous just because the litigating parties proffer alternative meanings. *See Woodford v. Insurance Department*, 243 A.3d 60, 81 (Pa. 2020) (Donohue, J., concurring) (explaining that "the Commonwealth Court erroneously cited a broad standard of review that required deference to the agency's conclusion on ambiguity and nebulously suggests that the court was permitted, or even required, to simply accept an agency's view without any legal analysis of its own").

A court must instead "exhaust all the 'traditional tools' of construction" before determining that a regulation is genuinely ambiguous. *Kisor*, 588 U.S. at 575. In Pennsylvania, that would include consideration of the factors outlined in 1 Pa.C.S. § 1921, such as the "text, structure, history, and purpose of a regulation." *Kisor*, 588 U.S. at 575; *see also* 1 Pa. Code § 1.7 (instructing that the rules of statutory instruction apply to the interpretation of agency regulations). According to Justice Kagan, "[d]oing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Kisor*, 588 U.S. at 575. According to Justice

Kavanaugh, "[i]f a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation." *Id.* at 632 (Kavanaugh, J., concurring in the judgment).

Regardless of whether Justice Kagan or Justice Kavanaugh is correct about how often apparent ambiguities will be resolved under this first *Kisor* inquiry, this guardrail comports with and supports the judiciary's constitutional role. As this Court has explained, engaging in a robust analysis when construing regulations—rather than deferring for deference's sake—"maintain[s] fidelity to the separation of powers." *Corman*, 266 A.3d at 486.

### 2. Reasonable interpretation

If a genuine ambiguity is found to be present, the next step is to make sure that the agency's interpretation of the regulation is reasonable. *Kisor*, 588 U.S. at 575. "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 576. Critically, the reasonableness inquiry is not akin to blind deference or even a "plainly erroneous" standard. *Id.* It is much more robust, and the reasonableness requirement is one "an agency can fail." *Id.*

### 3. Character and context

Even if a regulation is found to be ambiguous and the agency's interpretation is found to be reasonable, courts are still not done under *Kisor*. A court maintains a duty to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 576. This "independent inquiry" does not take any one specific form, but it instead looks to three "especially important markers for identifying when *Auer* deference is and is not appropriate." *Id.* at 576-77.

***First***, "the regulatory interpretation must be one actually made by the agency," meaning it is the agency's "authoritative" or "official" position. *Id.* at 577. In other words, the "interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.* Statements by mid-level government employees or in informal memoranda are likely insufficient. *See id.*

***Second***, "the agency's interpretation must in some way implicate its substantive expertise." *Id.* Such a limitation makes sense considering the policy reasons behind agency deference in the first place: an "awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns." *Id.* at 570 (plurality) (cleaned up). This Court has

acknowledged the same principle, recognizing that "where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute." *Corman*, 266 A.3d at 486. Outside of that expertise, however, an agency has no special powers above that of a court to interpret regulatory language, which is a quintessential judicial function. *Kisor*, 588 U.S. at 578; *Corman*, 266 A.3d at 486; *see also Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (declining to defer to an agency's interpretation of a regulation that merely parroted the enabling statute's text because an agency has no "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language").

***Third***, "an agency's reading of a rule must reflect fair and considered judgment" to receive any deference. *Kisor*, 588 U.S. at 579 (quotation omitted). That means "that a court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack." *Id.* (cleaned up); *see also Dep't of Educ. v. Empowerment Bd. of Control of Chester-Upland Sch. Dist.*, 938 A.2d 1000, 1014 (Pa. 2007) (Baer, J., concurring) (rejecting idea that "administrative interpretations forwarded for the first time in connection with adversarial litigation[] are entitled to any more

weight than any other litigant's argument in support of its position").

Nor should a court defer to "a new interpretation, whether or not introduced in litigation, that creates unfair surprise to regulated parties." *Kisor*, 588 U.S. at 579 (quotation omitted). After all, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). An agency would also not be entitled to deference if, for example, simply because of a change of administration, the "agency substitutes one view of a rule for another." *Kisor*, 588 U.S. at 579.

