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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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BERKLEY V. WALKER, on behalf of himself and all others similarly situated,

Plaintiff - Appellant,

v.

BOKF, NATIONAL ASSOCIATION, d/b/a Bank of Albuquerque, N.A.,

Defendant - Appellee.

No. 20-2046

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**Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:18-CV-00810-JCH-JHR)**

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J. Aaron Lawson, Edelson PC, San Francisco, California (Ryan D. Andrews and Roger Perlstadt, Edelson PC, Chicago, Illinois, with him on the briefs), appearing for Appellant.

Sarah Wishard Poston (J. Michael Medina with her on the briefs), Frederic Dorwart Lawyers PLLC, Tulsa, Oklahoma, appearing for Appellee.

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Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

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**BRISCOE**, Circuit Judge.

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This appeal asks us to rule on an issue of first impression in this circuit: whether extended overdraft charges made to a checking account are "interest"

charges governed by 12 C.F.R. § 7.4001, or "non-interest charges and fees" for "deposit account services" governed by 12 C.F.R. § 7.4002.

Berkley V. Walker holds a checking account at the national bank BOKF, National Association, d/b/a Bank of Albuquerque, N.A. ("BOKF"). He filed this putative class action challenging BOKF's "Extended Overdraft Fees," claiming they are in violation of the interest rate limit set by the National Bank Act of 1864 ("NBA"), codified at 12 U.S.C. § 85. The NBA provides a private cause of action to parties who have been charged interest exceeding the usury limit and permits recovery of "twice the amount of the interest thus paid." 12 U.S.C. § 86.

BOKF charged Walker Extended Overdraft Fees after he overdrew his checking account, BOKF elected to pay the overdraft, and then Walker failed to timely pay BOKF for covering the overdraft. Walker alleges that when he overdrew his account and BOKF paid his overdraft, BOKF was extending him credit and this extension of credit was akin to a loan. Walker argues that the Extended Overdraft Fees of $6.50 he was charged for each business day his account remained negative after a grace period constituted "interest" upon this extension of credit and were in excess of the interest rate limit set by the NBA.

The district court concluded that BOKF's Extended Overdraft Fees were fees for "deposit account services" and were not "interest" under the NBA. The district court granted BOKF's motion to dismiss under Rule 12(b)(6) and dismissed Walker's action for failure to state a claim. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## I

Walker maintains a checking account with BOKF. ROA, at 8a. Walker's checking account is subject to BOKF's Depository Agreement for Transaction Accounts, which is part of BOKF's Agreement and Disclosures. *Id.* at 9a–12a, 47a. The account agreement creates a system of procedures and attendant fees in the event an accountholder draws on his account when the funds are not sufficient to cover the charge—i.e., an overdraft. *Id.* at 54a. The account agreement gives BOKF two options when a customer overdrafts his account: (1) the bank can "refuse to pay the item, without giving [the accountholder] prior notice, and charge a Returned Item Fee at the rate set in the Summary of Fees," or (2) the bank can "elect to pay the item, in which case [the bank] will charge the Overdraft Fee at the rate set in the Summary of Fees and deduct the amount of the overdraft and the Overdraft Fee from the next deposit." *Id.* The Returned Item Fee and the Overdraft Fee are both $34.50. *Id.* at 71a. If the account remains overdrawn for five business days after the item is paid and an initial overdraft fee is charged, BOKF may charge an additional Extended Overdraft Fee of $6.50 per business day.[1] *Id.* at 54a, 71a.

[1] BOKF refers to these charges as "Extended Overdraft Fees," but other banks refer to the same type of fees as "Extended Overdraft Charges," "Sustained Overdraft Fees," or "Continuous Overdraft Charges." *See Johnson v. BOKF Nat'l Ass'n*, 15 F.4th 356, 361 (5th Cir. 2021) (describing the bank's "Extended Overdraft Charges" charged until an overdraft is cured); *Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 136 (1st Cir. 2019) (describing the bank's "Sustained Overdraft Fees" charged when it honors an overdraft); OFFICE OF THE COMPTROLLER OF THE CURRENCY, Interpretive Letter No. 1082, 2007 WL 5393636, at *1 n.3 (May 17, 2007) (discussing the bank's "Continuous Overdraft Charges" assessed to cover its customers' overdraft) [hereinafter Interpretive Letter 1082].

On January 19, 2017, Walker overdrew funds from his account in the sum of approximately $25.00. *Id.* at 13a. BOKF elected to cover the cost of the item and charged Walker an initial overdraft fee of $34.50. *Id.* Walker did not promptly pay back this balance. *Id.* On the sixth business day following Walker's initial overdraft, BOKF began imposing the Extended Overdraft Fee of $6.50 per business day. *Id.* Walker's account remained overdrawn until March 17, 2017. *Id.* Accordingly, BOKF assessed thirty-six separate overdraft fees, which totaled $234.00. *Id.*

On August 22, 2018, Walker filed this proposed class action in the United States District Court for the District of New Mexico. Walker asserted one claim, alleging that BOKF's Extended Overdraft Fees qualify as interest under the NBA and, as a result, the amount charged violates the NBA's anti-usury provisions.[2] The NBA prohibits banks from charging interest rates greater than "the rate allowed by the laws of the State . . . where the bank is located," and a bank is "located" in the state where it is chartered. *See* 12 U.S.C. § 85. BOKF is chartered in Oklahoma, and Oklahoma's maximum annualized interest rate is 6%. ROA, at 17a–18a. Walker alleges that the $234.00 BOKF charged in Extended Overdraft Fees "translates to an effective annualized interest rate between 501% and 2,462%," or over 83 times the maximum legal amount. *Id.* at 18a. Walker filed this suit as a putative class action representing all BOKF customers who, within the statute of limitations, were charged one or more Extended Overdraft Fees. *Id.* at 13a.

[2] Walker only challenges BOKF's imposition of the Extended Overdraft Fees (daily charges of $6.50 for running a negative balance), not the Initial Overdraft Fee (a one-time charge of $34.50). *See* Aplt. Br. at 11 n.3.

BOKF filed a motion to dismiss under Rule 12(b)(6), arguing that BOKF's Extended Overdraft Fees are not "interest" under the NBA and that Walker therefore failed to state a claim upon which relief can be granted. *Id.* 23a–32a. In support, BOKF asserted that the interpretation of overdraft fees by the Office of the Comptroller of the Currency ("OCC") in its Interpretive Letter 1082 place both initial and extended overdraft fees, including BOKF's Extended Overdraft Fees, under 12 C.F.R. § 7.4002(a)'s "deposit account services,"[3] not 12 C.F.R. § 7.4001's "interest."[4] *Id.*; Interpretive Letter 1082 at *1. BOKF also noted that although no Tenth Circuit decision directly resolves this issue, the overwhelming majority of federal courts who have addressed the issue have determined that both initial and extended overdraft fees are not interest under the NBA. ROA, at 23a–32a.

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[3] 12 C.F.R. § 7.4002 states, in relevant part: "A national bank may charge its customers non-interest charges and fees, including deposit account service charges. . . . 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."

[4] 12 C.F.R. § 7.4001 states, in relevant part:

> 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.

In response, Walker urged the district court to adopt the reasoning outlined in *Farrell v. Bank of America, N.A.*, 224 F. Supp. 3d 1016 (S.D. Cal. 2016), which is the only court to conclude that extended overdraft fees are interest under the NBA. *Id.* at 82a–92a. First, Walker argued that initial overdraft fees and extended overdraft fees are entirely separate and triggered at different times and for different reasons. *Id.* Although Walker concedes that BOKF's Initial Overdraft Fee qualifies as a "deposit account service" under § 7.4002(a), BOKF's Extended Overdraft Fee "is an interest charge levied by BOKF for the continued extension of credit made in covering a customer's overdraft" and therefore cannot be considered connected to the same banking services that BOKF provides to its depositors. *Id.* at 7a, 85a–86a. In support, Walker pointed to guidance issued by OCC and three other agencies on bank overdraft programs ("2005 Joint Guidance").[5] 70 Fed. Reg. 9127 (Feb. 24, 2005). The 2005 Joint Guidance observed that overdraft programs created risks for banks because "[w]hen overdrafts are paid, credit is extended." *Id.* at 9129. The 2005 Joint Guidance, however, did not address the application of the NBA to overdraft fee programs and appears more focused on alerting

[5] The 2005 Joint Guidance was issued by four federal bank regulators (OCC, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, and the National Credit Union Administration) to "assist" a variety of "insured depository institutions in the responsible disclosure and administration of overdraft protection services, particularly those that are marketed to consumers." 70 Fed. Reg. at 9127–28. Specifically, the 2005 Joint Guidance cautioned institutions to "carefully review their programs to ensure that marketing and other communications concerning the programs . . . do not encourage irresponsible consumer financial behavior" because overdraft protection programs "may expose an institution to more credit risk (e.g., higher delinquencies and losses)." *Id.* at 9128–29. Of the four agencies involved, only OCC is charged with the responsibility of interpreting and administering the NBA.

