In the Supreme Court of the United States

BARBARA FAWCETT

Petitioner,

v.

CITIZENS BANK, N.A.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the court of appeals improperly afforded *Auer* deference to a federal agency's informal "interpretation" of a regulation without first (i) resolving whether the applicable regulation is ambiguous, after engaging in any traditional tools of regulatory and statutory construction; and (ii) performing any independent inquiry as to whether the purported "interpretation" reflects the fair and considered judgment of the agency.

PARTIES TO THE PROCEEDING

Petitioner (Plaintiff below) is Barbara Fawcett. Respondent (Defendant below) is Citizens Bank, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioner Barbara Fawcett respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit. Petitioner seeks a writ of certiorari because, contrary to this Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the court of appeals improperly and reflexively afforded *Auer* deference to a federal agency's purported informal "interpretation" of a regulation without first (i) resolving whether the relevant terms used in regulation are ambiguous, after engaging in any traditional tools of regulatory and statutory construction; and (ii) performing any independent inquiry as to whether the interpretation reflects the fair and considered judgment of the agency.

OPINIONS BELOW

The First Circuit panel opinion, including Judge Lipez's dissent (App., *infra*, 4a–25a) is reported at 919 F.3d 133. The order of the First Circuit denying panel rehearing and rehearing en banc and the dissent from such denial is unpublished but appended hereto (App., *infra*, 26a–27a).

The decision of the District of Massachusetts dismissing petitioner's complaint and the order of

dismissal are unreported but appended hereto (App., *infra*, 1a–3a).

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2019. Petitioner filed a timely petition for petition for panel rehearing or rehearing en banc. That petition was denied on June 4, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case concerns the restrictions imposed by the National Bank Act, 12 U.S.C. §§ 85, 86 ("NBA") upon the rate of interest national banks may charge. The NBA does not define the term "interest." The NBA grants to the Office of the Comptroller of Currency ("OCC") authority to promulgate regulations under the NBA, including defining "interest" for purposes of the NBA. 12 U.S.C. § 93a.

The OCC regulation defining interest is 12 C.F.R. § 7.4001(a) ("Section 7.4001"). The OCC states in that regulation that "interest" includes, among other things: (i) "any payment compensating a creditor…for an extension of credit"; (ii) "[a]ny payment compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension." Petitioner contends that the Sustained Overdraft Fees that respondent charged against petitioner's account fall within the unambiguous terms of each of these provisions.

Petitioner sets forth below the full relevant portions of the NBA and Section 7.4001.

The National Bank Act, 12 U.S.C. § 85, provides, in relevant part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State…where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more….

The next section of the act, 12 U.S.C. § 86, provides, in relevant part:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [12 USCS § 85], when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same….

The OCC regulation, 12 C.F.R. § 7.4001(a), provides:

> (a) Definition. The term "interest" as used in 12 U.S.C. 85 includes 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. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

STATEMENT

Petitioner seeks a writ of certiorari because the appeals court below engaged in an extreme example of a "reflexive" deference to a purported agency interpretation of a regulation, which this Court in *Kisor* directed that courts should not do. The Court should grant the petition and reverse the court of appeals decision, or, alternatively, vacate the decision of the court of appeals and remand the case

with instructions to the court of appeals to decide the case as required by *Auer* and *Kisor.*

This case concerns the proper interpretation to be afforded to the term "interest" as that term is used in the NBA, 12 U.S.C. § 85 in light of the definition of "interest" set forth in a regulation promulgated by the OCC, Section 7.4001.

Petitioner contends that the Sustained Overdraft Fees charged by Citizens Bank are interest because they fall within the unambiguous terms of Section 7.4001 since they are (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension." These are the terms used in the regulation that lie at the core of petitioner's claim.

Auer and *Kisor* require that a court give deference to an agency's interpretation of its own regulation if, and only if, the court first finds that the regulation is "genuinely ambiguous," and "before concluding that a [regulation] is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415.

