No. 22-____

IN THE

Supreme Court of the United States

BERKLEY V. WALKER,

Petitioner,

v.

BOKF, N.A., D/B/A BANK OF ALBUQUERQUE, N.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When an account holder at Respondent BOKF, N.A. ("the Bank") overdraws their account and the Bank covers the shortfall by extending its own money, the Bank will continuously impose so-called "extended" overdraft charges until the covered amount is repaid. This case concerns whether those extended overdraft fees are "interest" within the meaning of the National Bank Act of 1864, 12 U.S.C. § 85, as implemented by 12 C.F.R. § 7.4001(a). That regulation, as relevant here, defines "interest" as "any payment compensating a creditor . . . for an extension of credit . . . ." A divided panel of the Court of Appeals resolved that question by deferring, under *Auer v. Robbins*, 519 U.S. 452 (1997), to an interpretive letter issued by the Office of the Comptroller of the Currency that addresses a different question about a different regulation, that does not cite to § 7.4001, that does not use the word "interest," and that ignores a previous agency interpretation of the same statute. A dissenting judge (Eid, J.) disagreed that the regulation was ambiguous, and, even if it was, that the interpretive letter in question was worthy of deference. The questions presented are:

1. May a court defer to an agency's post-promulgation pronouncements to determine that a regulation is genuinely ambiguous?

2. Is an agency interpretation that only addresses the question at issue by implication and which is inconsistent with a previous position taken by the same agency the product of that agency's "fair and considered judgment," and therefore potentially entitled to judicial deference?

3. Is 12 C.F.R. § 7.4001(a) genuinely ambiguous, such that an agency interpretation of the regulation

can be entitled to judicial deference under *Auer* and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)?

PARTIES TO THE PROCEEDINGS

Petitioner Berkley V. Walker was the plaintiff in the district court proceedings, and appellant in the court of appeals proceedings.

Respondent BOKF, N.A., d/b/a Bank of Albuquerque, N.A. was the defendant in the district court proceedings, and appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

Petitioner is unaware of any other proceedings that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Berkley V. Walker respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-48a) is reported at 30 F.4th 994. The order denying rehearing and rehearing en banc (App. 71a-72a) is unreported. The district court's order granting Respondent's motion to dismiss (App. 58a-70a) is unreported. The district court's order denying Petitioner's motion to alter or amend the judgment (App. 49a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2022. A timely petition for rehearing was denied on May 19, 2022. By order dated August 15, 2022, Justice Gorsuch extended the time in which to file a petition for certiorari to and through September 16, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Petitioner Berkley V. Walker held an account at the Bank of Albuquerque, a branch of BOKF, N.A., a national bank chartered in Oklahoma. Pet. App. 75a (¶¶ 7-8). According to his deposit account agreement, any time Walker overdrew his account, he would be charged $34.50. Pet. App. 76a (¶ 12).[1] The Bank

[1] The "Summary of Fees and Definitions" attached to Walker's account agreement labels this $34.50 charge either an "Overdraft Fee" or a "Returned Item Fee," depending on whether the Bank elects to honor the overdraft or not. C.A. App. 71. This Petition will refer to this fee as the "initial overdraft fee."

retained the option of covering any overdraft with its own funds. If it did so and Walker failed to repay the bank within five business days, the Bank would charge a fee of $6.50 (the "extended overdraft fee") on each business day until the debt was repaid. *Id.*

In 2017 Walker overdrew his account by about $25, and was charged the $34.50 initial overdraft fee. Pet. App. 80a (¶ 21). The Bank exercised its discretion to cover Walker's overdraft, extending its own money to cover Walker's shortfall. Walker was unable to repay the Bank for two months. Pet. App. 80a (¶¶ 22-23). During that time he incurred $234 in extended overdraft charges, a sum amounting to an annualized interest rate of over 500%. Pet. App. 84a-85a (¶¶ 41-42.)

After repaying his debt to the Bank, Walker instituted this lawsuit. He contends that the extended overdraft fees are a type of interest charge and that, as applied to his situation, they are usurious. The claim arises under 12 U.S.C. § 85, part of the National Bank Act, which allows national banks to receive interest at the rate allowed by the state in which the bank is chartered, here, Oklahoma. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308-13 (1978). An implementing regulation, 12 C.F.R. § 7.4001, defines "interest," in pertinent part, as "any payment compensating a creditor for an extension of credit . . . ." 12 C.F.R. § 7.4001(a). The regulatory definition includes a non-exclusive list of example interest charges that neither includes nor excludes extended overdraft fees. *See id.* Walker alleges that the extended fees "are unrelated to any particular event causing an account to become overdrawn . . . and, instead, are solely related to the fact that the Bank has extended credit to a customer to cover charges and it seeks compensation for the time value of that money." Pet. App. 77a-78a (¶ 16). Walker does not challenge the initial overdraft fee, because that fee is supported by separate consideration, such as the time and expense necessary to process the bad check, rather than imposed to compensate the Bank for the use of its money. Respondent, for its part, contends that its extended overdraft fees are properly classed as a "deposit account service charge," 12 C.F.R. § 7.4002(a), and are therefore not a type of interest charge.

