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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

FRANK E. SMITH; MARK A. KIOLBASA,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

No. 21-9538

Appeal from the Federal Reserve System
(FRS No. 18-036-E-I)

Jordan Factor (Vandana S. Koelsch and Rachel A. Sternlieb with him on the briefs), Allen Vellone Wolf Helfrich & Factor, Denver, Colorado, for Petitioners.

Joshua P. Chadwick (Yontan Gelblum and Katherine Pomeroy with him on the briefs), Board of Governors of the Federal Reserve System, Washington, D.C., for Respondent.

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

EID, Circuit Judge.

The Board of Governors of the Federal Reserve System brought an enforcement action against Frank Smith and Mark Kiolbasa ("Petitioners"), who were employees at Farmers State Bank at the time, after finding they committed

misconduct at Central Bank & Trust where they had previously worked. This resulted in their removal as officers and directors of Farmers Bank and the imposition of restrictions on their abilities to serve as officers, directors, or employees of other banks in the future. Petitioners sought review in this court, arguing, as they did before the Board, that the Board does not have authority to bring this enforcement action against them because the Board was not the "appropriate Federal banking agency," as defined by 12 U.S.C. § 1813(q)(3), with authority over the bank where the misconduct took place. We have jurisdiction under 12 U.S.C. § 1818(h)(2)[1] and hold that, because the Board had authority over Petitioners at the time the action commenced, the Board was an appropriate federal banking agency and had authority to initiate the proceeding. We also decline to review Petitioners' Appointments Clause challenge because they did not raise it below. We therefore affirm.

I.

Among other things, the Federal Deposit Insurance Act ("FDIA") defines the responsibilities of the various federal banking agencies, including the Federal Regulatory System Board of Governors ("Board"), the Office of the Comptroller of the Currency ("OCC"), and the Federal Deposit Insurance Corporation ("FDIC"). *See generally* 12 U.S.C. § 1813(q). These responsibilities include removing officers,

[1] 12 U.S.C. § 1818(h)(2) states that a party may obtain judicial review of specified federal banking agency orders "by filing [a written petition] in the court of appeals of the United States for the circuit in which the home office of the depository institution is located . . . praying that the order of the agency be modified, terminated, or set aside."

directors, and executives at insured depository institutions for misconduct or breach of fiduciary duty and prohibiting them from future participation in the industry. *See id.* § 1818(e).

Petitioners were executives at Central Bank & Trust ("Central") in Wyoming. Central is a state bank that is not a member of the Federal Reserve System ("FRS"). State nonmember banks are supervised instead by the FDIC. *See id.* § 1813(q)(2). As bank executives, Petitioners were Institution-Affiliated Parties ("IAP")—defined by § 1813(u)(1) as "director[s], officer[s], or controlling stockholder[s] . . . of, or agent[s] for, an insured depository institution"—and were removable by the "appropriate Federal banking agency" for specified misconduct, *id.* § 1818(e)(1).

By December 11, 2018, Petitioners had left Central and began working at Farmers State Bank ("Farmers"), also in Wyoming. Farmers is a state bank and a member of the FRS. The FRS Board of Governors supervises FRS member banks. *See id.* § 1813(q)(3).

After Petitioners began working at Farmers, Central sued them in a civil proceeding, alleging they improperly took certain customer information from Central shortly before leaving in breach of their fiduciary duties. *See Central Bank & Trust v. Frank Smith, et al.*, No. 186-671 (Laramie County, Wyoming). The civil proceedings brought Petitioners' misconduct to light, and the Board instituted removal proceedings against them on December 11, 2018.

An Administrative Law Judge ("ALJ") from the Office of Financial Institution Adjudication ("OFIA") oversaw the proceedings. OFIA ALJs are part of an ALJ

"pool" and oversee removal proceedings instituted by the Board, the FDIC, the OCC, and the National Credit Union Administration. *See* 12 C.F.R. §§ 308.3, 308.103. Petitioners moved to dismiss the action for lack of jurisdiction because the FDIC, not the Board, was the "appropriate Federal banking agency" over Central, the institution connected to their misconduct. R. at 3–4 (quoting 12 U.S.C. § 1813(q)(3)). The ALJ denied the motion, and they filed an interlocutory appeal with the Board. *Id.* The Board found it had authority to initiate proceedings against Petitioners because they were IAPs with Farmers at the time the action was commenced, and the Board is the "appropriate Federal banking agency" over Farmers. *Id.* at 139–40. As a result of the enforcement proceedings, the Board decided to issue prohibition orders against Petitioners in accordance with 12 U.S.C. § 1818(h)(1), barring them from further participation in the financial industry. Petitioners then petitioned this court for review.