Moreover, even if a court finds that a regulation is ambiguous, *Auer* and *Kisor* require, before any deference may be given, that a "court…make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight"—that is, whether the

interpretation reflects the "fair and considered judgment" of the agency. *Id.* at 2416, 2417.

In *Kisor*, this Court instructed the courts to adhere to those prerequisites for deference and avoid "reflexive" deference. *Id.* at 2415.

The court of appeals failed entirely to evaluate or decide whether the relevant terms of Section 7.4001 are ambiguous. As noted, the relevant terms of Section 7.4001 upon which petitioner based her claims were the following terms defining interest: (i) "any payment compensating a creditor…for an extension of credit"; (ii) "[a]ny payment compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension."

The court of appeals did not examine whether or determine that any of these words used in Section 7.4001 are ambiguous. Instead, it fast-forwarded to what it described as a "dispositive" application of *Auer* deference to an "interpretive letter" the OCC issued years after its most recent amendment to Section 7.4001. *See* OCC, Interpretive Letter 1082 (May 17, 2007) (the "Letter").[1]

Even had the court of appeals determined that the relevant terms of Section 7.4001 were ambiguous, it could not have determined that the Letter resolved any such ambiguity because, in the

[1] The OCC published the Letter on its website at https://www.occ.gov/topics/licensing/interpretations-and-actions/2007/int1082.pdf.

Letter, the OCC did not even mention or reference, let alone provide a considered analysis of, Section 7.4001. The Letter did not discuss or interpret any of the key phrases from Section 7.4001 that were at issue in this case, including (i) "any payment compensating a creditor…for an extension of credit"; (ii) "[a]ny payment compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension."

The court of appeals' decision reflects *Auer* deference run amok; it represents precisely the reflexive application of *Auer* deference this Court prohibited in *Kisor*. The Court should grant this petition and reverse the court of appeals decision, or, alternatively, vacate the decision of the court of appeals and remand with direction to the court of appeals to decide petitioner's appeal as required by *Auer* and *Kisor.*

A. Factual Background

Respondent Citizens Bank, N.A. charges its checking account customers what it describes as "Sustained Overdraft Fees." App., *infra*, 9a. Sustained Overdraft Fees are different from the "Initial Overdraft Fees" Citizens Bank charges customers when a customer incurs a debit that exceeds the checking account balance, and Citizens Bank honors the debit (i.e., advances the funds to pay the check, ATM withdrawal, or debit transaction), or the "Returned Item Fees" Citizens Bank charges when it declines such a transaction.

Petitioner does not challenge the lawfulness of either Initial Overdraft Fees or Returned Item Fees. *Id.*

If, after incurring an overdraft that Citizens Bank honors, a customer fails to repay the amount the customer owes to Citizens Bank (that is, the amount by which the account was overdrawn) within a specified period of time, then Citizens Bank begins charging what it calls "Sustained Overdraft Fees" on a periodic basis. *Id.* These charges are in addition to and separate from the Initial Overdraft Fee charged when the customer first overdraws an account. *Id.*

The Sustained Overdraft Fees are not one-time charges; Citizens Bank charges Sustained Overdraft Fees over regular intervals. *Id.* at 9a–10a. That is, the longer the customer takes to pay back the advance made by Citizens Bank, the greater the Sustained Overdraft Fees Citizens Bank levies against the customer.

Unlike the Initial Overdraft Fee, which Citizens Bank charges for the service of responding to a debit exceeding a customer's account balance, the only service Citizens Bank provides in exchange for the Sustained Overdraft Fee is the continued use of the funds it already advanced to the customer, which the customer still owes to Citizens Bank. App., *infra*, 30a, 35a, 37a–41a ¶¶ 5, 27, 35, 39, 43, 47.

Citizens Bank has never disputed that if Sustained Overdraft Fees are "interest" under the NBA, then those charges far exceed the maximum interest charges that the NBA permits. 12 U.S.C. § 85.