2. a. The Office of the Comptroller of the Currency ("OCC") is charged with regulating the activities of national banks and thrift institutions. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). OCC first formally addressed initial overdraft charges in 1983. *See* Interpretive Ruling Concerning National Bank Service Charges, 48 Fed. Reg. 54,319 (Dec. 2, 1983). Clarifying an existing regulation, *see* 12 C.F.R. § 7.8000 (1971), OCC wrote that the practice of "honoring . . . checks drawn against nonsufficient funds [has] the potential for misuse" because "such a practice, if left uncontrolled, provides a customer with automatic loans." 48 Fed. Reg. 54,319. Thus, OCC urged banks to impose service charges to discourage the practice, issuing the interpretive ruling specifically to clarify that then-existing § 7.8000 permitted the practice. *Id.*

OCC first considered *extended* overdraft charges the next year, in 1984. That year, a bank in Houston sought an Interpretive Letter concerning whether it could charge interest on sums advanced to cover a customer's overdraft.[2] That is, the bank already charged

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[2] In the course of administering laws governing national banks, OCC frequently issues Interpretive Letters, written by senior OCC staff in response to queries from regulated parties, which

a fee for processing the bad check (as permitted by § 7.8000), and wished to know if additional charges would be permissible under federal law. In an Interpretive Letter, an OCC official said yes:

> when a bank pays a check written on nonsufficient funds, it, in effect, extends a loan to the customer in an amount equal to the amount of the check minus the amount that is present in the customer's checking account. National banks have express authority to make loans. 12 U.S.C. § 24 (Seventh). Therefore, it is my opinion that a national bank may pay checks written on nonsufficient funds and charge interest on the amount of credit that is extended.

OCC Interpretive Letter, 1984 WL 164096, at *1 (May 22, 1984) (the "1984 Letter").

b. Fast forward 12 years: In response to a split of authority concerning whether credit card late fees were a type of interest charge under 12 U.S.C. § 85, OCC promulgated 12 C.F.R. § 7.4001. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739-40 (1996). The new § 7.4001 defines "interest" to "include[] any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." 12 C.F.R. § 7.4001(a). The Notice of Proposed Rulemaking insisted that the proposed rule was intended to "reflect current . . . interpretive letters." Interpretive Rulings, 60 Fed. Reg. 11,924, 11,929 (Mar. 3, 1995). And OCC later wrote that the rule "is consistent with OCC interpre-

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construe either the laws OCC administers (including the NBA) or the regulations it has promulgated. *See* Pet. App. 15a n.7.

tive letters in this area." Interpretive Rulings, 61 Fed. Reg. 4,849, 4,849 (Feb. 9, 1996). A companion regulation, 12 C.F.R. § 7.4002, governing "deposit account service charges," replaced former § 7.8000, restating the authority of national banks to impose "non-interest" charges according to "safe and sound banking principles." 12 C.F.R. § 7.4002(a)-(b).

Despite these efforts to clarify and restate current law, in 2001 OCC professed to identify ambiguity in the way in which the new regulation interacted with charges imposed when a bank honors an overdraft. In a Notice of Proposed Rulemaking, OCC wrote that "a bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8,178, 8,180 (Jan. 30, 2001). As such, "the difference between what the bank charges a customer when it pays the check and what it charges when it dishonors the check and returns it could be viewed as interest within the meaning of 12 U.S.C. 85." *Id.* Thus, OCC invited comment on whether the regulatory definition of "interest" should be amended explicitly to "include at least some portion of the fee imposed by a national bank when it pays a check notwithstanding that its customer's account contains insufficient funds to cover the check." *Id.*

OCC ultimately declined to issue any additional rule, citing "complex and fact-specific concerns." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,787 (July 2, 2001). In neither the Notice of Proposed Rulemaking nor the final order did OCC acknowledge the 1984 Letter.

c. Then, in 2007, in response to a question from a California bank concerning whether federal law permitted banks to collect debts from accounts containing public benefit funds, the OCC issued another interpretive letter, Interpretive Letter No. 1082, 2007 WL 5393636 (May 17, 2007) (the "2007 Letter"). Certain account holders had challenged the California bank's practice of recovering debts, including overdraft charges, from accounts containing public benefit funds as unlawful under state law. The California bank inquired whether that state law was pre-empted. *See* 12 C.F.R. § 7.4007(c) (saving from preemption laws dealing with, among other subjects a bank's "rights to collect debts").