II.

Petitioners raise two arguments. First, they renew their argument that the Board was not the appropriate federal banking agency over Central and therefore did not have authority to bring an enforcement action and issue orders of prohibition against them for their misconduct at Central. Second, they argue we should vacate the OFIA ALJ order and grant them a new hearing because, at the time of the decision, the OFIA ALJs were invalidly appointed in violation of the Appointments Clause. *See* U.S. Const. Art. II, § 2, cl. 2.

a.

First, we decide whether the Board has the authority to bring an enforcement action against an IAP who is affiliated with a Board-supervised bank at the time the action is commenced even though the misconduct that gave rise to the action occurred at a bank supervised by a different federal banking agency. It does.[2]

Federal agencies are creatures of statute and, as such, Congress may limit their authority. *Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urb. Dev.*, 881 F.3d 1181, 1192 (10th Cir. 2017) (citing *Killip v. Off. of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) and *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). "[I]f there is no statute conferring authority, a federal agency has none." *Michigan*, 268 F.3d at 1081. We will "hold unlawful and set aside" an agency's action when it is "in excess of statutory jurisdiction" or "not in accordance with law." 5 U.S.C. § 706(2)(C); *id.* at § 706(2)(A).

We review matters of law, including the interpretation of a statute, de novo. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir. 2010). "Statutory interpretation begins with the words in the statute." *Hasan v. Chase Bank USA, N.A.*, 880 F.3d 1217, 1218 (10th Cir. 2018). Our "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Peabody Twentymile*

[2] We do not decide today the separate question of which federal banking agency has authority to bring an enforcement action at the time the misconduct is discovered.

Mining, LLC v. Sec'y of Lab., 931 F.3d 992, 996 (10th Cir. 2019) (quoting *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016)). "If the statute's text is unambiguous, then its plain meaning controls, and our inquiry ends." *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021).[3]

The FDIA grants federal banking agencies authority to remove an IAP "[w]henever the appropriate Federal banking agency determines that any institution-affiliated party . . . [has] violated any law or regulation[, or] any cease-and-desist order[, or] engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution[, or] engaged in any act . . . which constitutes a breach of such party's fiduciary duty," so long as the misconduct meets certain additional statutory requirements. 12 U.S.C. § 1818(e)(1)(A)(i)–(iii). Section 1813(q) defines which federal banking agency is the "appropriate Federal banking agency" for each type of depository institution. As relevant here, the FDIC is the appropriate federal banking agency for "any State

[3] The Board argues under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we should defer to its reasonable interpretation of the statute. Petitioners argue *Chevron* deference does not apply here because more than one agency is charged with administering the statute. The first step of *Chevron* analysis is to examine the plain language of the statute and determine "whether Congress has spoken directly to the precise question at issue in such a way that its intent is clear and unambiguous." *Kientz v. Comm'r, SSA*, 954 F.3d 1277, 1280 (10th Cir. 2020) (internal quotation marks omitted). If the statute is unambiguous, we need not defer to the agency's interpretation. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 175 (2016). Because this statute is unambiguous, we need not invoke *Chevron* deference.

nonmember insured bank," *id.* § 1813(q)(2)(A), and the Board is the appropriate agency for "any State member bank," *id.* § 1813(q)(3)(A).

Petitioners argue the use of the article "the" to modify "appropriate Federal banking agency for the depository institution" in § 1813(q) means the agency supervising the institution connected to the harm has exclusive authority to remove executives who committed that harm. In their view, this means the agency's authority "depends on which agency regulates the entity, not on the affiliation of the IAP." Pet. Br. at 23. They rely on unpublished and out-of-circuit cases and Board orders to support their interpretation. These cases do not support Petitioners' interpretation, however, because they either do not involve an IAP at all or do not involve one who transferred from one financial institution to another.[4] These cases, therefore, do not discuss, let alone decide, whether authority depends on the affiliation of the entity or the IAP.