banks to the exposure of increased risk created by the payment of overdrafts. Nonetheless, Walker argued that the 2005 Joint Guidance illustrated that when a bank covers an overdrawn account, it is "loaning" money to the account depositor. *Id.* at 82a–92a. As such, BOKF's Extended Overdraft Fees are really "interest" on the bank's "loan," which falls under § 7.4001. *Id.*

The district court granted BOKF's motion to dismiss and concluded as a matter of law that BOKF's Extended Overdraft Fees are not "interest" under the NBA. *Id.* at 111a. The district court acknowledged that the NBA did not define the term "interest." It also noted that the Supreme Court has previously held that the NBA's use of the term "interest" is ambiguous, and OCC's interpretation of the ambiguous term should be afforded due deference. *Id.* at 115a (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996)). The district court agreed with BOKF that OCC had clarified the relationship between the NBA and extended overdraft fees in Interpretive Letter 1082. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). It therefore deferred to OCC's determination in Interpretive Letter 1082 that overdraft fees are "non-interest charges and fees" for "deposit account services" governed by § 7.4002, not "interest charges" governed by § 7.4001. *Id.* at 115a–21a. The district court concluded that Walker's attempt to characterize BOKF's Extended Overdraft Fees as "interest" on its "extension of credit" when covering overdrafts, or to draw a distinction between initial and extended overdraft fees, failed. *Id.*

In reaching this decision, the district court made the following additional observations about extended overdraft fees: (1) courts have consistently held that both

initial and extended overdraft fees are contingent upon a customer overdrawing their account; (2) § 7.4002(b) states that a charge does not need to be attached to a service to be considered non-interest; (3) extended overdraft fees are included in the terms of a bank's deposit account agreement with its customers; (4) extended overdraft fees lack the hallmarks of credit extensions because the overdraft does not involve a customer reaching out to the bank to borrow money; (5) extended overdraft fees do not operate like "interest" because the amount is a flat fee applied to any overdrawn balance, not a percentage applied to a specific principal; and (6) Walker's reliance on the 2005 Joint Guidance was inapplicable to the question at hand because it does not represent OCC's interpretation of the NBA, plus it predated Interpretive Letter 1082. *Id.*

The district court also noted that aside from the *Farrell* court, which did not consider or cite to Interpretive Letter 1082 in its reasoning, federal courts have routinely deferred to OCC's view and held that overdraft fees are not "interest" under the NBA. *See, e.g.*, *Fawcett*, 919 F.3d at 137 (stating that "as the law currently stands, Interpretive Letter 1082 resolves this case"); *Johnson v. BOKF, N.A.*, 341 F. Supp. 3d 675, 681 (N.D. Tex. 2018), *aff'd* 15 F.4th 356 (5th Cir. 2021) (holding that interpretations of regulations by the "most pertinent regulator, the OCC" are persuasive authority); *In re TD Bank, N.A. Debit Card Overdraft Fee Litigation*, 2018 WL 1101360 at *7 n.13 (D.S.C. Feb. 28, 2018) (stating that ample evidence exists that OCC intended for the collection of all overdraft fees to be considered activities directly connected with the maintenance of a deposit account); *Moore v. MB Financial Bank, N.A.*, 280 F. Supp. 3d 1069, 1071–72 (N.D. Ill. 2017) (agreeing with courts that have held extended overdraft fees are not

interest in accordance with OCC regulations); *Shaw v. BOKF, N.A.*, 2015 WL 6142903 at *3 (N.D. Okla. Oct. 19, 2015) (stating that Interpretive Letter 1082 expressly referred to overdraft fees as non-interest charges).[6]

Before the district court issued its order and final judgment, but after the parties fully briefed BOKF's Rule 12(b)(6) motion, the Supreme Court issued its decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Walker filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e), arguing that *Kisor* required the district court to first find that OCC's regulations were ambiguous before deferring to Interpretive Letter 1082. *Id.* at 125a. Walker contended that the district court did not properly analyze whether § 7.4001(a) is genuinely ambiguous under *Kisor* because the regulation's definition of interest—"any payment compensating a creditor . . . for an extension of credit"—is in fact unambiguous. *Id.* at 126a–30a. He reasoned that BOKF created a "debt" by advancing overdraft funds, thereby making BOKF a "creditor" and Walker a "debtor" within the meaning of the regulation. *Id.*

The district court denied Walker's motion for reconsideration. *Id.* at 152a. The district court reiterated that because the NBA does not define the term "interest," it had to defer to OCC's interpretation of the term. *Id.* at 150a. OCC's regulation, 12 C.F.R. § 7.4001(a), did not address extended overdraft charges, so the district court afforded *Auer* deference to OCC's Interpretive Letter 1082 because it directly addressed the legality of an overdraft fee structure "indistinguishable" from BOKF's. *Id.* The district

[6] We note here that the dissent fails to engage with these rulings and relies instead on the dissenting opinion in *Fawcett*.

court noted that the First Circuit in *Fawcett* similarly applied *Auer* deference to Interpretive Letter 1082, and Walker failed to argue that the letter was a plainly erroneous interpretation of the regulation. *Id.* at 150a–51a. The district court further stated that even assuming, *arguendo*, that it had committed error by deferring to Interpretive Letter 1082, the court had already ruled on and rejected Walker's central argument that the creditor–debtor relationship is reversed in the context of extended overdraft fees, and it also rested its decision "on a bulwark of federal cases holding that extended overdraft fees are not interest." *Id.* at 151a–52a.

The court entered final judgment and dismissed Walker's suit in favor of BOKF. Walker timely appealed. *Id.* at 155a.

**II**

"We review de novo the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Emps.' Ret. Sys. of R.I. v. Williams Cos., Inc.*, 889 F.3d 1153, 1161 (10th Cir. 2018). In reviewing a Rule 12(b)(6) motion, our role "is not to weigh potential evidence that the parties might present at trial" but instead to assess whether the "complaint alone is legally sufficient to state a claim for which relief may be granted." *Evans v. Diamond*, 957 F.3d 1098, 1100 (10th Cir. 2020). In doing so, we accept all well-pled factual allegations and view those allegations in the light most favorable to the plaintiff. *Id.*

We review a district court's ruling on a Rule 59(e) motion for reconsideration for abuse of discretion. *Carolina Cas. Ins. Co. v. Burlington Ins. Co.*, 951 F.3d 1199, 1207 (10th Cir. 2020). That abuse of discretion review, however, involves verifying that the

district court's "discretion was not guided by erroneous legal conclusions." *ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1178 (10th Cir. 2011).

**A. "Interest" Under the National Bank Act of 1864**

The National Bank Act of 1864 governs the business activities of national banks like BOKF and is implemented by OCC. The NBA authorizes national banks, in relevant part, to charge "*interest* at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 85 (emphasis added). The NBA, however, does not define the term "interest." In *Smiley*, the Supreme Court addressed whether credit card late-payment fees constitute "interest" for purposes of § 85. After determining the term "interest" as used in § 85 is ambiguous, the Court went on to note it would defer to OCC's interpretation of the term because OCC is the agency responsible for administering the NBA. *See Smiley*, 517 U.S. at 739 (noting that courts should defer to "the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws" and citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

OCC has issued two regulations relevant in this case to clarify what charges qualify as "interest" under the NBA. *See* 12 C.F.R. §§ 7.4001, 7.4002. The first regulation, § 7.4001, defines "interest" as used in the NBA to mean "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." § 7.4001(a). The regulation expressly includes as interest, "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." *Id.* If a bank fee qualifies as "interest," then the NBA's anti-usury provisions apply and limit the amount of that fee. § 7.4001(b) ("A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state.").

The second regulation, § 7.4002, states that banks also may impose "non-interest charges and fees, including deposit account service charges." § 7.4002(a). The regulation provides a series of factors that banks may consider in calculating these fees. § 7.4002(b) states that "[t]he establishment of non-interest charges and fees, their amounts and the method of calculating them are business decisions to be made by each bank." In setting these non-interest charges and fees, banks are to consider the following factors: "(i) The cost incurred by the bank in providing the service; (ii) The deterrence of misuse by customers of banking services; (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and (iv) The maintenance of the safety and soundness of the institution." § 7.4002(b)(2). The NBA's anti-usury provisions do *not* limit "non-interest charges and fees" governed by § 7.4002, and banks have discretion to determine the amount of these fees so long as they act within the bounds of "sound banking judgment and safe and sound banking principles." *Id.* The regulation does not provide a list of "non-interest charges and fees"

but explains that "[c]harges and fees that are 'interest' within the meaning of [the NBA] are governed by § 7.4001 and not by this section." § 7.4002(c).

