FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of:	DECISION AND ORDER ON REQUEST FOR INTERLOCUTORY REVIEW
CBW BANK Weir, Kansas (Insured State Nonmember Bank)	FDIC-22-0171k

I. INTRODUCTION

Before the Administrative Officer of the Federal Deposit Insurance Corporation (FDIC), pursuant to authority delegated by the FDIC Board of Directors (Board) in 12 C.F.R. Part 308, App. A § 308.102(b)(2)(ii), is a request by Respondent CBW Bank (Respondent) for interlocutory review of Order No. 11 (Order 11) by the Administrative Law Judge (ALJ). Pursuant to Order 11, the ALJ denied Respondent's Motion for Recommendation of Dismissal and Stay (Motion for Dismissal). Respondent argues that this proceeding should be dismissed by the Board on interlocutory review because the ALJ may not be removed from office without cause established and determined by principal officers who are themselves removable only for cause.

The ALJ issued Order 11 denying Respondent's Motion for Dismissal on March 21, 2025. On March 31, 2025, Respondent filed a Request for Interlocutory Review of Order 11 (Request). The ALJ referred this matter to the Board on April 18, 2025, pursuant to 12 C.F.R. Part 308, App A § 308.28(c). For the reasons stated below, the Request is denied.

II. BACKGROUND

The pleadings filed in this action reflect that Respondent operates its business from its headquarters in Weir, Kansas, and that from approximately December 11, 2018, to August 19,

2020, Respondent generated the bulk of its earnings through international banking services to individuals and entities in Central and South America, Europe, Africa, and the Middle East.

In 2020, Respondent entered into a Consent Order with the FDIC that addressed Respondent's failure to create and maintain an Anti-Money Laundering/Countering the Financing of Terrorism (AML/CFT) compliance program commensurate with the elevated risks of its business operations. The Consent Order required Respondent to terminate foreign-customer and cross-border transactions, appoint a Board Bank Secrecy Act (BSA)/AML compliance committee, develop and adopt a BSA/AML compliance program, maintain an adequate BSA/AML internal control structure, contract with a third-party consulting firm to audit its BSA/AML compliance program, hire a qualified BSA officer to oversee the program, provide training regarding BSA/AML compliance, and have a third party review all accounts and transactions beginning in 2019 for suspicious activity. Subsequent examinations by the FDIC in 2022 and 2023 found that Respondent had failed to correct the BSA compliance issues identified in the Consent Order.

On November 19, 2024, the FDIC issued a Notice of Assessment of Civil Money Penalty, Findings of Fact and Conclusions of Law, Order to Pay, and Prayer for Relief (Notice) against Respondent. The Notice charges that Respondent failed to maintain an adequate AML/CFT compliance program and that Respondent violated the BSA on multiple occasions. Respondent denies the allegations.

On November 19, 2024, Respondent filed a Complaint and concurrent Motion for Preliminary Injunction in the United States District Court for the District of Kansas arguing that (1) Respondent has a right to a jury trial on any action brought by the FDIC based on the allegations in the Notice and (2) the limitations on removal of the ALJ render the administrative

enforcement action unconstitutional. The district court dismissed Respondent's lawsuit for lack of subject matter jurisdiction on March 3, 2025, *CBW Bank v. FDIC*, 769 F. Supp. 3d 1204 (D. Kan. 2025), and Respondent has appealed that ruling to the United States Court of Appeals for the Tenth Circuit.

On February 25, 2025, Respondent filed its Motion for Dismissal seeking summary disposition of the proceedings on the ground that the ALJ is unconstitutionally insulated from control by the President because the ALJ may not be removed from office without cause established and determined by principal officers who are themselves removable only for cause. Enforcement Counsel opposed the motion, arguing that Respondent did not meet the requirements for summary disposition (FDIC Dismissal Response). On March 21, 2025, the ALJ issued Order 11 denying Respondent's Motion for Dismissal. Order 11. Respondent has requested interlocutory review of Order 11.