As Justice Kagan concluded for the majority in *Kisor*, "this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules." *Kisor*, 588 U.S. at 580.

### B. The predictability and stability that the *Kisor* guardrails encourage in the administrative state are critical for businesses and the economy.

These *Kisor* guardrails help ensure that agencies exercise discretion in a reasonable and lawful manner. This is critical to protecting core interests of private persons and regulated businesses. As courts have made clear for over a century, regulated entities rely on the predictability and stability afforded by agency interpretations that reflect thorough and careful consideration, are well reasoned, and—perhaps most importantly—remain consistent over time. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 457-58 (1978); *McLaren v. Fleisher*, 256 U.S. 477, 480-81 (1921). Investment and other decisions that private parties make in reliance on considered, consistent agency interpretations should not be lightly disturbed by oscillation in agency policy preferences. *See United States v. Chi., N. Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 14 (1933); *cf. Udall v. Tallman*, 380 U.S. 1, 4, 18 (1964). Further, "unfair surprise" would result if a new interpretation gave rise to "potentially massive liability . . . for conduct that occurred well before that interpretation was announced." *Christopher*, 567 U.S. at 155-56 (quotation omitted). The *Kisor* framework allows courts to consider these potential real-world impacts when considering and adjudicating the meaning of an agency's regulation.

Adopting the *Kisor* guardrails may also improve the quality of agency interpretations and regulations in the Commonwealth. For example, if agencies know that only an agency's official or authoritative interpretation will be given deference by courts, agencies may be more likely to use formal, thorough processes to announce interpretations of what the agency contends is an ambiguous regulation. Agencies may also be more rigorous in explaining the bases for the interpretation, knowing that a court will be conducting its own examination of the new interpretation's reasonableness. Providing a robust rationale would be particularly important if the agency is changing its previous interpretation in a manner that adversely affects reliance interests.

Similarly, if this Court adopts the *Kisor* guardrails, agencies may more carefully consider whether their new interpretations would "unfairly surprise" the regulated industry. They may also be more circumspect in advancing new interpretations through adjudicatory proceedings. To avoid such "unfair surprise," agencies may invite more input from the regulated community—both to avoid future challenges by gaining consensus and fixing potential problems *before* implementing the new interpretation and to avoid any claims of "unfair surprise" *after* implementing the new interpretation.

Agencies may also be prompted to adopt clearer regulations, negating any argument for deference. Under the *Kisor* framework, courts would be required to conduct a searching inquiry before determining that a regulation is ambiguous. Because of the risk that courts will find that a regulation is unambiguous in a way unfavorable to the agency, the agency may be motivated to promulgate regulations that are more precise in meaning. Clearer and more predictable regulations benefit the regulated community, the agency itself, and the courts called on to review agency determinations.

All businesses benefit from laws that are clearly written and consistently applied. And small businesses would particularly benefit from a clearer and more predictable regulatory framework. The findings of the Q4 MetLife and U.S. Chamber of Commerce Small Business Index are informative. *See* U.S. Chamber of Commerce, "Q4 MetLife and U.S. Chamber of Commerce Small Business Index" (December 16, 2024).[3] According to that report, almost 70% of small businesses say that they "spend more per employee to comply with regulations than larger competitors." *Id.* "About two in five (42%) say it is difficult to keep up with

[3] Available at https://www.uschamber.com/sbindex/summary (last visited March 10, 2025).

regulatory and compliance requirements." *Id.* A more predictable body of administrative regulations—premised on considered declarations of policy that are less likely to change at the whims of new administrations or political appointees—would help ease the substantial administrative burdens faced by the small business community.

## CONCLUSION

For the foregoing reasons, this Court should answer the first question presented by at least adopting the *Kisor* guardrails.

March 10, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief complies with the word count limits in Pa.R.A.P. 531(b)(3) because it contains 2,956 words.

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I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently from non-confidential information and documents.

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