**B. OCC's Interpretive Guidance**

In addition to the statutory text and regulations, OCC has issued additional interpretive guidance on the meaning of "interest" under the NBA.

On January 30, 2001, OCC issued a notice of proposed rulemaking indicating that it was considering revising its definition of "interest." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8178, 8180 (Jan. 30, 2001). The notice explained that the proposed rule would clarify that "NSF [not sufficient funds] fees" as used in § 7.4001 "includes only those fees imposed by a creditor bank when a borrower attempts to pay an obligation to that bank with a check drawn on insufficient funds." *Id*. That is, NSF fees refer to situations where a credit card bank charges its customer a fee when the customer pays his credit card bill with a check drawn on insufficient funds. In contrast to NSF fees charged by a credit card provider, the 2001 notice observed that "[f]ees that a bank charges for its deposit account services—including overdraft and returned check charges—are not covered by the term 'NSF fees'" and are not "interest" but instead are "charges" covered by § 7.4002. *Id.* The notice also queried whether the term "NSF fees" should 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.* The notice elaborated:

> 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. Currently, the OCC's regulation does not expressly resolve this issue.

*Id.* (emphasis added). OCC invited comment on this matter. *Id.*

On July 2, 2001, OCC published an updated final rule. 66 Fed. Reg. 34784, 34786–87 (July 2, 2001). OCC explained that it had "received numerous comments" on whether the term "NSF fees" as used in § 7.4001(a) "should include at least some portion of the fee imposed by a national bank in the more common scenario when it pays a check notwithstanding that its customer's account contains insufficient funds to cover the check." *Id.* at 34787. OCC noted that commenters "raised a number of complex and fact-specific concerns" involved in determining whether any portion of a charge imposed in connection with paying an overdraft constitutes "interest" under the NBA. *Id.* It also noted that the majority of comments opposed including in the definition of "interest" any portion of the fee imposed by a national bank when it pays an overdraft. *Id.* Based on this response, OCC declined to amend § 7.4001(a) to address this issue.

On May 17, 2007, OCC issued Interpretive Letter 1082, which for the first time directly addressed whether fees charged by a bank in connection with paying an overdraft

may qualify as "interest" under the NBA.[7] In Interpretive Letter 1082, a bank asked for clarification on whether its overdraft fee structure violated any portion of the NBA. *Id.* Specifically, the bank asked whether under the NBA and OCC's regulations it could "(1) in its discretion, honor items for which there are insufficient funds in depositors' accounts and recover the resulting overdraft amounts as part of the Bank's routine maintenance of these accounts; and (2) establish, charge and recover overdraft fees from depositors' accounts for doing so." *Id.*

The bank seeking OCC's clarification described its overdraft fee structure as follows: Pursuant to the bank's deposit account agreements with its customers, when the bank processed an item submitted on a depositor's account for which the account had insufficient funds, the bank, at its option, could elect to honor the overdraft item rather than return it. *Id.* This created an overdraft of the account. *Id.* In such circumstances, the bank cleared the overdraft amount as soon as sufficient funds were available in the account, and it also would charge overdraft fees. *Id.* In accordance with the bank's deposit agreement and fee schedule, the amount of the fee depended on the number of overdraft items presented on the account during the preceding 12-month period. *Id.* The

[7] OCC legal staff author "Interpretive Letters" to "address[] various legal and banking issues" and "[p]rovide legal analyses and interpretations, consistent with law and regulation, that support a safe and sound, vibrant, and diverse system of national banks and federal savings associations." *See Interpretations & Precedents*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (accessed January 18, 2022), https://www.occ.treas.gov/topics/laws-and-regulations/interpretations-and-precedents/index-interpretations-and-precedents.html; *Chief Counsel's Office*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (accessed January 18, 2022), https://www.occ.treas.gov/about/who-we-are/organizations/chief-counsels-office/index-chief-counsels-office.html.

bank charged (1) "an Overdraft Item (or Returned Item) Fee of $23 for the first and second occurrence during the 12-month period and $34 thereafter," i.e., an initial overdraft fee, and (2) "a Continuous Overdraft Charge of $5 per business day from the fourth through eleventh calendar day that an account is overdrawn," i.e., an extended overdraft fee. *Id.* at *1 n.3.

OCC determined that the bank's practice of collecting overdraft fees, both initial and extended, was lawful under the NBA and other banking regulations. *Id.* at *1. OCC recognized that creating and recovering overdrafts and overdraft fees "have long been recognized as elements of the discretionary deposit account services that banks provide" and "are part of or incidental to the business of receiving deposits." *Id*. Overdraft fees are meant to compensate banks for "services directly connected with the maintenance of a deposit account," and therefore the bank was not creating a "debt" that it then "collected" by recovering the overdraft and the overdraft fee from the account. Instead, the bank was "providing a service to its depositors" that the accountholder had agreed to pay for. *Id.* at *4. The bank's ability to charge such overdraft fees "is expressly reaffirmed in 12 C.F.R. § 7.4002(a)," which states that "[a] national bank may charge its customers non-interest charges and fees, including deposit account service charges." *Id.* at *4 (citing § 7.4002(a)). OCC concluded that as long as a bank uses a decision-making process that takes the factors listed in § 7.4002(b) into consideration, *supra* at 12, then "there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges—such as the overdraft fees at issue here—pursuant to section 7.4002(a)." *Id.* at *3.

## III

Walker argues on appeal that the district erred in granting BOKF's motion to dismiss because (1) when BOKF pays an overdraft on a customer's deposit account, it makes a "loan" within the meaning of the NBA; and (2) BOKF's Extended Overdraft Fees that it charges a customer who fails to timely pay back the overdraft are "interest" the customer must pay on that "loan," as unambiguously defined in § 7.4001(a). If BOKF's Extended Overdraft Fees are "interest," it is undisputed that the rate BOKF charges exceeds the applicable usury limits.

We note that the First Circuit in *Fawcett*, 919 F.3d at 134, addressed the same legal question of whether extended overdraft fees constituted interest under § 85 and the Fifth Circuit in *Johnson*, 15 F.4th at 365, addressed not only the same legal question but many of the same facts. Echoing *Fawcett* and *Johnson*, we determine that § 7.4001(a) and § 7.4002 are ambiguous regarding how we should categorize extended overdraft fees, and we therefore defer to OCC's interpretation in Interpretive Letter 1082 that extended overdraft fees are not "interest" within the meaning of the NBA.

### A. *Auer* Deference

In Interpretive Letter 1082, OCC considered the legality of a bank's overdraft fee structure, which included both initial and extended overdraft fees and is indistinguishable from BOKF's overdraft fee structure. OCC concluded that the bank's overdraft fees constituted "non-interest charges and fees" for deposit account services under § 7.4002. Interpretive Letter 1082 at *1–*2. Considering Interpretive

Letter 1082's applicability to BOKF's overdraft fee structure, we must decide whether to afford *Auer* deference to OCC's conclusion that these sorts of overdraft fees are "deposit account service charges" under § 7.4002(a) and therefore not interest under § 7.4001(a).

In the context of OCC, Interpretive Letters offer the agency's interpretation of its own regulations, and other courts repeatedly have turned to Interpretive Letters when appropriate while resolving disputes over the meaning of terms in OCC regulations. *See, e.g.*, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197–98 (11th Cir. 2011) (affirming district court's decision that deferred to OCC's Interpretive Letters for the definition of "customer" as used in § 7.4002(a)); *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 490, 490 n.2, 494–95 (5th Cir. 2003) (affording *Auer* deference to OCC's Interpretive Letters for the definition of "customer" as used in § 7.4002(a)); *Shaw*, 2015 WL 6142903 at *3 (deferring to Interpretive Letter 1082's definition of overdraft fees as "non-interest charges" under § 7.4002). *Cf. In re Bate*, 454 B.R. 869, 877–78 (Bankr. M.D. Fla. 2011) (determining that an Interpretive Letter regarding a preemption issue was not entitled to any deference under *Skidmore* because it was interpreting Supreme Court precedent rather than OCC's own regulations and preemption was outside the expertise of the agency).

The Supreme Court recently restated the circumstances under which courts should afford *Auer* deference to an agency's interpretation of its own regulation. *See Kisor*, 139 S. Ct. at 2414–18. Courts should defer to an agency's interpretation of its own regulations when (1) the regulation is "genuinely ambiguous," (2) the agency's

interpretation is "reasonable," and (3) the "character and context of the agency interpretation entitles it to controlling weight," which includes when the interpretation is the agency's "authoritative" or "official position," implicates the agency's "substantive expertise," and reflects the "fair and considered judgment" of the agency. *Id.* While we are not bound by OCC's Interpretive Letters, *Auer* deference dictates that an agency's interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). This deference scheme rests on the presumption that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991).