III. STANDARD OF REVIEW

Interlocutory review of ALJ orders is an "extraordinary remedy" that is "generally not favored." *See, e.g.*, *In the Matter of Randolph W. Lenz*, No. FDIC-02-174e, 2004 WL 2585214, at *3-4 (FDIC Sept. 21, 2004) (citations omitted); *In the Matter of Doolin Sec. Sav.*, No. AP94-05, 1994 WL 169620, at *2 (OTS Feb. 9, 1994). Nevertheless, the parties agree that the Board has discretion to "exercise interlocutory review of a ruling of the ALJ" if the Board finds that at least one of the following four criteria is satisfied:

> 1. The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
> 2. Immediate review of the ruling may materially advance the ultimate termination of the proceeding;
> 3. Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
> 4. Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 308.28(b)(1)-(4). The Board finds that none of these criteria are satisfied here.

IV. DISCUSSION

A. There are no substantial grounds for a difference of opinion on a controlling question of law or policy.

The first ground on which interlocutory review may be granted under section 308.28(b)—if "[t]he ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion," 12 C.F.R. § 308.28(b)(1)—mirrors the standard for interlocutory review in the federal courts. *See* 28 U.S.C. § 1292(b). "Substantial grounds" for a difference of opinion exist where a question "is difficult, novel, and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *KPH Healthcare Servs., Inc. v. Mylan N.V.*, No. 20-2065-DDC-TJJ, 2022 WL 16551340, at *2 (D. Kan. Oct. 31, 2022) (internal quotations omitted); s*ee Campaign Legal Ctr. v. Iowa Values*, 710 F. Supp. 3d 35, 49 (D.D.C. 2024) (internal citations omitted) ("And 'although the requirement that there be substantial grounds for difference of opinion is sometimes satisfied when there are novel and difficult questions of first impression in a case,' the novel questions must 'present the sort of exceptional circumstances [necessary to] justify a departure from the basic policy of postponing appellate review.'"). "That an issue presents a question of first impression isn't, by itself, sufficient. Nor will contradictory case law, by itself, qualify a case for certification." *KPH Healthcare Servs.*, 2022 WL 16551340, at *2; *Citizens for Resp. and Ethics in Wash. v. Am. Action Network*, 415 F. Supp. 3d 143, 146 (D.D.C. 2019). Instead, a party must satisfy this requirement by presenting a "colorable" argument in support of its position. *KPH Healthcare Servs.*, 2022 WL 16551340, at *2; *see also Coca v. City of Dodge City*, No. 22-1274-EFM, 2023 WL 3948472, at *2 (D. Kan. June 12, 2023); *IBT Emp. Grp. Welfare Fund v. Compass Minerals Int'l., Inc.*, 723 F. Supp. 3d 1053, 1057 (D. Kan. 2024).

The crux of Respondent's argument for interlocutory review and, ultimately, dismissal is that because Office of Financial Institution Adjudication (OFIA) ALJs are unconstitutionally protected from removal, Respondent should not be required to participate in these proceedings. The ultimate question on which Respondent seeks interlocutory appeal is "whether the administrative proceeding before the unconstitutionally insulated ALJ should carry on, despite the constitutional violation, unless [Respondent] can make a showing that the unconstitutional statutory provisions are affecting the proceeding." Request at 5. Both parties agree that *Collins v. Yellen*, 594 U.S. 220 (2021), is the controlling law in this case. *Collins* established that succeeding in a constitutional challenge to a removal provision does not entitle a party to relief, but rather the party must also demonstrate that the unconstitutional removal provision actually caused harm to the party. *See Collins*, 594 U.S. at 258-59. Thus, under *Collins*, even if a party raises a meritorious challenge to a removal provision, the party is not automatically entitled to relief. *Id.* at 258.

Both parties also agree that *Collins* mandates dismissal only if Respondent would suffer a compensable harm by being compelled to participate in these proceedings. Request at 5; FDIC Response to Request at 4-5. However, the parties disagree regarding whether Respondent has shown a compensable harm. *Id.* Having carefully considered the parties' arguments and supporting case law, there is no colorable argument that a substantial ground for a difference of opinion on that issue exists.