The 2007 Letter does not cite to § 7.4001, or even mention the word "interest," but in a footnote it notes that the bank overdraft program at issue includes an extended overdraft fee imposed not indefinitely, but from the fourth through the eleventh calendar day an account was overdrawn. *See* 2007 WL 5393636, at *1 n.3. The 2007 Letter also notes that the California bank itself provided evidence that it considered factors set forth in 12 C.F.R. § 7.4002(b) that banks should consider when establishing "deposit account service charges." *Id.* at *3-*4 & n.11. The 2007 Letter then reasons, following the California bank's lead, that banks may impose "deposit account service charges" after consideration of the factors in 12 C.F.R. § 7.4002(b). *Id.* at *3. The Letter discusses that the savings clause in § 7.4007(c) refers to the "*right* to collect a debt" (which can be subject to state law) as opposed to "*how* national banks elect to collect their debts" (subject only to federal control), but nevertheless ultimately concludes that "when the Bank processes an overdraft item and recovers a fee for doing so, it is not exercising its right to collect a debt," and therefore the state debt-collection law does not govern the practice. *Id.* at *4 & n.12.

3. The district court dismissed Walker's complaint, *see* Fed. R. Civ. P. 12(b)(6), citing the 2007 Letter, and

a divided panel of the Court of Appeals for the Tenth Circuit affirmed, holding that deference to the 2007 Letter under *Auer v. Robbins*, 519 U.S. 452 (1997), was appropriate. According to the panel majority, 12 C.F.R. § 7.4001 is ambiguous. Pet. App. 20a. The panel majority observed that, in 2001, OCC itself had deemed the regulation ambiguous on the issue of its application to extended overdraft fees and that the list of example interest charges in the regulation does not expressly include overdraft fees, and opined that the phrase "extension of credit" lacks a commonly accepted meaning. Pet. App. 20a-24a. And although the Bank had never asked for *Auer* deference to the 2007 Letter (indeed it had not even cited *Auer* in its briefs to the court of appeals), the panel majority elected to defer to the 2007 Letter, gleaning from the Letter a dispositive rule of decision governing this case. Rejecting Walker's contention that the 2007 Letter does not reflect the agency's fair and considered judgment on the issue in question, the majority wrote that the Letter was not a "*post hoc* rationalization," did not create any "unfair surprise," and did not "impose[] retroactive liability for long-standing conduct that the agency had not previously addressed." Pet. App. 31a-32a.

Judge Eid dissented. She first explained that 12 C.F.R. § 7.4001 is not ambiguous. In her view, the Bank's decision to provide funds to cover Walker's shortfall is plainly a loan or credit transaction. Thus, she reasoned, the costs imposed specifically to compensate the Bank for the use of its money are unambiguously interest. Because that is how Walker's complaint alleged the Extended Overdraft Fees operated, Judge Eid would have held that the fees are "interest." Pet. App. 33a-38a.

But even assuming ambiguity, Judge Eid continued, the panel majority should not have deferred to the 2007 Letter. The Letter did not evidence thorough consideration, or any consideration, of the key legal issue before the court. As she wrote, "the question whether extended overdraft fees qualify as interest under the regulatory definition was not considered or answered in the letter—except for improper inference and illogical implication." Pet. App. 42a-43a. The result, she reasoned, was a "kind of contingent, even inadvertent, agency interpretation" that "hardly supports *Auer* deference as a general matter, and certainly does not support it after *Kisor*." Pet. App. 43a. The panel majority's "ambitious" read of the 2007 Letter, she concluded, was the product of "inference, not deference." Pet. App. 43a, 48a.

REASONS FOR GRANTING THE PETITION

The panel majority's decision to defer to the 2007 Letter highlights the need for clarification regarding this Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Prior to *Kisor*, "substantial inconsistency, even confusion, exist[ed] with respect to how courts interpret[ed] and appl[ied]" the *Auer* deference standard. Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 Admin. L. Rev. 787, 801 (2014). In addition to addressing constitutional objections to this doctrine, *Kisor* sought to bring order to the chaos by emphasizing the "cabined" but "potent" role *Auer* plays in our judicial system. But despite the Court's efforts, *Auer* continues to receive uneven treatment. *See* Comment, Melissa Corry, *Kisor's Chaos: Conflicting Meanings of the Clean Air Act's "Applicable Requirements" in the Fifth and Tenth Circuits*, 74 S.M.U. L. Rev. 749, 778 (2021) ("the Court's recent limitations on *Auer* have only increased confusion in the lower courts"). The decision below brings aspects of this inconsistent treatment into sharp relief.