We will consider each *Kisor* factor in turn.

***1. "Genuinely Ambiguous"***

"First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2415 (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). While ambiguity always has been a requirement for *Auer* deference, *Kisor* provides that a court may make this determination only after exhausting "all the 'traditional tools' of construction," including the "text, structure, history, and purpose of a regulation." *Id.* at 2412–15 (quoting *Chevron*, 467 U.S. at 843 n.9).

Walker argues that the district court did not seriously consider the text of § 7.4001(a) ("any payment compensating a creditor . . . for an extension of credit") because the plain language of the regulation is unambiguous and therefore no consideration of OCC's position is necessary. He contends that § 7.4001(a)'s phrases of "any payment" and "extension of credit" have "clear meaning" and are not "susceptible of conflicting interpretations." Aplt. Reply Br. at 4. Walker asserts that BOKF "extended credit" to him when it covered his overdraft, and BOKF later charged the Extended Overdraft Fees on the basis of his failure to repay the "loan" in a timely fashion. Aplt. Br. at 9. BOKF's Extended Overdraft Fees, therefore, are intended to compensate the bank for the risk it undertakes in covering the overdraft. *Id.* In support, Walker argues that "there is a nearly universal understanding that the checking overdraft is, in fact, a loan." Aplt. Reply Br. at 4. He points to state court cases, treatises, and the 2005 Joint Guidance, while discounting the majority of federal cases on the topic as wrongly decided. Aplt. Br. at 8–27. He concludes by stating "[t]he notion that discretionary overdraft coverage involves a short-term extension of credit merely acknowledges the economic realities of the transaction." *Id.* at 14.

Engaging in the rigorous inquiry required under *Kisor*, we conclude that Walker's arguments and the dissent's analysis are unpersuasive and the regulations are genuinely ambiguous. Under OCC's regulations, a charge can be either "interest" under § 7.4001(a) or a "non-interest" charge under § 7.4002. *Johnson*, 15 F.4th at 362–63; *Fawcett*, 919 F.3d at 138 (citing §§ 7.4002(a), (c)). Here, the charge is an extended

overdraft fee, so we first look to the text, structure, history, and purpose of § 7.4001(a) to determine if an extended overdraft fee falls within its scope.

Starting with the text of § 7.4001(a), the passage stating that "any payment compensating a creditor . . . for an extension of credit" appears to have broad reach, but the words "extended overdraft fees" do not appear in the regulation. The dissent claims that this passage unambiguously "maps onto extended overdraft fees like BOKF's." Dissent, at 1. We disagree. The dissent asserts that "an extension of credit" is plainly defined as any overdraft that a bank like BOKF covers because the bank "makes a temporary provision of money with the expectation of repayment"—in other words, the bank "makes a loan." *Id.* at 2. But this definition of "extension of credit" is far from well-accepted, and other federal courts have held that a bank does *not* loan money in the event an account becomes overdrawn. *See, e.g.*, *Fawcett*, 919 F.3d at 138–39; *McGee v. Bank of America, N.A.*, 2015 WL 4594582 at *3–*4 (S.D. Fla. 2015), *aff'd*, 674 F. App'x 958 (11th Cir. 2017); *Shaw*, 2015 WL 6142903 at *4. These courts reached this conclusion by reasoning that extended overdraft fees do not arise from credit transactions and the bank does not become a creditor to the accountholder if the account becomes overdrawn, which is a typical feature of a creditor–debtor relationship. The lack of a creditor–debtor relationship is also present in Walker's case: We can reasonably determine that Walker did not seek a bank loan or obtain a line of credit from BOKF and that Walker was not charged for the use of money obtained by prior loan agreement with BOKF. Rather, BOKF charged Walker for overdrawing his account and then failing to timely remedy the overdraft. Moreover, the cases that the dissent cites in support of its

definition of "extension of credit" rely on state law and do not consider the context of the NBA. Dissent, at 2 (referencing cases that cite Iowa's definition of "extension of credit," Louisiana insurance law, and other state law defining "loan" in the context of bond exclusion).

The dissent also claims that BOKF's Extended Overdraft Fees plainly "compensate" the bank for its credit extension because they "directly and proportionately arise from a customer's failure to timely repay a debt obligation." *Id.* at 3. This definition is premised on the dissent's assumption that extended overdraft fees are entirely distinct from initial overdraft fees: Unlike extended overdraft fees, initial overdraft fees do not "compensate" the bank for covering an overdraft by extending credit because they "are charged immediately upon an overdraft event." *Id.* But courts routinely have rejected this purported distinction and have observed that both initial and extended overdraft fees are contingent upon a customer overdrawing their account and are automatically charged. *See, e.g.*, *In re TD Bank*, 2018 WL 1101360 at *9; *McGee*, 2015 WL 4594582 at *3–*4; *Shaw*, 2015 WL 6142903 at *4.

Delving deeper into the text, the regulation's language defines "interest" as "fees connected with credit extension or availability" and includes the following examples: "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." § 7.4001(a). These examples not only fail to mention extended overdraft fees, but they also follow no discernible pattern and arguably confuse the issue. Further,

our discussion of the dissent's views illustrates that meritorious rival interpretations do exist and we have a "choice between (or among) more than one reasonable reading" of the regulation's text. *Kisor*, 139 S. Ct. at 2411. Therefore, as applied to the type of fee at issue, we conclude that the language defining "interest" is ambiguous.

The regulation's structure and purpose similarly do not illuminate whether § 7.4001(a) embraces extended overdraft fees, especially if we look at how § 7.4001(a) and § 7.4002 relate to each other. *Johnson*, 15 F.4th at 363; *see also Kisor*, 139 S. Ct. at 2415. § 7.4002(a) states that "deposit account service charges" are "non-interest," and § 7.4002(c) clarifies that "[c]harges and fees that are 'interest' within the meaning of . . . § 85 are governed by § 7.4001." §§ 7.4002(a), (c). As the *Fawcett* court observed, extended overdraft fees in many ways are more similar in purpose and application to initial overdraft fees, a non-interest deposit account charge. 919 F.3d at 138–39 (citing *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1050 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir. 2000)). Extended overdraft fees do not bear the normal characteristics of interest or credit and do not involve a customer reaching out to the bank to borrow money. Instead, they originate from terms of a bank's deposit account agreement with its customers and are a flat fee applied to any overdrawn balance, not a percentage applied to a specific principal. From this perspective, § 7.4002 can reasonably be read to include extended overdraft fees because the charges are directly connected with deposit account services.

Accordingly, even if it may be plausible to understand extended overdraft fees to be interest under § 7.4001(a), the regulations taken together are ambiguous.

The regulation's history further supports that § 7.4001(a) is ambiguous. OCC's 2001 notice of proposed rulemaking and commentary accompanying the updated final rule expressly avoided resolving whether overdraft fees constitute "NSF fees" under § 7.4001(a). *See* 66 Fed. Reg. at 8180; 66 Fed. Reg. at 34786–87. Notably, in the process, OCC distinguished credit card provider fees from bank account fees. The agency explained that inclusion of "NSF fees" in § 7.4001(a)'s definition of "interest" was intended to codify a position OCC took in an Interpretive Letter: "charges imposed by a credit card bank on its customers who paid their accounts with checks drawn on insufficient funds" are "interest" within the meaning of the NBA. 66 Fed. Reg. at 8180. But the agency recognized that the term "NSF fees" was also commonly used to refer to "fees imposed by a bank on its checking account customers whenever a customer writes a check against insufficient funds, regardless of whether the check was intended to pay an obligation due to the bank." *Id.* OCC acknowledged that the different uses of the term "NSF fees" created ambiguity about the scope of § 7.4001(a), and the agency's proposed rule was meant to remedy this ambiguity. *Id.* Yet when OCC promulgated its final rule, it declined

to amend the text of § 7.4001(a) to clarify whether the regulation reached these charges.[8] 66 Fed. Reg. at 34786–87. In short, the 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. Based on the acknowledged difficulty in interpreting its meaning, we conclude that § 7.4001(a) is genuinely ambiguous.[9]

Logic dictates that if § 7.4001(a) is genuinely ambiguous, § 7.4002 also must be genuinely ambiguous. § 7.4001(a) and § 7.4002 together cover all possible charges. If we cannot determine whether a charge falls under the scope of § 7.4001(a)'s "interest,"

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[8] OCC also acknowledged that commentors "raised a number of complex and fact-specific concerns related to [whether the] inclusion of any portion of a charge imposed in connection with paying an overdraft constitutes 'interest' for purposes of section 85" and that the majority of comments "opposed including in the definition of 'interest' any portion of the fee imposed by a national bank when it pays an overdraft." 66 Fed. Reg. at 34787.

