SUPREME COURT OF THE UNITED STATES

Nos. 07–984 and 07–990

COEUR ALASKA, INC., PETITIONER
07–984 *v.*
SOUTHEAST ALASKA CONSERVATION COUNCIL
ET AL.

ALASKA, PETITIONER
07–990 *v.*
SOUTHEAST ALASKA CONSERVATION COUNCIL
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2009]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except for its protestation, *ante*, at 20, that it is not according *Chevron* deference to the reasonable interpretation set forth in the memorandum sent by the Director of the Environmental Protection Agency's (EPA) Office of Wetlands, Oceans and Watersheds, to the Director of the EPA's regional Office of Water with responsibility over the Coeur Alaska mine—an interpretation consistently followed by both EPA and the Corps of Engineers, and adopted by both agencies in the proceedings before this Court. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The opinion purports to give this agency interpretation "a measure of deference" because it involves an interpretation of "the agencies' own regulatory scheme," and "'the regulatory regime,'" *ante,* at 20 (citing *Auer* v. *Robbins*, 519

U. S. 452, 461 (1997)). *Auer*, however, stands only for the principle that we defer to an agency's interpretation *of its own ambiguous regulation*. But it becomes obvious from the ensuing discussion that the referenced "regulatory scheme," and "regulatory regime" for which the Court accepts the agency interpretation includes not just the agencies' own regulations but also (and indeed primarily) the conformity of those regulations with the ambiguous governing statute, which is the primary dispute here.

Surely the Court is not adding to our already inscrutable opinion in *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), the irrational fillip that an agency position which otherwise does not qualify for *Chevron* deference *does* receive *Chevron* deference if it clarifies not just an ambiguous statute but *also* an ambiguous regulation. One must conclude, then, that if today's opinion is *not* according the agencies' reasonable and authoritative interpretation of the Clean Water Act *Chevron* deference, it is according some *new* type of deference—perhaps to be called in the future *Coeur Alaska* deference—which is identical to *Chevron* deference except for the name.

The Court's deference to the EPA and the Corps of Engineers in today's cases is eminently reasonable. It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions. If we must not call that practice *Chevron* deference, then we have to rechristen the rose. Of course the only reason a new name is required is our misguided opinion in *Mead*, whose incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts* that there has now appeared

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* Compare, *e.g., Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F. 3d

the phenomenon of *Chevron* avoidance—the practice of declining to opine whether *Chevron* applies or not. See Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1464 (2005).

I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it.

49, 61 (CA2 2004) (according *Chevron* deference to policy statements issued by Department of Housing and Urban Development) and *Schuetz* v. *Banc One Mortgage Corp.*, 292 F. 3d 1004, 1012 (CA9 2002) (same), with *Krzalic* v. *Republic Title Co.*, 314 F. 3d 875, 881 (CA7 2002) (denying *Chevron* deference to same policy statements). Compare *American Federation of Govt. Employees, AFL–CIO, Local 446* v. *Nicholson*, 475 F. 3d 341, 353–354 (CADC 2007) (according *Chevron* deference to informal adjudication by Department of Veterans Affairs), with *American Federation of Govt. Employees, AFL–CIO, Local 2152* v. *Principi*, 464 F. 3d 1049, 1057 (CA9 2006) (denying *Chevron* deference to similar action). It is not even clear that notice-and-comment rulemaking will assure *Chevron* deference to agency interpretation of an ambiguous statute. See *Rubie's Costume Co.* v. *United States*, 337 F. 3d 1350, 1355 (CA Fed. 2003) (customs classification).