In deferring to the 2007 Letter, a majority of the court of appeals set aside important limits on the scope of agency deference in favor of a procedure by which *Auer* deference is bootstrapped into *Kisor*'s analysis after only the briefest of attempts to discern the plain meaning of the text. In the hands of the court of appeals, *Kisor* merely opens up new opportunities to defer to an agency interpretation, despite the presence of unambiguous regulatory text. The decision below therefore demonstrates that further guidance from this Court is sorely needed.

Moreover, the subject matter of this lawsuit is of great national importance. Research shows that banks collect well over $1 billion in extended overdraft fees every year, and that such fees help drive hundreds of thousands of Americans every year out of the banking system, leaving them in an economically precarious position.

Finally, review at this time and in this case is appropriate. This Petition presents purely legal questions that have received thorough ventilation in the courts of appeals, with judges reaching differing conclusions about the propriety of *Auer* deference to the 2007 Letter. Indeed, similar claims have been presented to three courts of appeals, and none have produced a unanimous opinion. In the First Circuit, Judge Lipez dissented, like Judge Eid in the court below, on the ground that 12 C.F.R. § 7.4001 is unambiguous, and thus the issue of agency deference should have been off the table. *See Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 140-43 (1st Cir. 2019)

(Lipez, J., dissenting). In the Fifth Circuit, Judge Ho concurred in the judgment only, though he declined to produce a separate written opinion. *See Johnson v. BOKF, N.A.*, 15 F.4th 356, 358 n.* (5th Cir. 2021). Thus, there is significant underlying disagreement among the judges on the courts of appeals, demonstrating the need for this Court's intervention and guidance. And as the arguments for and against *Auer* deference have been thoroughly developed, the Court would not benefit from waiting for additional decisions from the courts of appeals.

The petition for certiorari should be granted.

I. This Court should clarify that *Kisor*'s ambiguity analysis does not include baked-in deference to agency interpretations of their own regulations.

Kisor teaches that before declaring a regulation ambiguous and applying *Auer* deference, courts must "exhaust all the traditional tools of construction" by "carefully consider[ing] the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." 139 S. Ct. at 2415 (majority opinion). "[T]hose tools include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases." *Id.* at 2448 (Gorsuch, J., concurring in the judgment). But the approach taken by the court of appeals exploits perceived loopholes in *Kisor* to continue deferring to agency interpretations when it is possible—and desirable—not to do so.

The majority opinion begins by making some gestures at the analysis required by *Kisor*, but it does not approach the required rigor. Most troublingly, the panel majority understood this Court's directive to consider the regulation's history as a backdoor to import *Auer* deference into the ambiguity analysis itself. After briefly describing the text of the regulation at a high level, the panel majority invoked what it termed the regulation's "history" not to understand the meaning of the words in the regulation, but to demonstrate that *OCC* believes the regulation to be ambiguous, and in fact intentionally wrote it to be ambiguous. *See* Pet. App. 24a ("[T]he fact that OCC noted an ambiguity and expressly refused to resolve it in the final rule provides historical support for finding that § 7.4001(a) was intentionally ambiguous."). But the support for this statement was a Notice of Proposed Rulemaking issued in 2001, *five years* after the regulation in question was adopted, and after a change in presidential administrations. This subsequent statement, written amidst a rulemaking proceeding in which OCC specifically *declined* to amend § 7.4001 to say what the court of appeals held that it says, sheds no light on the context of the regulation or the meaning of the words used by the agency at the time it was adopted. *See* Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 300 (2000) ("Whatever congruence may have existed between an agency's original intent and a contemporaneous interpretation announced shortly after promulgation, the passage of time will lead to a divergence between the agency's likely original understanding and its current considered view of the rule.").

As *Kisor* recognizes, a review of a regulation's history may be useful because of the possibility that "a . . . term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020). But *Kisor*'s reasoning about the need for, and wisdom of, consulting a regulation's history, does not change the fundamental principle that "[t]he text of the regulation is treated *as* the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text." *Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment) (emphasis in original); *see also* Noah, *Divining Regulatory Intent*, 51 Hastings L.J. at 290 ("Even with this deeply ingrained tradition of deference, courts may have to search for an agency's original intent in order to determine whether the latest view espoused by the incumbent administration deserves to be regarded as authoritative."). And of course, "all agree that legislators' statements about the meaning of an already-enacted statute are not a legitimate tool" of interpretation. *Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring in the judgment) (quotations omitted). In truth, what the panel majority termed an analysis of the regulation's history was no more than backdoor deference. Pet. App. 42a (Eid, J., dissenting) ("Deferring to an agency's view that its own regulations are ambiguous distorts our important ambiguity determination.").