[9] Here the dissent accuses us of "[d]eferring to an agency's view that its own regulations are ambiguous," which "distorts our important ambiguity determination" and "should be categorically irrelevant." Dissent, at 9–10, 10 n.4. Contrary to the dissent's view, we do not argue that § 7.4001(a) is ambiguous in deference to OCC's saying it was. Nor are we "rel[ying] on the agency's view" uncritically. *Id.* at 10 n.4. We instead are describing the *history* of the regulation as an interpretive tool in our genuine ambiguity inquiry, which *Kisor* specifically requires us to do. 139 S. Ct. at 2412–15, 2423–24 ("[T]he court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning."). *Kisor* dictates that a court must "employ[] all its interpretive tools" and "carefully consider[]" agency regulatory history before resorting to deference because doing so may "resolve many seeming ambiguities." *Id.* at 2415–16 (internal quotations omitted). Careful consideration of such history involving agency authorities with expertise in the area also helps "establish the outer bounds of permissible interpretation," even when a regulation turns out to be truly ambiguous. *Id.* at 2416. Accordingly, our historical analysis of the regulation appropriately focuses on the back-and-forth between the commentators and the agency, including the agency's inaction, that revealed confusion about the regulation and resulted in the agency's ultimate decision to preserve the ambiguity.

we likewise cannot determine whether a charge falls under the scope of § 7.4002's "non-interest charges." *See Johnson*, 15 F.4th at 362–63; *Fawcett*, 919 F.3d at 138. Furthermore, Walker's cited sources do not show a "nearly universal understanding" of the meaning of "interest" under the NBA, and we agree with the *Fawcett* court that reliance on the 2005 Joint Guidance is misguided. *Fawcett*, 919 F.3d at 140 (explaining why the 2005 Joint Guidance does not purport to provide OCC's interpretation of the NBA).

We conclude that the regulations lack a clear textual command regarding extended overdraft fees and therefore are genuinely ambiguous. An overwhelming majority of courts have reached the same conclusion we do, and the dissent's contrary view is an outlier.

***2. "Reasonable"***

If genuine ambiguity remains, the agency's reading must still be a "reasonable" interpretation and come within the "zone of ambiguity" the court has identified after employing all its interpretive tools. *Kisor*, 139 S. Ct. at 2415–16 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Walker argues that Interpretive Letter 1082 is not a reasonable interpretation because it does not resolve the instant dispute for the following reasons. First, the bank receiving a response through Interpretive Letter 1082 did not explicitly ask OCC whether extended overdraft fees are governed by § 7.4001 or § 7.4002. Second, OCC did not mention the term "interest" or § 7.4001(a) and instead only discussed whether extended overdraft charges are "non-interest charges and fees" under

§ 7.4002. Walker asserts that deference is unwarranted because OCC did not appear to consider the relevant question, that is: Are extended overdraft charges interest?

We conclude that OCC's determination in Interpretive Letter 1082 that extended overdraft fees are "deposit account services" under § 7.4002, and therefore not "interest" under § 7.4001(a), is a reasonable interpretation. As *Fawcett* and *Johnson* note, Walker's argument that reliance on Interpretive Letter 1082 is unreasonable because it does not expressly mention § 7.4001(a) or interpret "interest" is "a non-starter." *Johnson*, 15 F.4th at 363 n.3; *Fawcett*, 919 F.3d at 138. The bank receiving a response through Interpretive Letter 1082 asked OCC whether the NBA and OCC's regulations—which include § 7.4001(a)—authorized its overdraft fee structure. Interpretive Letter 1082 at *1. In response, OCC stated that the bank's extended overdraft fees qualified as "deposit account service charges" under § 7.4002 and "there [was] *no supervisory impediment* to the bank exercising its discretionary authority to charge non-interest fees and charges" in accordance with § 7.4002(b). *Id.* at *1–*3 (emphasis added). The reference to there being "no supervisory impediment" to the bank charging extended overdraft fees was a clear reference to the usury limits imposed by the NBA on interest. This is yet another reason why we disagree with the dissent's view that Interpretive Letter 1082 does not address § 7.4001(a): OCC's supervisory regulations include § 7.4001(a), so if there is "no supervisory impediment" to extended overdraft fees, then that means they do not violate § 7.4001(a). Put another way, by classifying the bank's extended overdraft fees as "deposit account service charges," OCC "necessarily rejected the conclusion

that those charges were 'interest.'" *Johnson*, 15 F.4th at 363 n.3; *Fawcett*, 919 F.3d at 138. OCC's reading thus came within the identified "zone of ambiguity."

The dissent asserts that even if Interpretive Letter 1082 answered the question at hand, we should not grant it deference because it is an unreasonable interpretation. First, the dissent argues that the letter does not consider the difference between initial and extended overdraft fees. Dissent, at 14–15. As previously discussed, "[n]othing in the relevant OCC regulations indicates any inclination on the OCC's part to treat [extended] overdraft fees differently than initial overdraft fees" when determining if the fee is considered interest. *In re TD Bank*, 2018 WL 1101360 at *7 n.13. Second, the dissent contends that deference is not warranted because of the "difference between the fee structure in the letter and BOKF's alleged practices." Dissent, at 15–16. The dissent remarks that the bank receiving a response through Interpretive Letter 1082 charges extended overdraft fees "from the fourth through eleventh calendar day that an account is overdrawn," whereas BOKF charges its Extended Overdraft Fees until the overdraft is cured. *Id.* at 15; Interpretive Letter 1082 at *1 n.3. The dissent argues that this difference in duration makes it "look[] much more like the customer is 'compensating a creditor or prospective creditor for an extension of credit.'" Dissent, at 16 (quoting § 7.4001(a)). Besides observing that BOKF's Extended Overdraft Fees could "look" more like a short-term loan, the dissent does not explain why this distinction is relevant, and other courts have deferred to Interpretive Letter 1082 when the banks at issue charged extended overdraft fees for either a set number of business days or until the overdraft was cured. *See Johnson*, 15 F.4th at 361

(charging an "extended overdraft charge" of $6.50 per business day until the overdraft is cured); *Fawcett*, 919 F.3d at 136 (charging a "sustained overdraft fee" three times: "$30 four business days after the overdraft, another $30 after seven business days, and a final $30 after ten business days"). More to the point, the overdraft fee structures of both BOKF and the bank receiving a response through Interpretive Letter 1082 are indistinguishable in how they arise: a customer's overdraft first triggers an initial overdraft fee and then triggers an extended overdraft fee, one that undoubtedly could exceed the usury limits if defined as "interest" under the NBA. We therefore do not see any meaningful difference between the overdraft fee structures at issue in this case and those addressed in Interpretive Letter 1082.

We conclude that OCC's interpretation is reasonable.

***3. "Character and Context"***

In order to grant *Auer* deference, we also must determine "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416; *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *United States v. Mead Corp.*, 533 U.S. 218, 229–31, 236–37 (2001) (requiring an analogous though not identical inquiry for *Chevron* deference). Although no "exhaustive test" exists on this point, the Supreme Court has laid out three "especially important markers" for determining if an agency's regulatory interpretation commands *Auer* deference: (a) whether the agency's interpretation reflects the agency's "authoritative" or "official position"; (b) whether "the agency's interpretation implicates its substantive expertise"; and (c) whether the agency's

construction is rooted in its "fair and considered judgment." *Kisor*, 139 S. Ct. at 2416–17 (internal quotation marks omitted).

Walker generally argues that Interpretive Letter 1082 does not indicate the agency's thorough consideration because OCC stated when promulgating its final rule in 2001 that the classification of extended overdraft fees involved "complex and fact-specific" considerations. Walker contends that if OCC in fact believed that the issue was "complex and fact specific," "one would not expect it to think the issue so easily resolved that it did not even warrant discussion of [§ 7.4001(a)] in [Interpretive Letter 1082]." Aplt. Br. at 30.

**a. "Authoritative" or "Official Position"**

To receive *Auer* deference, the interpretation must be the agency's "authoritative" or "official position." *Kisor*, 139 S. Ct. at 2416–17. The interpretation must appear to be an authoritative statement rather than an "ad hoc statement not reflecting the agency's views" and "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy." *Id.*

We conclude that Interpretive Letter 1082 meets these requirements. Interpretive Letter 1082 bears the hallmarks of an official interpretation by OCC: It is labeled as an "Interpretive Letter," as opposed to general correspondence; a senior OCC official drafted the letter; it responds to a bank's request for OCC's guidance under the NBA and OCC regulations; and it indicates that it represents OCC's official position on the matter of whether extended overdraft fees are classified as "non-interest charges and fees" governed by § 7.4002. *See* Interpretive Letter 1082

at *1. Interpretive Letter 1082 also directly acknowledges that the bank's overdraft fee structure included both initial and extended overdraft fees and addresses OCC's views on the permissibility of such overdraft fees. *Id.* at *1–*2, *1 n.3.