Petitioner's complaint is straightforward: Citizens Bank's "Sustained Overdraft Fees" are "interest" as that term is used in the NBA and defined by the OCC in Section 7.4001, and the Sustained Overdraft Fees violate the NBA's restriction on the maximum interest a national bank can charge. *Id.* at 10a; 12 U.S.C. §§ 85, 86. Petitioner therefore asserts a single claim under the NBA on her own behalf and on behalf of other customers of Citizens Bank. *Id.*

B. The Regulatory Context

The core substantive question in this case is whether Citizens' Bank's "Sustained Overdraft Fees" were "interest" under the NBA, 12 U.S.C. § 85, as defined by the OCC in Section 7.4001.

The NBA tasked the OCC with defining what charges count as "interest" for purposes of 12 U.S.C. §§ 85, 86. *See* 12 U.S.C. § 93a. Section 7.4001 is the OCC's regulation governing whether particular charges are "interest." The regulation provides as follows:

> The term "interest" as used in 12 U.S.C. 85 includes *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*. It includes, among other things, the following *fees connected with credit extension or availability*: numerical periodic rates, *late fees*, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees,

> cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

12 C.F.R. § 7.4001(a) (emphasis added).

Citizen Bank's Sustained Overdraft Fees fall well within three separate, unambiguous provisions of the OCC regulation and are therefore "interest." Specifically, Sustained Overdraft Fees are (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension."

The OCC clarified, in commentary in an initial Request for Comment regarding proposed amendments to section 7.4001, that overdrafts involve extensions of credit, and whether charges in connection with overdrafts are "interest" is a question that is "fact-specific" depending upon how the charges are imposed. Specifically, in 2001, when the OCC considered specifying in Section 7.4001 the precise circumstances in which charges relating to overdrafts would be deemed interest, it discussed the example of a bank that imposes an Initial Overdraft Fee that is greater than the same bank's Returned Item Fee:

> As a matter of practice, banks often vary the amount of the charges they impose depending on whether they honor the customer's check. *A bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder. Consistent with that approach, 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.*

66 Fed. Reg. 8178, 8180 (Jan. 30, 2001) (emphasis added).

In response to the Request for Comment, some commenters advocated that all charges relating to deposit account overdrafts should be defined categorically as non-interest charges. The OCC declined this suggestion, explaining that whether charges relating to overdrafts are interest presents "*complex and fact-specific concerns*." 66 Fed. Reg. 34784, 34787 (July 2, 2001) (emphasis added). That is, the OCC recognized substantial variation in how banks imposed charges relating to overdrafts, and that in some of those factual settings, charges relating to overdrafts could be interest under the NBA. Accordingly, the OCC decided against attempting to craft a rule to address all such factual variations. *Id.*

Given that the OCC ultimately declined to amend this aspect of its regulation, it remained the case, as the OCC had stated in its commentary through its Request for Comment, that particular charges

relating to overdrafts "could be viewed as interest" and that "[a] bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder." 66 Fed. Reg. 8178, 8180.

Of course, the fact that the OCC decided that whether overdraft-related charges are "interest" is a "fact-specific" question does not mean Section 7.4001 is ambiguous; it simply means that resolution of disputes such as petitioner's claim here depend upon the application of Section 7.4001 to the facts of the case.

Here, the circumstances in which Citizens Bank charged Sustained Overdraft Fees—including the facts alleged in petitioner's complaint that (i) unlike initial overdraft fees, Citizens Bank provided no service for Sustained Overdraft Fees other than the continued extension of credit; and (ii) the Sustained Overdraft Fees are only charged if the customer breaches her agreement with Citizens Bank by being late in paying back to Citizens Bank its advances, demonstrate that Sustained Overdraft Fees fall well within the unambiguous definition of "interest" set forth in Section 7.4001. Such charges are (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor …for…default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension." 12 C.F.R. § 7.4001(a).

Six years later, the OCC issued Interpretive Letter 1082, the lynchpin of the court of appeals decision in this case. In the Letter, the OCC responded to a question from a bank as to whether

the bank's overdraft fees complied with 12 C.F.R. § 7.4002. Section 7.4002 is a different regulation from Section 7.4001. While Section 7.4001 governs whether a charge is "interest," Section 7.4002 regulates charges that are not interest under Section 7.4001, specifying considerations banks must take into account in setting such noninterest charges. 12 C.F.R. § 7.4002. Section 7.4002 itself confirms that whether a charge is interest is to be decided by and is governed by Section 7.4001, not Section 7.4002. 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 by this section.").