The Board argues the FDIA grants it authority over Petitioners because they were IAPs of a state member bank subject to Board supervision at the time the proceedings commenced. It further argues the "statute contains no language limiting

[4] *See generally F.D.I.C. v. Hurwitz*, 384 F. Supp. 2d 1039 (S.D. Tex. 2005), *rev'd in part, vacated in part sub nom. F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008) (defendant was not an IAP); *Helkowski v. Sewickley Sav. Bank*, 2:09-CV-633, 2009 WL 3350453 (W.D. Pa. Oct. 15, 2009), *vacated sub nom. Dragotta v. W. View Sav. Bank*, 395 F. App'x 828 (3d Cir. 2010) (unpublished) (no IAP involved); *In re Richard Alan Henderson and Philip Henry Cooper Institution-affiliated Parties of Regions Bank, Birmingham, Alabama*, 2016 WL 7667935 (F.R.B.) (only one financial institution and its subsidiary involved).

the Board's authority over IAPs of Board-supervised institutions in instances where another regulator may also take action." Resp't Br. at 37–38.

The plain language of § 1818(e)(1) supports the Board's interpretation. Section 1818(e)(1) permits the appropriate federal banking agency to bring an action when "*any* institution-affiliated party" of a bank supervised by that agency has "violated *any* law or regulation," or "engaged in *any* unsafe or unsound practice in connection with *any* insured depository institution or business institution," or "engaged in *any* act . . . which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A)(i)–(iii) (emphases added). As Petitioners were IAPs of a state member bank supervised by the Board at the time the Board initiated the enforcement action, the Board had authority to remove them for *any* misconduct against *any* federally insured depository institution. Further, the statute does not grant exclusive authority to the agency charged with supervising the institution connected to the misconduct. Section 1818(i)(3) does not, as Petitioners have argued, "provide[] continuing jurisdiction over an IAP by, and only by, the agency exercising jurisdiction over the institution at which the IAP terminated employment." Pet. Br. at 26. Rather, the section provides a "six-year limitations period beginning on [the] date [the] party ceases to be [an] IAP with regard to [the] relevant depository institution" during which the appropriate federal banking agency may still issue an order against the IAP. *Henderson v. Off. of Thrift Supervision, Dept. of Treasury*, 135 F.3d 356, 358 (5th Cir. 1998); *see also Stanley v. Bd. of Governors of Fed. Reserve System*, 940 F.2d 267, 274 (7th Cir. 1991) (holding § 1818(i)(3) affects only

the timing within which the Board may initiate proceedings against a director, permitting it to proceed against a director even when the financial institution has closed or the director has resigned, so long as the Board initiates proceedings within a six-year period beginning when the director severs ties with the institution). Nothing in this section prohibits another federal banking agency from issuing orders against an IAP over which it has authority.

The Board is the appropriate federal banking agency supervising Farmers, the state member bank where Petitioners were IAPs at the time the proceedings commenced. Because the plain language of 12 U.S.C. §§ 1813 and 1818 grants the Board authority to remove IAPs from a financial institution which it supervises, regardless of when and where the misconduct took place, and nothing limits authority to only the agency supervising the institution where the misconduct took place, the Board had authority to remove Petitioners for their misconduct at Central. We therefore affirm the Board on this issue.

b.

Next, we decide whether Petitioners forfeited[5] their Appointments Clause challenge by failing to raise it before the Board. They did, and therefore we do not reach the merits of the claim.

[5] We use the word "forfeited" without deciding whether Petitioners forfeited or waived this challenge. While the two words are often used interchangeably, they have different meanings. "Waiver, the intentional relinquishment or abandonment of a known right or privilege, is merely one means by which a forfeiture may occur." *Freytag v. Comm'r*, 501 U.S. 686, 895 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (internal quotation marks and citation omitted). A party

"Appointments Clause challenges are nonjurisdictional and may be waived or forfeited." *Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) (unpublished)[6] (citing *Freytag v. Comm'r*, 501 U.S. 686, 878–79 (1991)). Absent a statute barring us from reviewing issues not raised before the Board, we may consider the issue. *See Sims v. Apfel*, 530 U.S. 103, 108 (2000). However, if an agency regulation requires a party to raise all potential issues during an administrative appeal, and the party does not do so, courts of appeals have regularly declined or refused to review the issue in a subsequent judicial proceeding. *Id*; *see also State of South Carolina v. U.S. Dep't of Labor*, 795 F.2d 375, 378 (4th Cir. 1986) (discussing 20 C.F.R. § 676.91 (1984)); *McConnell v. U.S. Dep't of Agric.*, 198 F. App'x 417, 424–25 (6th Cir. 2006) (unpublished) (discussing 7 C.F.R. § 1.145(a)). 12 C.F.R. § 263.39(a) requires a party seeking the Board's review of an OFIA ALJ decision to "file with the Board written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party." If a party fails to file an exception, it is

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may waive an Appointments Clause challenge by "expressly consenting" to the authority of the ALJ or administrative agency. *Id.* Here, we need not determine whether Petitioners expressly consented to the ALJ's authority because the result is the same whether they waived or forfeited this argument.