**b. "Substantive Expertise"**

*Kisor* also dictates that the agency's interpretation "must in some way implicate its substantive expertise" because generally "agencies have a nuanced understanding of the regulations they administer." *Kisor*, 139 S. Ct. at 2417 (internal quotations omitted).

We conclude that Interpretive Letter 1082 clearly falls within OCC's substantive expertise. OCC is the agency charged with implementing the NBA and its regulations, and Interpretive Letter 1082 specifically offers guidance about whether, under the NBA and OCC's regulations, the regulated parties can "honor items for which there are insufficient funds in depositors' accounts and recover the resulting overdraft amounts as part of the Bank's routine maintenance of these accounts" and "establish, charge and recover overdraft fees from depositors' accounts for doing so." Interpretive Letter 1082 at *1. Interpretive Letter 1082 therefore directly engages the agency's substantive expertise regarding the permissibility of extended overdraft fees and gives fair notice that such fees are classified as "non-interest charges" under § 7.4002. *See Johnson*, 15 F.4th at 364.

**c. "Fair and Considered Judgment"**

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. *Kisor*, 139 S. Ct. at 2417 (internal quotations

omitted) (citing *Christopher*, 567 U.S. at 155; *Auer*, 519 U.S. at 462). Deference may not be warranted where the agency interpretation is a "*post hoc* rationalizatio[n] advanced to defend past agency action" or when it creates "unfair surprise," such as when the interpretation conflicts with the agency's prior interpretation or imposes retroactive liability for long-standing conduct that the agency had not previously addressed. *Id.* at 2417–18.

We conclude that Interpretive Letter 1082 reflects a "fair and considered judgment" because nothing indicates that it was merely a "*post hoc* rationalizatio[n] advanced to defend past agency action against attack" or that it created an "unfair surprise" to national banks, the regulated parties. *Id.* Instead, Interpretive Letter 1082 carefully responded to the "complex and fact-specific concerns" that a regulated party had regarding its overdraft fee system—one that is indistinguishable from BOKF's—and provided assurance about compliance with § 7.4002.

We therefore conclude that *Auer* deference to Interpretive Letter 1082 is appropriate. Interpretive Letter 1082 represents OCC's reasonable interpretation of genuinely ambiguous regulations, and OCC's determination that fees like BOKF's Extended Overdraft Fees are "non-interest charges" is neither plainly erroneous nor inconsistent with the regulations it interprets. As "non-interest charges" under § 7.4002, BOKF's Extended Overdraft Fees are not subject to the NBA's usury limits, and Walker fails to state a claim. The district court also did not abuse its discretion in denying Walker's motion for reconsideration.

### B. Discovery

Walker also argues that discovery is warranted even if we conclude that BOKF's Extended Overdraft Fees are not "interest" under the NBA because the issue is "complex and fact-specific" and the parties should be allowed to develop the necessary facts. Aplt. Br. at 33–34. Because we have taken as true Walker's well-pleaded facts and concluded that he has failed to "state a claim to relief that is plausible on its face," Walker's complaint is deficient under Federal Rule of Civil Procedure 8(a) and therefore he is not entitled to discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## IV

For the foregoing reasons, we AFFIRM.

No. 20-2046, *Walker v. BOKF Nat'l Ass'n*

**EID**, J., dissenting.

Because extended overdraft fees meet the regulatory definition of "interest," Berkley Walker's claim that BOKF's fees violate the National Bank Act's interest rate limit should not have been dismissed. *Auer* deference, which the majority invokes to reach the opposite result, is inapplicable in this case because the operative regulation is not ambiguous, and certainly not for the reasons the majority suggests. Even if it were ambiguous, Interpretive Letter 1082 ("the letter") does not answer the question the majority thinks it does. And even if it did, BOKF's fees are meaningfully different from those referenced in the letter. For these reasons, I respectfully dissent.

**I.**

Extended overdraft fees are interest. For that reason alone, the majority should not invoke a deference doctrine. To explain why BOKF's extended overdraft fees unambiguously qualify as interest—a question of interpretation the majority does not seriously grapple with—I start with the regulatory definition of interest in 12 C.F.R. § 7.4001(a), which controls the meaning of interest in 12 U.S.C. § 85. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996). The regulation provides that "'interest' . . . includes any payment compensating a creditor . . . for an extension of credit," and lists several examples and exceptions. 12 C.F.R. § 7.4001(a). In my view, this definition maps onto extended overdraft fees like BOKF's, so Walker states a claim.

An extended overdraft fee is, of course, a "payment." For example, after a short grace period, BOKF can charge a customer $6.50 every business day that her account

balance remains negative after an overdraft. Not all payments to a bank are interest, however. The regulation only defines as interest those payments that "compensat[e] a creditor . . . for an extension of credit." *Id.* The question is whether extended overdraft fees meet those additional requirements. They do.

Looking at the plain language of the regulation, any overdraft that a bank like BOKF covers is "an extension of credit." When BOKF decides to cover a customer's overdraft, it pays for the item and expects to be paid back. For example, despite Walker's inability to afford the original charge due to insufficient funds, BOKF made money available to him by purchasing the item for him. BOKF deducted the cost from Walker's account and charged him an overdraft fee, which it also deducted. But the bank expected to be paid back. By covering an overdraft, BOKF thus makes a temporary provision of money with the expectation of repayment. In other words, BOKF makes a loan. *See, e.g.*, *In re AgriProcessors, Inc.*, 859 F.3d 599, 605 (8th Cir. 2017) (where bank "paid overdrafts for" customer, bank "made an unsecured loan and/or extension of credit to" customer); *Calcasieu-Marine Nat'l Bank of Lake Charles v. Am. Emp'rs' Ins. Co.*, 533 F.2d 290, 297 (5th Cir. 1976) ("Repeatedly, it has been observed that a loan may exist regardless of the form of a transaction. . . . Overdrafts from demand deposit accounts have been thought to constitute loans."). In the language of the regulation, BOKF makes "an extension of credit." *Cf.* Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 8178,

8180 (Jan. 30, 2001) ("A bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder.").[1]

That leaves the question whether BOKF's extended overdraft fees "compensate" the bank for its credit extension. They do. When BOKF covers items that a customer cannot pay for due to insufficient funds in her account, it extends credit. But it also takes on risk. Not only is there a chance of nonpayment, but future repayment almost certainly means that the customer will be giving the bank less value than it provided, due to factors like inflation affecting the time value of money. "The Extended Overdraft Fees," Walker alleges, "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." App'x at 10–11. Extended overdraft fees directly and proportionately arise from a customer's failure to timely repay a debt obligation, so they compensate the lender bank for extending credit in the form of covering the overdraft.

It is the compensation requirement in § 7.4001(a) that places extended overdraft fees within the regulatory definition of interest, even as initial overdraft fees fall outside it. Extended overdraft fees accrue as time passes, the overdraft remains unpaid, and the value of the underlying sum decreases. In contrast, initial overdraft fees are charged immediately upon an overdraft event. They do not

[1] The majority is correct that there are cases going the other way. *See, e.g.*, *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1052–55 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir. 2000). None is binding.

"compensate" the bank for covering an overdraft by extending credit. Instead, "the processing of an overdraft and recovery of an overdraft fee by balancing debits and credits on a deposit account are activities directly connected with the maintenance of a deposit account." Office of the Comptroller of the Currency, Interpretive Letter No. 1082, 2007 WL 5393636, at *4 (May 17, 2007). Here, for example, BOKF charges the same fee upon an overdraft regardless of whether it covers the underlying overdraft. The bank charges a $34.50 Overdraft Fee if it pays the overdraft, and a $34.50 Returned Item Fee if it does not. *See Fawcett v. Citizens Bank, N.A.*, 919 F.3d 133, 141 n.7 (1st Cir. 2019) (Lipez, J., dissenting) ("When the charge stemming from an overdraft does not differ depending on whether the bank advances funds to the accountholder or refuses to do so, the fee is plainly for an account service (handling the overdraft) and not for the de facto 'credit' given to the customer whose debit is paid despite her inadequate funds.").