Most significantly, in the Letter the OCC:

- Did not even mention Section 7.4001;
- Did not discuss or interpret any of the words or phrases contained in Section 7.4001; and
- Did not engage in any analysis or interpretation of Section 7.4001.

In particular, the Letter provides no guidance with respect to or interpretation of any of the key OCC phrases in Section 7.4001 upon which petitioner relied for her claim. Specifically, the Letter provides no guidance as to whether Sustained Overdraft Fees constitute (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor…for… default or breach by a borrower of a condition upon which credit has been extended"; or (iii) "late fees" that are "connected with credit extension."

Accordingly, "the character and context of" the Letter cannot possibly "entitle[] it to controlling weight," and the Letter cannot possibly reflect the "fair and considered judgment" of the OCC regarding the meaning of the words used in Section 7.4001, including whether Sustained Overdraft Fees fall within the terms of the regulation quoted above. *Kisor*, 139 S. Ct. at 2417.

C. Proceedings Below

The relevant procedural history of this case is as follows:

1. Petitioner filed her complaint on June 7, 2007. App., *infra*, 10a. Citizens Bank filed a motion to dismiss and/or to stay the case and compel arbitration. *Id.* The district court denied Citizen Bank's motion to compel arbitration. Citizens Bank did not appeal that decision. *Id.* at 10a n.3. In its motion to dismiss, Citizens Bank argued that the district court should dismiss the complaint, pursuant to Rule 12(b)(6), and rule as a matter of law that the Sustained Overdraft Fees that Citizens Bank charged to customers were not "interest" subject to the National Bank Act's restriction on interest charges.

On Citizens Bank's motion, the district court dismissed petitioner's complaint through a short text order entered on ECF with no written memorandum. *Id.* at 1a–3a.

2. Petitioner timely appealed the district court's dismissal of her complaint to the court of appeals. A divided panel of the court of appeals, in a split

decision dated March 26, 2019, affirmed the decision of the district court. *Id.* at 4a–25a.

The court of appeals held that "Interpretative Letter 1082 resolves this case" because the Letter is "controlling under *Auer*." *Id.* at 11a–12a. It reached this conclusion without determining whether Section 7.4001 is ambiguous. *Id.* at 5a–19a. The court of appeals, although briefly referencing the text of Section 7.4001, *id.* at 6a–7a, performed no analysis or interpretation of Section 7.4001 or the NBA, *id.* at 5a–19a.

The court of appeals acknowledged that the Letter does not reference Section 7.4001, but it afforded *Auer* deference anyway because it found that the Letter provided the "OCC's guidance" that Sustained Overdraft Fees are "lawful…'under the [NBA] and [OCC] regulations.'" *Id.* at 13a The court reasoned that by describing the charges as "'deposit account service charges,'" the OCC implicitly rejected any claim that the charges were "interest." *Id.*

The court of appeals also concluded that even absent *Auer* deference, it would apply *Skidmore* deference to the Letter. *Id.* at 14a–17a (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012), which in turn quotes *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Judge Lipez dissented from the panel majority's decision and its improper, reflexive application of *Auer* deference to the Letter. He said:

> I cannot conclude that the OCC, in…making only a passing descriptive reference to [a]

> bank's continuous overdraft charges, decided *sub silentio* the important issue of whether such fees constitute interest….
>
> Interpretive Letter 1082…simply does not resolve the issue. The OCC was not specifically asked to consider, and the Letter does not purport to address, whether any charges exceeding a returned check fee – which would include the "sustained" fees at issue here – constitute interest… Silence…is not guidance… 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.

App., *infra*, 22a–23a.

3. Petitioner filed with the court of appeals a timely petition for panel rehearing or rehearing en banc. The court of appeals denied that petition on June 4, 2019; Judge Lipez dissented from the denial of panel rehearing. *Id.* at 26a–27a.