It is implausible that the approach of the court of appeals adheres faithfully to *Kisor*. An agency's post-promulgation statements about the meaning of a regulation are the sort of material to which a court might theoretically defer (assuming the preconditions of deference are met), not the sort of material which may establish whether deference is appropriate in the first place. Treating an agency's *post hoc* statements as dispositive evidence that a regulation was "intentionally ambiguous" in the first place, Pet. App. 24a, plainly flouts *Kisor*'s teachings. Allowing agencies an open-ended remit to determine the existence of and then to resolve regulatory ambiguities ultimately robs litigants of "a fair hearing before an impartial judge." *Kisor*, 139

S. Ct. at 2440 (Gorsuch, J., concurring in the judgment). *Auer* deference should be unwarranted in such circumstances. *See id.* at 2440-41 ("Whether purposeful or not, the agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law's meaning."); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (observing that *Auer* deference imparts "important advantages" but "also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit"). This Court's review is necessary to clarify that for purposes of whether to apply *Auer* deference, the history of a regulation does not include subsequent agency pronouncements that purport to interpret or contextualize a regulation.

II. There is no "fair and considered" agency judgment on the issue presented that merits deference.

Equally important, the decision of the court of appeals highlights the need for further guidance from this Court regarding when an agency's interpretation constitutes the "fair and considered judgment" of the agency. *See Kisor*, 139 S. Ct. at 1417. The court of appeals rejected Walker's argument that the 2007 Letter does not represent the agency's fair and considered judgment on how to class extended overdraft fees under §§ 7.4001 and 7.4002 because the 2007 Letter was not a "post hoc rationalization" to justify unconsidered agency action, and did not create any "unfair surprise," Pet. App. 31a-32a, parroting examples provided by this Court in *Kisor*, *see* 139 S. Ct. at 2417-18.

But there remain serious questions about the extent to which the 2007 Letter actually represents OCC's judgment on the issue presented by Walker's claim, and how thoroughly OCC considered the issue.

As Judge Eid observed in her dissent, there is no indication that OCC was presented with the issue of how to categorize extended overdraft fees, or that OCC was even aware that the issue might be relevant to the California bank's situation. Pet. App. 42a-45a (Eid, J., dissenting). The 2007 Letter discusses only the operation of §§ 7.4002 and 7.4007, without even attempting to explain why the Letter's author concluded that the California bank's overdraft charges are governed by § 7.4002 and not § 7.4001 (and whether those reasons are specific to the California bank or apply to all overdraft programs). Moreover, the 2007 Letter was issued six years after the agency's published statement that application of § 7.4001 to extended overdraft fees implicates "complex and fact-specific" concerns. 66 Fed. Reg. at 34,787. The absence of any discussion of these concerns is powerful evidence that the OCC did not appreciate that the issue of how to classify extended overdraft fees (i.e., either as interest or not) was presented by the California bank's request for guidance. *See* Pet. App. 45a (Eid, J., dissenting). Thus, the 2007 Letter cannot reflect the agency's "fair and considered" judgment on the issue. *Cf. Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (declining to defer to agency interpretation because the record "strongly suggests to us that the Secretary has in fact never grappled with—and thus never exercised her judgment over—the conundrum posed by the regulation's clear ambiguity").

OCC's omission is even more glaring given that guidance predating § 7.4001 treated charges imposed for nonrepayment of overdraft sums *as interest*. *See* 1984 WL 164096, at *1. It is Walker's contention that the pre-1996 rule—that initial overdraft fees are a "deposit account service charge" and additional sums are "interest"—survived the promulgation of §§ 7.4001 and 7.4002. Nothing in the text of the regulation or OCC's published statements suggests that the 1996 regulations intended to change the law in this regard. *See FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* . . . ."). That this change in position went completely unremarked upon in the 2007 Letter is additional evidence that—to the extent the 2007 Letter actually embodies a dispositive rule as applied to this case—the Letter does not constitute the agency's fair and considered judgment. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.").

Nor does affording binding deference to the 2007 Letter's "inadvertent" agency interpretation make doctrinal sense. This Court has held that an agency's views have the power to persuade in direct proportion to, among other things, the "thoroughness evident in [the agency's] consideration" of the issue. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). And this Court has reasoned that this "thoroughness" requires careful attention to the specific statutory regime and a specific explanation for a particular action or interpretation. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 361 (2013) ("The manual's failure to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, call the manual's conclusions into serious question."); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978) (declining to afford *Skidmore* deference in light of the "lack of specific attention to the statutory authorization").