Putting the pieces together, Walker plausibly alleges that BOKF's extended overdraft fees are "payment[s] compensating [the bank] . . . for an extension of credit." 12 C.F.R. § 7.4001(a). As the OCC regulation "includes any" such "payment" as interest, subject to a few possible exceptions not relevant here,[2] Walker

[2] The regulatory definition adds that interest "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). To whatever extent these charges may be carved out of the definition of interest, BOKF's alleged practices do not fall within any of these exclusions.

plausibly alleges that the extended overdraft fees in this case are interest for purposes of § 85. *Id.*

It does not matter that the regulation does not explicitly list these fees as interest. The list in the regulation is not exhaustive. It expressly provides that interest, under the definition expounded, "includes, *among other things*, the [listed] fees." *Id.* (emphasis added). Nor do the items on the list limit the application of the OCC's general definition. The "line" "draw[n]" by the regulation is not just between the listed fees or similar payments to the listed fees and all other payments. *Smiley*, 517 U.S. at 741–42. Rather, the line is drawn between "payment[s] compensating a creditor . . . for an extension of credit . . . and . . . all other payments." *Id.* at 741. Moreover, the specific list follows the general definition, is qualified by the phrase "among other things," and defies any easy, narrow categorization. *See* 12 C.F.R. § 7.4001(a) (listing fees ranging from "late fees" to "annual fees" to "overlimit fees"). As a result, I do not think the listed fees should inform or narrow the broad "any payment" language.[3] *Id.*

Finally, I do not think § 7.4002 carves out from § 7.4001 all payments connected with deposit accounts. Section 7.4001(a) contains no such limitation, and

[3] Even if they should, a good case can be made that extended overdraft fees are actually "late fees"—a category of interest enumerated in § 7.4001(a). *See Fawcett*, 919 F.3d at 142–43 (Lipez, J., dissenting) ("[A]lthough the sustained fees may reflect payments for services related to monitoring and maintaining the overdrawn account, . . . speculation about such services does not justify discrediting the alternative possibility that the fees are instead designed to deter late payment and, as 'late fees,' constitute interest.").

neither does § 85. Instead, those provisions are broadly concerned with "payment[s] compensating a creditor . . . for an extension of credit." *Id.*; *see also* 12 U.S.C. § 85. Neither controls the context in which the creditor-debtor relationship can arise. It may be true that some charges connected with deposit accounts—"deposit account service charges"—are "non-interest charges." 12 C.F.R. § 7.4002(a). But that does not mean that all charges and fees arising out of a deposit account cannot be interest. The charges referred to in § 7.4002(a) are, by definition, "non-interest," as the regulation clarifies that "[c]harges and fees that are 'interest' within the meaning of 12 U.S.C. [§] 85 are governed by § 7.4001 and not by this section." *Id.* § 7.4002(c).

For these reasons, I would hold that BOKF's extended overdraft fees are interest under § 7.4001(a) and therefore § 85. If so, it is undisputed that the effective interest rate defies applicable limits, so Walker states a claim, and the decision below should be reversed. Because the plain language of the regulation unambiguously accounts for BOKF's extended overdraft fees as interest, any deference to a countervailing regulatory interpretation of § 7.4001(a) should be categorically foreclosed. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("The regulation . . . means what it means—and the court must give it effect, as the court would any law."). But that is not the only reason that deference is problematic in this case.

**II.**

The majority is wrong to invoke *Auer v. Robbins*, 519 U.S. 452 (1997), to defer to Interpretive Letter 1082 because § 7.4001(a) is not "genuinely ambiguous" and the letter does not answer the question this case presents. In applying *Auer*, the majority casts

aside the care and caution that the Supreme Court stressed in *Kisor*, which we have said "narrowed" *Auer*. *See Reyes-Vargas v. Barr*, 958 F.3d 1295, 1307 (10th Cir. 2020).

**a.**

*Auer* deference, as framed by *Kisor*, has several essential preconditions. Chief among them is the requirement that the underlying regulation be "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414; *see also id.* at 2423–24 ("[C]ourts must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning."). The majority claims to undertake "the rigorous inquiry required under *Kisor*" to assess whether § 7.4001(a) is genuinely ambiguous. Maj. op. at 20. But the reasons that support its conclusion to that effect are bereft of rigor. Non-enumeration in an illustrative list does not automatically render text ambiguous, the possibility that a charge may fall in another category does not excuse analyzing the controlling definition, and deference to an agency's own ambiguity determination is paradoxical. The majority's ambiguity analysis does not live up to our obligations under *Kisor*. *See Kisor*, 139 S. Ct. at 2419 ("[A] court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover.").

The majority first observes that the regulatory text defining interest provides several examples of charges that qualify, but extended overdraft fees are not among them. *See* maj. op. at 22 ("These examples not only fail to mention extended overdraft fees, but they also follow no discernible pattern and arguably confuse the issue."). The majority is right that the regulation contains examples. *See* 12 C.F.R. § 7.4001(a). And it is true that

extended overdraft fees are not literally listed among them. *See id.* But the legal conclusion the majority reaches—that the regulation is ambiguous as to anything not on that list—makes little sense. The majority's ambiguity methodology ignores the regulatory definition of interest that precedes those examples. *See id.* (defining interest as "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"). Because we have a definition to interpret, the regulation's failure to specifically state that extended overdraft fees are interest does not preclude those fees from meeting the definition. It is certainly not a factor that renders the regulation "genuinely ambiguous" without considering the definition's text. *See* maj. op. at 21 ("Starting with the text of § 7.4001(a), the passage stating that 'any payment compensating a creditor . . . for an extension of credit' appears to have broad reach, but the words 'extended overdraft fees' do not appear in the regulation."). *Auer* and *Kisor* ask what the text of the regulation says—not what the text does not say.

It bears emphasizing that the list of examples in § 7.4001(a) is not exhaustive. The regulation states that interest "includes, *among other things*," the enumerated charges. 12 C.F.R. § 7.4001(a) (emphasis added). Putting aside whether the regulatory definition covers extended overdraft fees, I think it is indefensible to premise a regulation's genuine ambiguity on an illustrative list's omission of the practice under scrutiny without trying to apply the regulation to the practice. Regulatory text is not genuinely ambiguous with respect to any application that is not literally provided for, and certainly not without undertaking analysis of the text of the definition itself. Far from

"exhausting" the "traditional tools" of regulatory construction, the majority fears deploying them. Maj. op. at 19. That defies the Supreme Court's guidance. *See Kisor*, 139 S. Ct. at 2415.

The majority also finds ambiguity in "how § 7.4001(a) and § 7.4002 relate to each other." Maj. op. at 23. The argument seems to be that because extended overdraft fees are "directly connected with deposit account services," § 7.4002 could "reasonably be read to include" them, even if they plausibly fall under § 7.4001(a). *Id.* But this makes little sense. The chance that a charge may fall under different provisions does not make it impossible to sort the charge into its proper regulatory home. The way to find out where a charge belongs is to consider the definition of interest, which even the majority recognizes supersedes § 7.4002. *Id.* A mere connection to a deposit account does not stop a charge from qualifying as interest if it meets the definition of interest in § 7.4001(a). But the majority thinks that the technical possibility that extended overdraft fees *may* fall into another category is a cause for confusion.

Next, the majority finds the regulation ambiguous as to extended overdraft fees on the ground that OCC—the regulating agency—has suggested as much. *See id.* at 24–25 ("[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."). The Fifth Circuit has also called this a relevant consideration. *See Johnson v. BOKF Nat'l Ass'n*, 15 F.4th 356, 362 (5th Cir. 2021) ("OCC itself has acknowledged that the text of § 7.4001(a) is ambiguous."). But it should be categorically irrelevant. Ambiguity is a question for the courts. The Supreme Court has made this

clear. *See Kisor*, 139 S. Ct. at 2415 ("[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."); *see also id.* at 2421 ("[C]ourts retain a firm grip on the interpretive function.").[4] Deferring to an agency's view that its own regulations are ambiguous distorts our important ambiguity determination. The same is true of hiding in the shadow of nonbinding cases coming out the same way. *See* maj. op. at 26 ("An overwhelming majority of courts have reached the same conclusion we do, and the dissent's contrary view is an outlier.").

While I disagree that § 7.4001(a) is genuinely ambiguous, I think the majority's reasons for calling it ambiguous are particularly pernicious. This treatment of ambiguity is fatal to the majority's decision to invoke *Auer* deference. *See Kisor*, 139 S. Ct. at 2424 (reversing where court of appeals did not "seriously think through" "whether the regulation really has more than one reasonable meaning"). However, even if the regulatory definition was ambiguous, *Auer* deference would nonetheless be inappropriate.

**b.**

Ambiguity aside, there is nothing to defer to in Interpretive Letter 1082. That is because the question whether extended overdraft fees qualify as interest under the

[4] The majority prefers to characterize its reliance on the agency's view as a turn to "history," as *Kisor* contemplates. Maj. op. at 25 n.9 (emphasis omitted). Even if that were the right framing, I see good reason to doubt the source. *See Kisor*, 139 S. Ct. at 2441–42 (Gorsuch, J., concurring in the judgment) ("While Members of this Court sometimes disagree about the usefulness of pre-enactment legislative history, we all agree that legislators' statements about the meaning of an already-enacted statute are not a legitimate tool of statutory interpretation, much less a controlling one. So why on earth would we give controlling weight to an agency's statements about the meaning of an already-promulgated regulation?") (footnote and internal quotation marks omitted).

regulatory definition was not considered or answered in the letter—except by improper inference and illogical implication. Similarly, the letter failed to consider how extended overdraft fees meaningfully differ from initial overdraft fees. The kind of contingent, even inadvertent, agency interpretation that follows from these foundational flaws hardly supports *Auer* deference as a general matter, and certainly does not support it after *Kisor*. *See id.* at 2419 ("[A] court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties."). Even if the letter were more on-point, however, the infinite extended overdraft fees BOKF can charge are distinguishable from the limited fee structure employed by the bank seeking guidance in the letter. For these reasons, the position on extended overdraft fees supposedly taken in Interpretive Letter 1082 is not a "reasonable interpretation" under *Kisor*. *See* maj. op. at 26; *see also Kisor*, 139 S. Ct. at 2415–16.