This Court issued its decision in *Kisor* on June 26, 2019, a few weeks after the court of appeals denied petitioner's petition for panel rehearing or rehearing en banc. Accordingly, the court of appeals did not consider or apply *Kisor*.

JURISDICTION OF THE DISTRICT COURT AND THE COURT OF APPEALS

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action

arises under the laws of the United States, namely the National Bank Act, 12 U.S.C. § 1, *et seq.*

Final judgment entered in the district court on April 19, 2018. Petitioner filed a timely notice of appeal on May 10, 2018. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294.

REASONS FOR GRANTING THE PETITION

This Court in *Kisor* cautioned against a "reflexive" approach to affording *Auer* deference to purported agency interpretations of regulations. 139 S. Ct. at 2415. The Court affirmed two important prerequisites to *Auer* deference.

First, courts construing regulatory texts should not afford *Auer* deference to agency interpretations of such texts "unless the regulation is 'genuinely ambiguous.'" *Id.* And, "before concluding that a [regulation] is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* That is, "[a] court must carefully consider the text, structure, history, and purpose of a regulation before resorting to deference." *Id.*

Second, *Auer* deference should be afforded only where an interpretation "reflect[s] an agency's authoritative, expertise-based, fair and considered judgment." *Id.* at 2417. Accordingly, "in applying *Auer*, a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416.

Although *Kisor* affirmed principles this Court had announced previously, *Kisor* clarified the scope of *Auer* in order to discourage the overzealous application of *Auer*. Such was the case in *Kisor* itself; this Court held "that a redo [was] necessary" because the "Federal Circuit assumed too fast that *Auer* deference should apply." *Id.* at 2424.

Here too, without the benefit of *Kisor*, the court of appeals "assumed too fast" that *Auer* deference applies without (i) deciding whether the relevant provisions of Section 7.4001 are ambiguous; or (ii) evaluating whether the Letter reflects the OCC's "authoritative, …fair and considered judgment," *id.* at 2417, on the meaning of the relevant provisions of Section 7.4001.

The court of appeals' application of *Auer* was particularly problematic in that it gave deference to the Letter, which did not reference, let alone discuss, the applicable regulation, Section 7.4001. It therefore violated *Auer* and *Kisor* by disregarding a basic premise of *Auer*—that the agency must have, in fact, "interpreted" the relevant regulation. Such an unprecedented extension of *Auer* is a symptom of the pre-*Kisor* world, in which courts often leapt too quickly to *Auer* deference rather than engaging in the required tasks of determining if the regulation is ambiguous and, if so, deciding if the agency's interpretation is its "authoritative, …fair and considered judgment," *Kisor*, 139 S. Ct. at 2417.

For these reasons, the Court should reverse the court of appeals, or, as in *Kisor*, order a "redo," with the court of appeals being instructed to decide petitioner's appeal in light of and consistent with this Court's decisions in *Kisor* and *Auer*.

A. The Court of Appeals Erred in Affording *Auer* Deference to the Letter.

Auer deference finds its origins in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In *Seminole Rock*, the Court held that when "the

meaning of the words used" in a regulation are in doubt, the interpretation of the agency that authored a regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 413–14, 417–18. The Court's reference to the "meaning of the words" underscores a basic premise of *Seminole Rock/Auer* deference—it applies only where an agency is interpreting its own words contained in the text of a regulation it authored.

The Court in its recent *Kisor* decision confirmed two important prerequisites to the application of *Auer* deference. First, before a court may apply *Auer* deference, it must determine whether the relevant regulation is "genuinely ambiguous," a determination which requires the court to "exhaust all the 'traditional tools' of construction.'" 139 S. Ct. at 2415. Second, if a regulation is ambiguous, *Auer* deference should be afforded only where an interpretation "reflect[s] an agency's authoritative, expertise-based, fair and considered judgment." *Id.* at 2417.

Here, the court of appeals, without the benefit of the *Kisor* decision, disregarded each of these prerequisites and therefore misapplied *Auer.*

1. Section 7.4001 Is Not Ambiguous, and the Court of Appeals Failed to Examine Whether, or Decide that, Section 7.4001 Is Ambiguous.

