

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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BERKLEY V. WALKER,

*Applicant,*

*v.*

BOKF, NATIONAL ASSOCIATION,

*Respondent.*

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**APPLICATION DIRECTED TO THE HONORABLE NEIL M. GORSUCH  
FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
TENTH CIRCUIT**

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August 4, 2022

**To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:**

1. Pursuant to this Court’s Rules 13.5, 22, and 30.3, applicant Berkley V. Walker respectfully requests a 30-day extension of time—to and including September 16, 2022—to file a petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review *Walker v. BOKF, N.A.*, 30 F.4th 994. The Tenth Circuit’s opinion, and Judge Eid’s dissent, are attached as Exhibit A. The order denying Walker’s petition for rehearing en banc, entered on May 19, 2022, is attached as Exhibit B. Unless extended, the deadline to petition for a writ of certiorari is August 17, 2022. This application is timely. Sup. Ct. R. 30.2. This Court’s jurisdiction will be invoked under 28 U.S.C. § 1254(1).

2. This case presents the following questions: (1) whether 12 C.F.R. § 7.4001(a) is genuinely ambiguous such that an agency interpretation of the regulation is entitled to judicial deference under *Auer v. Robbins*, 519 U.S. 452 (1997) and *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019); and, (2), if it is, whether an implicit agency interpretation that is inconsistent with a previous agency position could be a “fair and considered judgment” that might warrant *Auer* deference. These questions implicate both the “right to an independent judicial determination of the law’s meaning” and the Court’s “special responsibility to defend [judicial independence].” *Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring). A brief extension of time is warranted to permit counsel to present them to the Court completely yet succinctly.

3. The statutory and regulatory interpretation questions in this case concern whether a bank's extended overdraft charges are "interest" within the meaning of 12 U.S.C. § 85 and 12 C.F.R. § 7.4001(a). Unlike a regular one-time overdraft fee, *extended* overdraft charges are incurred continuously from when a bank advances money to cover a checking account overdraft until the account holder is able to repay the bank. Regulations promulgated by the Office of the Comptroller of the Currency ("OCC") define "interest" in 12 U.S.C. § 85 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). If a national bank located in a particular state charges "interest," then the interest rate cannot exceed "the maximum rate permitted . . . by the law of that state." *Id.* § 7.4001(b).

4. Here, Respondent BOKF, Walker's bank, covered a \$25 overdraft from Walker's checking account. After Walker did not pay BOKF back within five days, BOKF imposed an extended overdraft fee every business day for the two months that Walker's account remained overdrawn, eventually totaling nearly ten times the amount of the original overdraft. If those extended overdraft fees are interest under § 7.4001(a), then that interest was charged at an annualized rate many times greater than the maximum rate permitted in Oklahoma (where BOKF is chartered), and Walker can recover the usurious charge. *See* 12 U.S.C. § 86.

5. On review of the district court's order granting BOKF's motion to dismiss Walker's complaint, a divided panel of the court of appeals affirmed. The

panel majority found the OCC regulations ambiguous and deferred to an “Interpretive Letter” issued by OCC which does not even reference, let alone purport to interpret, the definition of “interest” in § 7.4001(a). The panel’s opinion and Judge Eid’s dissent demonstrate significant areas of disagreement among circuit judges on the proper application of *Kisor*, which would benefit from a clear presentation to this Court.

6. In *Kisor*, this Court envisioned a procedure by which *Auer* deference is available only after a court finds a regulation to be “genuinely ambiguous[.]” 139 S. Ct. at 2414. Rather than focusing on the text of the OCC regulations, the panel majority framed its entire decision around the Interpretive Letter, discussing it at great length before even suggesting that it might not be applicable. Instead of rigorously applying traditional interpretive tools to ascertain the meaning of the regulation, the panel uncritically relied upon several pre-*Kisor* courts’ interpretations of 12 C.F.R. § 7.4001 to find the regulation’s text ambiguous. Even more troublingly, the panel majority took *Kisor*’s direction to consider the “history” of the regulation as license to import deference into the ambiguity analysis itself. *Walker*, Ex. A at 25 (“[T]he fact that OCC noted an ambiguity [in its own regulation] and expressly refused to resolve it . . . provides historical support for finding that § 7.4001(a) was intentionally ambiguous.”).

7. In dissent, Judge Eid identified serious structural flaws with the panel majority’s approach, including that “[d]eferring to an agency’s view that its own regulations are ambiguous distorts [the court’s] important ambiguity

determination.” *Id.* at 43 (Eid, J., dissenting). Judge Eid explains that the panel majority, in an analysis “bereft of rigor,” premised its ambiguity determination “on an illustrative list’s omission of the practice under scrutiny without trying to apply the regulation to the practice” and “without undertaking analysis of the text of the definition itself.” *Id.* at 40–41. Applying standard interpretive tools and canons of construction, Judge Eid correctly ascertained that the extended overdraft fees Walker paid are unambiguously “interest” under § 7.4001. *Id.* at 39.

8. The dissent goes on to question why, “even if [the regulations] were ambiguous,” the majority would defer to an agency document that “does not contain a single sentence explaining why extended overdraft fees do not meet the regulatory definition of interest in § 7.4001(a).” *Id.* at 34, 49; *accord Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 142 (1st Cir. 2019) (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 [Interpretive] 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.”). Deferring to agency silence—especially silence about a regulatory ambiguity the panel determined to be deliberate on the part of the agency—embodies the problem of “secret intentions” identified by the concurring justices in *Kisor*. *See* 139 S. Ct. at 2441 (Gorsuch, J., concurring).

9. Each court of appeals to consider the issue presented by Walker’s claim has fractured. In the First Circuit, Judge Lipez dissented, as Judge Eid did in the court below, on the ground that 12 C.F.R. § 7.4001 is unambiguous, so deference

to the agency was inappropriate. *See Fawcett*, 919 F.3d at 142 (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 Nat'l Ass'n*, 15 F.4th 356 (5th Cir. 2021). Thus, despite the lack of an actual circuit split on the questions presented, there is significant underlying disagreement and uncertainty among judges on the courts of appeals on the proper application of *Kisor*. This demonstrates both the importance and the complexity of the issues Walker will raise in his forthcoming petition for certiorari.

10. “For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.” Sup. Ct. R. 13.5. Additional time is warranted to allow counsel to prepare and file a clear, concise petition on these critical questions of administrative law and Constitutional separation of powers. Counsel for applicants have also had significant professional obligations during the period in which the petition would otherwise need to be prepared, including time-sensitive briefing on a motion for interlocutory appeal in *James et al. v. PacifiCorp. et al.*, No. 20-cv-33885 (Or. Cir. Ct.) as well as complex summary judgment briefing in *District of Columbia v. Facebook, Inc.*, No. 2018 CA 008715 B (D.C. Super. Ct.) and *Gee v. National Collegiate Athletic Ass'n*, No. 20STCV43627 (Cal. Super. Ct.). Moreover, no party would be prejudiced by a 30-day extension. Accordingly, good cause exists for this application, and applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including September 16, 2022.

Respectfully Submitted,

August 4, 2022

s/ Ryan D Andrews

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