Given its lack of attention to the issue presented here, the 2007 Letter lacks the power to persuade with respect to the application of § 7.4001 to extended overdraft fees. And if the 2007 Letter cannot persuade, it is doubtful that this Court's cases would require a court nevertheless *to defer* to the agency's implicit, unexplained stance regarding the proper construction of its regulations. *See Fawcett*, 919 F.3d at 142 (Lipez, J., dissenting) ("Silence . . . is not guidance, and we would thus need to infer a ruling on a debated issue from between the lines of the [2007] Letter. I do not see how we can defer to an interpretation that the OCC never clearly made on an issue that it previously described as complex and fact-specific.").

This is not to say that an agency must explain all facets of its reasoning, or even that deference under *Auer* to an agency position that is only implicit is never appropriate. But when courts have deferred to "implicitly adopted" interpretations, those interpretations have been part and parcel of longstanding and generally well-accepted agency practices. *See Goffney v. Becerra*, 995 F.3d 737, 747 (9th Cir. 2021) (confronted with regulatory silence regarding whether Medicare billing privileges could be reactivated retroactively, court of appeals held that deference was appropriate to agency's answer of no, because that was consistent with how agency had long processed Medicare provider reactivation requests); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998) (deferring to agency interpretation that had not been expressed explicitly until a brief filed in the case because the interpretation was consistent with past agency practice).

This case presents nothing of that sort. The agency "interpretation" at issue surfaced, if at all, by implication in the 2007 Letter. The Bank has never cited any other instance of the OCC relying on the interpretation the Bank contends was advanced in the 2007 Letter. Unlike in *Goffney* and *Bituminous Contractors*, there is no longstanding agency practice to provide context for a supposedly "implicit" agency interpretation.

The court of appeals' analysis on this score makes clear the need for additional guidance from this Court. The 2007 Letter does not opine at all on whether and why extended overdraft fees are or are not interest charges under § 7.4001. But consistent with its efforts to bootstrap a broad deference doctrine into *Kisor*'s analysis, the court of appeals brushed aside concerns about the thoroughness of the agency's consideration of the issue, construing contrary precedent from this Court narrowly. That analysis demonstrates that further clarification of this Court's precedents is needed.

III. The decision below is wrong.

Plenary review is especially warranted here because the panel majority's misapplication of *Kisor* led it to reach the wrong result. Consider a critical question that was only seriously addressed by Judge Eid in the court below: is overdraft coverage an extension of credit? If a bank's decision to extend its own funds to cover a customer's shortfall with the expectation of repayment is an extension of credit, then any compensation for that extension of credit, including, under the allegations here, Respondent's Extended Overdraft Fees, is an interest charge. And the structure of the regulation makes clear that this is the first question that must be asked. *See* 12 C.F.R. § 7.4002(c) ("Charges and fees that are 'interest' within the meaning of 12 U.S.C. 85 are governed by § 7.4001 and not be this section.").

Black's Law Dictionary defines "credit" as, pertinent here, "[t]he availability of funds either from a financial institution or under a letter of credit." *See Credit*, Black's Law Dictionary (11th ed. 2019). Because, as Walker alleges, overdraft coverage requires a bank to make available to an account holder the bank's own funds, overdraft coverage is an extension of credit. Pet. App. 77a (¶ 15). And, in fact, the common law has always treated overdraft coverage in this way. *See, e.g.*, *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994) ("The parties acknowledge that in this case there was a loan—honoring a check drawn on insufficient funds[.]"); *Thiele v. Sec. State Bank of New Salem*, 396 N.W.2d 295, 298 (N.D. 1986) ("When a bank honors a customer's overdraft, it makes an unsecured loan to that customer[.]"); *Torrance Nat'l Bank v. Enesco Fed. Credit Union*, 285 P.2d 737, 739 (Cal. Ct. App. 1955) ("An overdraft is in legal effect a loan by the bank to its depositor."); *Payne v. Freer*, 91 N.Y. 43, 48 (1883) ("As between a banking firm and a depositor not a member of the firm, an overdraft is a loan.").

Positive law, including federal banking regulations, has followed the same understanding. For instance, the total sum of a bank's overdrafts to all customers counts against the lending limits imposed by 12 C.F.R. part 32. "Deposit-related credit products," such as overdraft protection, are subject to the non-discrimination provisions established by the Equal Credit Opportunity Act, *see* 15 U.S.C. §§ 1691-1691f, and its implementing regulation, Regulation B, 12 C.F.R. §§ 1002.1-1002.16. And section 4-401(a) of the Uniform Commercial Code, which is codified both in New Mexico, where the Bank of Albuquerque is located, and Oklahoma, where BOKF is chartered, and which permits banks to honor overdrafts, treats an overdraft as an application for credit. *See* Ronald Hersbergen, *Banking Law*, 44 La. L. Rev. 247, 261 n.86 (1983) ("The drawing of an item against an insufficient account is treated as an implied request for a loan from the drawee in the amount necessary to pay the item and an implied promise to repay the loan; therefore, the act of paying the overdraft is actually a loan to the drawer of the amount of the overdraft.").