The majority's suggestion that Interpretive Letter 1082 resolves the issue presented concerning extended overdraft fees is unpersuasively conclusory. For example, the majority states that the letter "for the first time directly addressed whether fees charged by a bank in connection with paying an overdraft may qualify as 'interest' under the NBA." Maj. op. at 14–15. That is an ambitious takeaway from a letter that does not once use the term "interest." The majority also says that the letter's "reference to there being 'no supervisory impediment' to the bank charging extended overdraft fees was a clear reference to the usury limits imposed by the NBA on interest." *Id.* at 27. In my experience, a "clear reference" to a law will cite the law in question, but the letter does not cite § 85 or § 7.4001 once. Besides,

that sentence in the letter is obviously talking about the "considerations" that guide the imposition of non-interest charges and fees. *See* § 7.4002(b) (listing considerations); *see also* Interpretive Letter 1082, 2007 WL 5393636, *3 ("If a bank uses a decision-making process that takes these [§ 7.4002(b)] factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges . . . pursuant to section 7.4002(a)."). Elsewhere, the majority recognizes how the letter's "supervisory impediment" language has nothing to do with usury limits and everything to do with these considerations. *See* maj. op. at 16. The majority's theory that the letter's reference to supervisory impediments entailed a secret analysis of § 7.4001 because that regulation is part of what the majority calls, without authority, "OCC's supervisory regulations," *id.* at 27, fails.

The only thing clear about extended overdraft fees in the letter—they are mentioned by name once, in passing, in a footnote—is that the bank asking for guidance used a version of them. *See* Interpretive Letter 1082, 2007 WL 5393636, *1 n.3 ("The Bank also may charge a Continuous Overdraft Charge of $5 per business day from the fourth through eleventh calendar day that an account is overdrawn."). Other than that footnote, the letter does not discuss the extended overdraft fees, which it calls Continuous Overdraft Charges, again. And, as I have pointed out, it does not once cite to or reference § 7.4001 or § 85, nor does it even use the word "interest." *See Fawcett*, 919 F.3d at 142 (Lipez, J., dissenting) ("I cannot conclude that the OCC, in responding to [the requesting bank's limited]

questions and making only a passing descriptive reference to the bank's continuous overdraft charges, decided sub silentio the important issue of whether such fees constitute interest."). The letter's failure to grapple with the text of the definition in § 7.4001(a), as applied to extended overdraft fees like BOKF's, ought to be dispositive and preclude *Auer* deference, especially after *Kisor*.[5]

The majority thinks that deference is reasonable because of an inference it makes about the letter's analysis, but that inference is incorrect. In the majority's view, the letter inherently resolved a question that, in my view, it never considered. "[B]y classifying the bank's extended overdraft fees as 'deposit account service charges,'" the majority reasons, "OCC 'necessarily rejected the conclusion that those charges were "interest."'" Maj. op. at 27 (*quoting Fawcett*, 919 F.3d at 138). The idea is that a charge falls under either § 7.4001 or § 7.4002, and that if the letter treats a charge as falling under one, it necessarily rejects its connection to the other. But these two regulations are not created equal. To the extent that § 7.4001(a) applies to a given charge or fee, it carves that fee out of, and therefore displaces, § 7.4002—but not the other way around. The text of § 7.4002 recognizes this asymmetry when it states that "[c]harges and fees that are 'interest' within the meaning of 12 U.S.C. [§] 85 are governed by § 7.4001 and not by this section." 12

[5] Perhaps recognizing this flaw, BOKF does not cite *Auer* once in its brief. Instead, it asks us to apply *Skidmore* deference and find the letter persuasive. *See* Aple. Br. at 4; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Because the majority ignores BOKF and invokes *Auer* to frame its decision, I limit my analysis to the issues raised by *Auer*.

C.F.R. § 7.4002(c). To define interest under § 85, we defer to the regulatory definition in § 7.4001(a). That means that if a charge meets the definition in § 7.4001(a), then § 7.4001 controls the charge and § 7.4002 has no application. The majority's inference flips the relationship between the two regulations and ignores the import of the letter's failure to consider whether the regulatory definition of interest applies to extended overdraft fees.

Another reason the letter is unworthy of deference is that it fails to consider whether extended overdraft fees are meaningfully different from initial overdraft fees. Courts deferring to the letter seem to infer that it stands for initial and extended overdraft fees being legally identical non-interest because the letter fails to address their differences after noting that the bank employed both. But that is a discomfiting analytical leap. The distinctions between the two kinds of overdraft fees are as decisive as they are overlooked. *See Fawcett*, 919 F.3d at 141 (Lipez, J., dissenting) ("Nowhere else in the Letter . . . does the OCC make specific reference to the continuous charges, and the Letter contains no analysis of whether those fees constitute interest."). Regular overdraft fees are imposed by a bank because a customer overdraws her account. Here, BOKF charges $34.50 upon an overdraft event, regardless of whether the bank covers the full amount. In contrast, extended overdraft fees are tied to nonpayment of the debt obligation incurred by the customer when the bank covered the overdraft. BOKF assesses the latter fees repeatedly and periodically, and they are related to the customer's failure to repay the negative balance caused by the overdraft, as opposed to her failure to afford the charge that

caused the overdraft. That they are a "flat fee," and not a "percentage applied to a specific principal," maj. op. at 23, is irrelevant. The regulation defining interest states that "overlimit fees, annual fees, cash advance fees, and membership fees" are all interest. 12 C.F.R. § 7.4001(a). In sum, extended overdraft fees are very different from initial overdraft fees. Their similarity in name and time is deceptive. But the letter does not get into any of this, which is another reason why we should not rely upon it. Even if I thought the letter contained a relevant application of the meaning of interest under OCC regulations, then, deference would be improper because the letter fails to consider how extended overdraft fees differ from initial overdraft fees. In sum, the letter does not apply the regulatory definition of interest to extended overdraft fees, and it does not consider the dispositive differences between initial and extended overdraft fees, so there is nothing to defer to.

Even if I found Interpretive Letter 1082 relevant, I would hesitate to uncritically apply it here. That is because of a significant difference between the extended overdraft fee structure described in the letter and the system BOKF employs. The majority calls the two "indistinguishable," maj. op. at 32, even though the bank in the letter charged extended overdraft fees for only the fourth through eleventh days that the underlying overdraft went uncorrected and BOKF's extended overdraft fees accrue indefinitely. Walker, for example, was charged extended overdraft fees for thirty-six days until his balance was no longer negative. The majority ignores the potential import of this distinction. Keeping in mind the regulatory definition of interest, it may be easy to characterize a limited or one-time fee as tied to the overdraft event, but after enough

consecutive charges for failing to repay the funds advanced by the bank, it looks much more like the customer is "compensating a creditor or prospective creditor for an extension of credit." 12 C.F.R. § 7.4001(a); *see also Fawcett*, 919 F.3d at 141 (Lipez, J., dissenting) ("[A]s the days pass without offsetting deposits, the overdraft coverage looks more and more like a short-term loan."). The majority avoids the need to consider the possibility that BOKF's structure is meaningfully different from that referenced in the letter, however, because it is content to deem the two systems identical "in how they arise." Maj. op. at 29. But the two systems are quite different, and the difference may well be legally relevant. Even if Interpretive Letter 1082 was a reasonable interpretation of how extended overdraft fees map onto a genuinely ambiguous regulation, unqualified deference would nonetheless be inappropriate because of the difference between the fee structure in the letter and BOKF's alleged practices.

**III.**

It is remarkable that Interpretive Letter 1082 does not contain a single sentence explaining why extended overdraft fees do not meet the regulatory definition of interest in § 7.4001(a). And yet the majority defers to it today to deny Walker the relief the law should provide him. In doing so, the majority exercises inference, not deference. It ignores the operative regulation's unambiguous inclusion of extended overdraft fees within the category of interest. It turns *Auer* upside-down and rebukes *Kisor*, finding ambiguity in clarity and deferring to a nonexistent interpretation of the question we are charged with deciding. For these reasons, I respectfully dissent.