[6] Although unpublished orders are generally not binding on this court, they may be cited for their persuasive value with respect to a material issue in the case. *See* 10th Cir. R. 32.1.

deemed waived by the Board. *Id.* § 263.39(b)(1). The Board may, but is not required to, consider objections the party did not raise before the ALJ. *Id.* § 263.39(b)(2).

Petitioners conceded at oral argument they did not raise this issue before the ALJ or the Board[7] and nothing barred them from doing so.[8] However, they argue their failure to raise the issue before the ALJ or the Board should be excused because it would have been futile. They cite *Carr v. Saul*, for the proposition that they are not required to raise structural constitutional challenges before an ALJ who has "no special experience" deciding constitutional matters and "can provide no relief." 141 S. Ct. 1352, 1361 (2021). However, unlike *Carr* where "the [Social Security Administration's] administrative review scheme at no point afforded petitioners access to the Commissioner, the one person who could remedy their Appointments Clause challenges," *id.* at 1361, Petitioners could have appealed to the Board, as they did when the ALJ denied their jurisdiction argument, *see* R. at 4 (citing 12 C.F.R. § 263.28); 12 C.F.R. § 263.40 (review by the Board). *See also Energy W. Mining Co.*, 929 F.3d 1202, 1206 (10th Cir. 2019). Additionally, whereas the petitioners in *Carr* were excused from raising the issue because the administrative proceeding was

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[7] Q: "Can you please help us understand where you raised the argument you're making now below?"
A: "We did not."
Q: "So, you concede you did not?"
A: "Yes, your honor."
Oral Argument, No. 21-9538, at 5:12–5:20 (Jan. 19, 2022).

[8] Q: "Is there anything else [in the APA] you can point to that would have barred you from raising this issue to the ALJ?"
A: "No, your honor, there's nothing that bars us from raising this issue."
Id. at 7:32–7:42.

inquisitorial in nature, *see* 141 S. Ct. at 1359, proceedings before the Board are more like traditional, adversarial trials, *see* 12 C.F.R. § 263.24 (discovery rules); *id.* § 263.36 (evidence notice and objection requirements); *id.* § 263.35(a)(1) (providing for each party to present their side at a hearing). And, in an adversarial proceeding, "claimants bear the responsibility to develop issues for adjudicators' consideration." *Carr*, 141 S. Ct. at 1359. Further, futility did not deter Petitioners from making other collateral attacks on the proceeding by, for example, filing a motion requesting the ALJ dismiss the enforcement action even though "a presiding administrative law judge lacks the power to grant such a request." R. at 13.

Petitioners also argue this is a structural challenge and, as such, it is "appropriate" for us to consider the issue even though they did not raise it below. Reply Br. at 4 (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). However, we have previously observed that structural challenges "have no special entitlement to review" on appeal from the agency and have declined to consider them. *Turner Bros.*, 757 F. App'x at 700 (citing *Freytag*, 501 U.S. at 893–94 (Scalia, J., concurring in part and concurring in the judgment)).[9]

[9] *Axon Enter., Inc. v. Fed. Trade Comm'n*, 143 S. Ct. 890 (2023) does not apply here. That case held "the review schemes set out in the [Securities] Exchange Act and the [Federal Trade Commission] Act do not displace district court jurisdiction over" certain constitutional challenges, including Appointments Clause challenges. *Id.* at 900. Petitioners here are appealing an order from the Board; they did not collaterally attack the constitutionality of the ALJ in a separate district court proceeding as in *Axon Enterprises*.

Because the agency regulation required Petitioners to raise this issue before the Board, and they do not show that they could not have done so, they have forfeited their Appointments Clause challenge and we will not consider it now.

III.

For the reasons stated above, we AFFIRM the order of the Federal Reserve System Board of Governors.[10]

[10] We also direct the Clerk's Office to correct the spelling of "Kiolbasa" in the case caption.