This uniform background understanding ought to have settled the principal interpretive question in this case. True enough, "a characterization fitting in certain contexts may be unsuitable in others." *NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). But nothing about the National Bank Act in general, or § 7.4001 in particular, provides any reason to depart from the uniform treatment of overdrafts as loans or extensions of credit. *Cf. Morrissette v. United States*, 342 U.S. 246, 263 (1952) (lawmaking bodies that borrow terms with an accumulated legal meaning "presumably know[] and adopt[] the cluster of ideas that were attached to each borrowed word").

And if that treatment applies, then, as explained above, the judgment below is incorrect. Walker alleges that the Bank's extended fees do not compensate the bank for any additional services, and are charged simply as a function of the amount of time Walker needed to repay the bank. *See Fawcett*, 919 F.3d at 141 (Lipez, J., dissenting) ("Those fees unquestionably relate to the accountholder's continuing 'use' of the bank's money over time—a service for which banks ordinarily charge interest."). They are, in other words, a "payment compensating a creditor . . . for an extension of credit." 12 C.F.R. § 7.4001(a). Since "any" such payment is considered "interest" under the regulation, so, too, must the Bank's extended overdraft fees be. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (noting that the word "any" has an "expansive meaning"); *see also Smiley*, 517 U.S. at 746-47 (rejecting arguments that interest charges must be time- or rate-based and holding that (1) the form of a charge (i.e., flat or expressed as a percentage of some principal) did not determine whether it was interest, (2) that federal law did not command, and § 7.4001 did not incorporate, any distinction between "interest" and "penalties," and that charges imposed for the breach of an agreement could qualify as "interest," and (3) that late fees and over limit fees could and do qualify as "interest" under the regulation).

The panel majority nevertheless intoned that Walker's proffered understanding of "extension of credit" is "far from well-accepted." But this statement is supported only by citations to district courts who *also* deferred to the 2007 Letter, or which relied on authority that is incompatible with *Smiley*. This echo chamber does not reveal the sort of unsettled landscape that might imply ambiguity, particularly when many of the cited decisions predate *Kisor*. *See United States v. Adair*, 38 F.4th 341, 349 (3d Cir. 2022) ("[P]rior caselaw that had afforded *Auer* deference to the Commission's interpretive commentary without engaging in the *Kisor* process does not automatically retain its controlling force.").

The panel majority further suggested that "extension of credit" does not include overdraft coverage because such coverage does not "arise from credit transactions" or create a "creditor-debtor relationship" between the bank and the customer. But this reasoning is inherently circular, since the majority nowhere defines "credit" itself. It is also wrong. 1 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards* ¶3.04[2], at 3-85 (Rev. Ed. 2010) ("The relationship of debtor and creditor is reversed to the extent of the overdraft."). Moreover, as Black's shows, *see Credit*, Black's Law Dictionary, *supra* (defining "credit" as "the availability of funds from a financial institution *or* under a letter of credit") (emphasis added), and as caselaw confirms, a formal loan instrument has long been unnecessary for a transaction to be considered a loan or extension of credit. *See Calcasieu-Marine Nat'l Bank of Lake Charles v. Am. Emp. Ins. Co.*, 533 F.2d 290, 297-98 (5th Cir. 1976) ("While a note would certainly be evidence of a loan, it is not a prerequisite for the transaction to be a loan.").

Neither does the omission of extended overdraft fees from the list of example interest charges in § 7.4001(a) point in any direction. As Judge Eid attempted to remind the majority, examples to one side, there is a definition to interpret. Pet. App. 39a-40a.

Given the unambiguous language of the regulation, the court of appeals should have had "no reason or basis to put a thumb on the scale in favor of" the OCC's interpretation of the statute. *See Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment). But the panel majority below declined to rigorously apply the available "tools of construction," instead "wav[ing] the ambiguity flag," not because "it found the regulation impenetrable on first [or even second] read," but because of an agency statement made five years after the adoption of the regulation in question, and in favor of an interpretation the agency in question may not even have made. The majority's missteps demonstrate that this Court's review is needed.

IV. The questions presented are exceptionally important.

This case presents questions of significant legal import. In addition to the critical administrative issues presented, legal protections on overdraft fees are of enormous practical importance.