As Respondent acknowledges, Executive Order 14,215 issued on February 18, 2025, provides that "'The President and the Attorney General . . . shall provide authoritative interpretations of law for the executive branch........ No employee of the executive branch acting in their official capacity may advance an interpretation of the law as the position of the United

States that contravenes the President or the Attorney General's opinion on a matter of law, including but not limited to . . . positions advanced in litigation.'" Request at 3 (quoting Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10448-49 (Feb. 18, 2025)). Respondent argues that, based on Executive Order 14,215, the FDIC is bound by the Department of Justice's "official determination that 'multiple layers of removal restrictions shielding administrative law judges (ALJs) are unconstitutional.'" Request at 3 (quoting Press Release, Department of Justice, Statement from Justice Department Chief of Staff Chad Mizelle (Feb. 20, 2025), https://www.justice.gov/opa/pr/statement-justice-department-chief-staff-chad-mizelle). Respondent further notes that, following the issuance of Executive Order 14,215 and the Department of Justice's determination, the FDIC has taken the position that it will no longer defend the constitutionality of ALJ removal restrictions. Request at 3-4.

The Department of Justice's official determinations that are relevant to this matter do not end with its determination that ALJ removal protections like those for the ALJ in this proceeding are unconstitutional. The Department of Justice also has determined that a party challenging such removal restrictions must show compensable harm in order to obtain relief. In *Lemelson v. SEC*, the Department of Justice "argue[d] that Plaintiff's claim fails at the threshold because Plaintiff has not shown that [the removal restriction at issue] 'inflict[ed] compensable harm' on him." Notice of Change in Position at 1, *Lemelson v. SEC*, No. 24-2415 (SLS) (D.D.C. Feb. 18, 2025), ECF No. 16 (internal quotations omitted).

As the Department of Justice has explained regarding challenges to ALJ removal provisions:

> A plaintiff challenging a removal restriction may only obtain relief when the challenged restriction "inflict[s] compensable harm" on the plaintiff. *Collins v. Yellen (Collins I)*, 594 U.S. 220, 259 (2021). This is because an unconstitutional removal provision "does not strip" the officer "of the

> power to undertake the other responsibilities of his office." *Id.* at 258 n.23. In other words, the "mere existence of an unconstitutional removal provision . . . generally does not automatically taint Government action by an official unlawfully insulated." *Id.* at 267 (Thomas, J., concurring); *Jarkesy v. SEC*, 34 F.4th 446, 463 n.17 (5th Cir. 2022) (citing *Collins v. Yellen (Collins II)*, 27 F.4th 1068, 1069 (5th Cir. 2022) (en banc)), *aff'd and remanded*, 603 U.S. 109 (2024).
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> Thus, a plaintiff bringing a removal challenge may be granted a remedy only when it can show that the challenged provision "cause[d] harm" by in fact prejudicing the President's control of the administrative proceeding. *Collins I*, 594 U.S. at 248. For example, the Supreme Court has held that a plaintiff can show a challenged removal provision causes harm to that plaintiff by identifying a public statement in which the President "express[es] displeasure with actions taken by" the Commission and "assert[s] that he would remove" the Commissioners "if the statute did not stand in the way." *Collins I*, 594 U.S. at 248.
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> Three harm-related showings are required. The President or agency head must have a "substantiated desire" to remove the "unconstitutionally insulated actor." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (CFSA)*, 51 F.4th 616, 632 (5th Cir. 2022), *rev'd on other grounds sub nom. CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416 (2024), *reinstated in relevant part*, 104 F.4th 930 (5th Cir. 2024) (per curiam) (mem.). Despite that desire, the President or agency head must have a "perceived inability to remove the actor due to the infirm provision." *Id.* And finally, there must be "a nexus between the desire to remove and the challenged actions taken by the insulated actor." *Id.* These showings are required whether the relief sought is retrospective, as in *Collins I*, or prospective, as in *CFSA*, 51 F.4th at 631; *see also Burgess v. FDIC*, 639 F. Supp. 3d 732, 746 (N.D. Tex. 2022) (applying *CFSA*, 51 F.4th at 631).