This Court affirmed in *Kisor* the basic principle that *Auer* deference only potentially applies if the regulation at issue is ambiguous.

Here, the court of appeals did not examine whether or decide that Section 7.4001 is ambiguous. The court of appeals did observe that "the term 'interest,'" as used in 12 U.S.C. § 85, "is ambiguous and that OCC is due deference in interpreting it." App.*, infra*, 5a–6a. The court then proceeded to set forth the text of Section 7.4001, which it noted reflected the OCC's interpretation of the term "interest," which was "promulgated after notice and comment." *Id.* at 6a–7a. The court of appeals, however, nowhere examined whether, or decided that, Section 7.4001 is itself ambiguous. *Id.* at 5a–19a.

As *Kisor* counsels, such a finding of ambiguity in the relevant regulation is an initial prerequisite to the application of *Auer* deference—one the court of appeals disregarded here.

Petitioner contends that Citizens Bank's Sustained Overdraft Fees fall within the plain terms of Section 7.4001 because they are (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor…for… default or breach by a borrower of a condition upon which credit has been extended"; and (iii) "late fees" that are "connected with credit extension."

Rather than engage these textual arguments in the first instance, or decide whether the above-quoted words of Section 7.4001 are, in fact, ambiguous, the court of appeals reflexively jumped to *Auer* deference at the outset of the analysis section of its decision, ruling that "[a]s the law currently stands, [the Letter] resolves this case." *Id.* at 11a.

Even had the court of appeals determined that the relevant terms of Section 7.4001 were ambiguous, such a finding, standing alone, would have been insufficient to warrant the application of *Auer* deference. Rather, the court of appeals was still required to try to resolve the meaning of Section 7.4001 through traditional tools of construction. *Kisor*, 139 S. Ct. at 2415.

This Court in *Kisor* cautioned, with respect to analysis of regulatory texts:

> [A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved…. [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.

Here, court of appeals did not even bother to "wave the ambiguity flag." Instead, it just declared that *Auer* deference to the Letter was "dispositive" on the petitioner's complaint without considering the "text, structure, history, or purpose of" Section 7.4001 or the NBA.[2]

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[2] The history of the NBA's prohibition on usurious interest supports petitioner's construction of the NBA and Section 7.4001. In particular, long before the OCC promulgated Section 7.4001, this Court held that the NBA (then codified at R.S.

This was error; the court of appeals decision reflects precisely the "reflexive" application of *Auer* deference this court prohibited in *Kisor*. The court of appeals' failure to resolve at all whether Section 7.4001 is ambiguous, or to engage in any meaningful sense with the applicable statutory and regulatory texts, requires reversal.

2. The Letter Does Not Reflect a "Fair and Considered" Judgment as to the Meaning of Section 7.4001.

Even had the court of appeals properly decided that the relevant terms of Section 7.4001 upon which petitioner relied were ambiguous, it would have been error for the court to afford *Auer* deference to the Letter because there is compelling reason to conclude that the Letter does not reflect the fair or considered judgment by the OCC on the meaning of Section 7.4001.

For *Auer* deference to apply, an agency's interpretation of its regulation must reflect "the agency's fair and considered judgment on the matter in question." *Auer,* 519 U.S. at 462. The Court reaffirmed this principle in *Kisor*, explaining that

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5197) applies to overdraft transactions. *Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 373–74 (1904). The Court held that a "charge on overdrafts" exceeded the interest charges permissible under the NBA and rejected a bank's argument that the Court should instead characterize the charge not as interest but as a "penalty because of a failure to pay a debt when due." *Id.* The court of appeals' contrary holding, based on an implicit "interpretation" found in the Letter, is incompatible with *Citizens' National Bank.*

courts should hesitate to find that an interpretation reflects an agency's fair and considered judgment "without significant analysis of the underlying regulation [and] careful attention to the nature and context of the interpretation." 139 S. Ct. at 2414.