It is impossible to know how much Americans pay in extended or sustained overdraft fees, because regulatory reports require this information to be included among the total "interest income" generated by a bank in a given year, but the Center for Responsible Lending has estimated, based upon CFPB data, that consumers pay around $17 billion in overdraft or nonsufficient funds fees every year. Rebecca Borné, Peter Smith & Rachel Anderson, *Broken Banking: How Overdraft Fees Harm Consumers and Discourage Responsible Banking Products* (May 2016), at 2 n.1, 5, *available at* https://perma.cc/F9Q6-2ET3. But an analysis by the Consumer Financial Protection Bureau of banking practices between 2010 and 2012 estimated that 9.2% of all overdraft and nonsufficient Funds fees were extended or sustained overdraft fees. Consumer Fin. Prot. Bureau, *Data Point: Checking Account Overdraft*, at 10, *available at* https://perma.cc/96SY-UNGQ. That means that American consumers pay at least $1.5 billion in extended overdraft fees every year.

And the burden of these fees falls on the poorest Americans. Nearly one million Americans reported high or unpredictable checking account fees as the reason they are currently unbanked. Borné, et al., *supra*, at 13; Michael S. Barr, *Banking the Poor*, 21 Yale J. on Reg. 121, 131 (2004) ("Broadly speaking, the most common reason persons cite for lacking a checking account is not having enough money to be able to afford the costs of account ownership."). And "without access to a checking account, the individual is deprived of the most basic link to the mainstream economy." Lawrence H. Summers, Sec'y of the Treasury, Extending the Frontiers of Capital, Remarks before the CDFI Coalition (Jan. 27, 2000), *available at* https://perma.cc/K2XY-M45V. Lack of access to a checking account pushes individuals to high-cost and often predatory financial products, like payday loans, or check cashing services. *See* Rourke O'Brien, *"We Don't Do Banks": Financial Lives of Families on Public Assistance*, 19 Geo. J. on Poverty L. & Pol'y 485, 485 (2012) ("Unbanked consumers spend hundreds of dollars a year conducting routine financial transactions."); *see generally* Barr, *Banking the Poor*, 21 Yale J. on Reg. at 134-77.

And even for those who retain their accounts, enforcing limits on proper account charges provides an important protection. This case provides a vivid illustration. The $234 in extended charges paid by Walker exceeded by orders of magnitude the interest rate permitted by Oklahoma law. While $234 may not be a huge amount from a bank's perspective, it can be of enormous consequence to economically vulnerable consumers. It could be a week's worth of groceries, or the reason they make rent this month.

Interest groups of diverse political leanings have noted the special dangers *Auer* deference poses for disfavored or politically powerless groups. *See* Br. of Wash. Legal Found. as Amicus Curiae in Support of

Pet'r, *Kisor v. Wilkie* (No. 18-15), at 18-19 ("It is when dealing with unpopular groups that an empowered regulator will feel least obliged to act consistently and with restraint. . . . The fact that *Auer* assists agencies in singling out disfavored groups for special (poor) treatment is yet another strike against it."); Br. for Amici Curiae The Nat'l Immigrant Justice Ctr. and The Am. Immigration Lawyers Ass'n, *Kisor v. Wilkie* (No. 18-15), at 18 ("*Auer* deference thus creates myriad traps for the unwary across most - if not all - federally regulated contexts, and, as *amici* have learned from experience, particularly undermines efficiency, fairness, and predictability in immigration law.") (quotations omitted). But in this case, this Court's efforts to rein in *Auer* deference, and thus mitigate these concerns, went for naught, as the court of appeals hid behind *Auer* in permitting the bank to charge its customers more than the law allows.

The Court should address the confusion regarding *Auer* that persists in the courts of appeals. The doctrine as applied by the court of appeals lacks the critical guardrails set forth in *Kisor*, guardrails which respect the concerns presented by an overbroad reading of *Auer*. The majority's decision to eviscerate important limits on *Auer* deference that were only just reaffirmed by this Court cries out for review.

And this case presents an ideal vehicle to address the questions presented. Neither the defendant nor the court of appeals have identified any lurking issues that might disrupt this Court's consideration of the questions presented by this Petition. Both the district court and the court of appeals have issued thorough decisions analyzing whether *Auer* deference is warranted. And two of the cases analyzing this issue in the courts of appeals have generated published dissents, leaving this Court with the benefit of dueling, reasoned opinions on the propriety of agency deference.

Finally, the absence of a circuit split provides no reason to deny review. Each court of appeals to consider the issue presented by Walker's claim has fractured, revealing significant underlying disagreement among appellate jurists. Moreover, this Court regularly grants certiorari even absent a circuit split when, as here, the case raises important questions regarding the limits of federal agency interpretive authority on issues relevant to the lives of many Americans. *E.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022); *Kisor*, 139 S. Ct. 2400; *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The same review is merited here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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