Brief in Support of Defendants' Motion for Summary Judgment, *Flanagan v. Bondi*, No. 3:24-CV-02471-B, 2025 WL 1360007 (N.D. Tex. Mar. 28, 2025). As Respondent acknowledges in its argument regarding Executive Order 14,215, the FDIC is bound by the position articulated by the Department of Justice in *Flanagan.*

The Department of Justice's determination is in accord with the decision in *Leachco, Inc. v. Consumer Product Safety Commission*, 103 F.4th 748 (10th Cir. 2024), by the United States Court of Appeals for the Tenth Circuit, the federal circuit in which Respondent is located and

one of the courts that would have jurisdiction over any appeal of a final Board order against Respondent in this matter. In *Leachco*, the Tenth Circuit held that a party challenging an agency proceeding based on unconstitutional removal restrictions is not entitled to relief unless it can demonstrate that the restriction "actually affected the agency's decision or conduct" against the party. *Id*. at 756. While the United States Court of Appeals for the District of Columbia Circuit, the other federal circuit court that would have jurisdiction over an appeal of a final Board order against Respondent in this matter, has not yet reached the issue, the district courts within that district applied the same reasoning and reached the same conclusion as *Leachco*. *See Lemelson v. SEC*, No. 24-2415(SLS), 2025 WL 1503815, *12 (D.D.C. May 27, 2025) (dismissing case because plaintiff failed to allege a harm caused by the removal restrictions); *Avila v. NLRB*, No. 24-1688 (RC), 2025 WL 859223, at *8 (D.D.C. Mar. 19, 2025) (dismissing case because plaintiff failed to articulate any harm was caused by the removal restrictions).

Respondent contends, however, that it is suffering compensable harm by being compelled to submit to an enforcement proceeding before an unconstitutionally-insulated ALJ. In support of this proposition, Respondent argues that the Supreme Court's ruling in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), disposes of the matter, Request at 6, because "[b]eing subject to unconstitutional agency authority . . . qualifies as a 'here-and-now injury.'" Motion for Dismissal at 6. Respondent's argument is unpersuasive, because *Axon* did not alter the *Collins* analysis and therefore does not provide a basis for satisfying any of the criteria for interlocutory review.[1] The Supreme Court's decision in *Axon* was limited to determining whether and how to infer Congressional intent to withdraw jurisdiction from the district courts. It did not reach,

[1] In *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), the Supreme Court explained that a "here-and-now injury" is one that is impossible to remedy once the proceeding is over. *Id*. at 212. *See also Leachco*, 103 F.4th at 758-59 ("*Seila Law* concerned standing, not entitlement to [] relief." (emphasis omitted) (citing *Collins*, 594 U.S. at 258 n.24)).

much less determine, whether an administrative proceeding should be dismissed due to an unconstitutionally insulated ALJ. *Axon*, 598 U.S. at 180 ("Our task today is not to resolve [the] challenges; rather, it is to decide where they may be heard."). The Supreme Court specifically considered only whether a federal district court has subject matter jurisdiction to hear a claim asserting a so-called "structural" constitutional challenge when Congress has created an alternative review scheme for an agency action.[2] The Supreme Court held that, when statutes implicitly preclude district court jurisdiction under the *Thunder Basin* factors,[3] district courts may nevertheless hear structural constitutional challenges. *Id.* at 186.

Respondent also cites a footnote in the Fifth Circuit's 2021 *Cochran v. SEC* decision, which was a companion case decided by the Supreme Court along with *Axon*, in support of Respondent's argument that it should not be required to participate in the hearing before the ALJ. Request at 6 (citing *Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021)). But *Cochran*, like *Axon*, provides no support for Respondent's Request, as it too was limited to determining whether Congress had implicitly withdrawn jurisdiction from the district courts to determine "structural" Constitutional claims: "[t]he sole issue on appeal is whether the district court had subject-matter jurisdiction over Cochran's claims." *Cochran*, 20 F.4th at 199.[4] In a later decision addressing the merits of a claim of impermissible removal protections—where jurisdiction was

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[2] Among the structural constitutional challenges the Court identified were Article II and separation of powers claims when an ALJ is insulated from removal and Fifth Amendment Due Process claims when an agency has investigative, prosecutorial, adjudicative, and appellate roles. *See generally Axon*, 598 U.S. 175.