The court of appeals' decision violates those commands of the Court. There is substantial "reason to suspect" the Letter does not "reflect the [OCC's] fair and considered judgment" on the "meaning of the words used" in Section 7.4001, given that *the OCC does not even mention Section 7.4001 in the Letter*. It does not, for example, contain any discussion of whether overdraft fees generally, or Sustained Overdraft Fees specifically, may constitute (i) "payment[s] compensating a creditor…for an extension of credit"; (ii) "payment[s] compensating a creditor…for…default or breach by a borrower of a condition upon which credit has been extended"; or (iii) "late fees" that are "connected with credit extension."

The court of appeals is understandably silent as to precisely what words in Section 7.4001 it finds the OCC interpreted in the Letter. While the court, early in its decision, presents the text of Section 7.4001, App., *infra*, 6a–7a, it draws no connection between that text and the Letter, *id.* at 5a–19a, because there is no connection. The Letter does not even reference Section 7.4001 or the key provisions upon which the petitioner's claim is based. It simply goes without saying that an agency cannot set forth its "fair and considered judgment" of the "meaning of the words used" in its regulation without evening mentioning the regulation or the words used in its regulation.

The court of appeals pointed to the OCC's statement in the Letter that the bank's overdraft fees were "consistent with the NBA and OCC's regulations interpreting the NBA," *id.* at 11a–12a, and appears to suggest that general statement reflects the OCC's "considered" conclusion that overdraft fees must comply with *all* OCC regulations and the *entirety* of the NBA (which contains fifteen sections).

Setting aside the fact that the Letter contains no such broad pronouncement, such a pronouncement would not have constituted a "fair and considered" interpretation about anything in Section 7.4001.

Moreover, the conclusion of the court of appeals that the OCC intended, through the Letter, to decide that overdraft charges comply with all applicable regulations under the NBA is incompatible with the OCC's commentary concerning Section 7.4001. Recall, the OCC observed that "[a] bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder," and therefore, certain charges in connection with overdrafts "could be viewed as interest within the meaning of 12 U.S.C. 85." 66 Fed. Reg. 8178, 8180. Nothing in the Letter provides any basis to conclude that the OCC intended to perform an about-face and reach the exact opposite conclusion, without even mentioning Section 7.4001

As Judge Lipez explained in his dissent:

> Interpretive Letter 1082, which was issued six years [after the OCC considered amending Section 7.4001], simply does not resolve the

> issue. The OCC was not specifically asked to consider, and the Letter does not purport to address, whether any charges exceeding a returned check fee -- which would include the "sustained" fees at issue here -- constitute interest.... *Silence...is not guidance*, and we would thus need to infer a ruling on a debated issue from between the lines of the 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.

App., *infra*, 23–24a (emphasis added); *see also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (rejecting *Auer* deference to "interpretive rule" announced years after regulation because "the Interpretive Rule cannot be justified as indicative of some intent the [agency] had in 1971").

Judge Lipez was correct. His dissent is consistent with *Kisor*; the majority's unsupportable reading of the Letter and abandonment of the regulatory text is not. The notion that the OCC, in an informal letter, *implicitly* overruled its prior, carefully reasoned determination presents the precise opposite of a "fair and considered" judgment as required for *Auer* deference to apply.[3]

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[3] As noted, the court of appeals does not explain how the Letter could have construed the relevant provisions of Section 7.4001 without even mentioning the regulation or its text. To the degree that the court of appeals assumed that the Letter decided directly the question of whether Sustained Overdraft fees are "interest" under 12 U.S.C. § 85, then *Auer* deference could not apply because *Auer* applies *only* to interpretations of

B. The Court of Appeals Also Gave Improper *Skidmore* Deference to the Letter.

The court of appeals, in a *sua sponte* analysis presented in dicta, suggested that even if *Auer* deference did not apply, the court would afford *Skidmore* deference to the Letter. However, *Skidmore* deference here would be error for the same reason as *Auer* deference was error, because the same requirements for *Auer* deference of which the court of appeals ran afoul also apply to *Skidmore* deference.

First, like *Auer* deference, *Skidmore* deference requires that the legal text being interpreted must be ambiguous before deference to the interpretation potentially applies. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991). That is, the same basic principles discussed in *Kisor* with respect to *Auer* deference—including requiring a finding of ambiguity and the exhaustion of traditional tools of construction—also apply to *Skidmore* deference.

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an agency's own *regulation*; it does *not* apply to an interpretation of a *statute*. Had the OCC intended to resolve directly whether Sustained Overdraft Fees are "interest" as Congress used that term in 12 U.S.C. § 85, it could have done so only through the more demanding requirements of *Chevron U.S.A., Inc. v. Nat'l Resource Defense Council*, 467 U.S. 837 (1984), which include "a relatively formal administrative procedure" such as "notice and comment" rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). The Letter is plainly not the product of notice and comment rulemaking; accordingly, it cannot serve as an authoritative determination by the OCC of whether Sustained Overdraft Fees are "interest" under the 12 U.S.C. § 85.

Here, to repeat, the court of appeals did *not* analyze or decide whether the relevant provisions of Section 7.4001 were ambiguous; instead, it reflexively applied *Auer*, and later *Skidmore*, deference without engaging with the regulatory text or deciding whether the regulation is ambiguous.

Moreover, the principle discussed above with respect to *Auer* deference—that an agency's interpretation must reflect the fair and considered judgment of the agency—applies equally under *Skidmore*. *Skidmore* deference hinges upon the "thoroughness evident in [the agency's] consideration" of an issue and the "validity of its reasoning." *Skidmore*, 323 at 140. This standard necessarily requires that the purported interpretation contain at least some analysis of the words used in the regulation at issue.

Again, the Letter does not even reference, let alone contain any "consideration" or "reasoning," concerning the text of Section 7.4001, making the majority's decision to afford *Skidmore* deference an unprecedented and unwarranted extension of *Skidmore.* Petitioner is aware of no decision affording *Skidmore* deference to an "interpretation" of a legal text where the interpretation does not even reference the relevant text it purportedly interprets.

The court of appeals' *Skidmore* deference also runs afoul of this Court's recent decision in *Young v. UPS*, 135 S. Ct. 1338 (2015). There, the EEOC issued formal guidance (published in the C.F.R.) that construed a provision of the Pregnancy Discrimination Act, but the guidance did "not resolve [an] ambiguity in the statutory text" that was

important to the case. *Id.* at 1351. The EEOC later purported to resolve informally that same ambiguity without complying with formal process. *Id.* The Court declined to afford *Skidmore* deference to the new informal guidance, observing: "the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent," and the EEOC did not "explain the basis for its latest guidance." *Id.* at 1351–52. That is, *Young* underscores that for *Skidmore* deference to apply, there must be some reasoning supporting a new interpretation.

Here, *Skidmore* deference is even less appropriate than in *Young*. In *Young*, the EEOC at least cited the relevant statute, even if it failed to offer any supporting analysis; here, the Letter did not mention 7.4001. As Judge Lipez aptly observed, the Letter "contains *no* analysis of whether [Sustained Overdraft Fees] constitute interest," and "*[s]ilence…is not guidance….*" App., *infra*, 22a–23a (emphasis added). Applying *Skidmore* deference to the Letter is contrary to both *Skidmore* and *Kisor*.

CONCLUSION

The court of appeals decision reflects the improper, reflexive application of *Auer* deference, which this Court prohibited in *Kisor*. The court of appeals assumed much "too fast" that *Auer* deference applied without first determining whether the applicable regulation was ambiguous or attempting to engage in any analysis of the applicable statutory and regulatory texts. Moreover, the decision below violates *Auer*'s and *Skidmore*'s basic prerequisite—

that there must have been an actual "interpretation" to which the Court could "defer."

The Court should grant this petition and reverse the decision of the court of appeals. Alternatively, as was the case in *Kisor*, the petitioner respectfully requests that the Court order a "redo"—that is, that the Court grant the petition, vacate, and remand for further consideration consistent with *Kisor* and *Auer*.

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