[3] "The [Supreme] Court identified three considerations . . . commonly known now as the *Thunder Basin* factors" to determine whether "particular claims brought [concerning agency action] were 'of the type Congress intended to be reviewed within th[e] statutory structure.' . . . First, could precluding district court jurisdiction 'foreclose all meaningful judicial review' of the claim? Next, is the claim 'wholly collateral' to [the] statute's review provisions? And last, is the claim 'outside the agency's expertise'?" *Axon*, 598 U.S. at 900 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)) (internal citations omitted).

[4] In *Cochran,* the court considered whether Congress *implicitly* withdrew jurisdiction from the district courts over structural constitutional claims against the SEC and distinguished the court's holding that the FDIC's statute "*explicitly* divested" district courts of jurisdiction over such claims. *Cochran*, 20 F.4th at 204.

undisputed– the Fifth Circuit did address *Collins* and held that a substantiated showing of actual harm is necessary, laying out three prerequisites to relief:

> We distill from these hypotheticals [in *Collins*] three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor.

Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616, 632 (5th Cir. 2022) [CFSA], *rev'd on other grounds*, 601 U.S. 416 (2024). "[T]he Plaintiffs must show a connection between the President's frustrated desire to remove the actor and the agency action complained of." *Id.*; *see also Lemelson*, 2025 WL 1503815, at *11 ("*Collins* held that 'where plaintiffs showed no harm stemming from similar removal protections, there was "no basis for concluding" that an agency "lacked the authority to carry out [its] functions" and thus no unlawful action to remedy.'" (citation omitted)). Respondent satisfies none of these requirements.

B. Immediate review will not advance the ultimate termination of the proceeding.

In urging immediate interlocutory review, Respondent contends that "[i]f the Board agrees with the arguments Respondent has made for dismissal, this proceeding will end." Request at 7. But, because substantial grounds for a difference of opinion on the controlling law on which the ALJ relied in Respondent's motion for dismissal and stay do not exist and the FDIC is bound by the position of the Department of Justice that a showing of compensable harm is required, Respondent has not shown that immediate review will advance the ultimate termination of the proceeding. To the contrary, interlocutory review would only further delay the ultimate termination of the proceeding.

C. Subsequent modification of the ruling would provide an adequate remedy and would not cause unusual delay or expense.

Respondent's Request also fails to satisfy the third and fourth grounds for granting interlocutory review. Here too Respondent relies on *Axon*, urging the Board to extend that decision's dicta beyond the bounds of the opinion. Request at 8.[5] However, for many of the reasons discussed previously, review and modification of a ruling at the conclusion of this proceeding would provide an adequate remedy and would not cause unusual delay or expense.

Even if an ALJ is unconstitutionally insulated from removal, that defect does not automatically result in harm to a respondent that must immediately be remedied. As long as an ALJ is properly appointed, she or he may lawfully exercise an ALJ's legislatively prescribed powers. *Leachco*, 103 F.4th at 756 ("[t]he mere existence of an unconstitutional removal provision . . . generally does not automatically taint Government action by an official unlawfully insulated" (citing *Collins*, 594 U.S. at 264) (Thomas, J., concurring)). Respondent does not allege that the ALJ here was unconstitutionally appointed, only that the ALJ is unconstitutionally insulated from removal. Without more, no remedy at all may be needed. *See Collins*, 594 U.S. at 267 (Thomas, J. concurring). The majority of circuits would similarly require Respondent to identify a harm separate from the unconstitutional removal protections. *CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2579 (2024); *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 613-16 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 984 (2024); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *CFSA*, 51 F.4th at 632-33; *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-1754, 2024 WL 4489598, at *2 (6th Cir. Oct. 13, 2024); *Bhatti v. FHFA*, 97 F.4th 556, 559 (8th Cir. 2024); *Decker Coal Co. v. Pehringer*, 8 F.4th

[5] *Axon*, 598 U.S. at 190-91.

1123, 1137 (9th Cir. 2021). Here, Respondent has failed to demonstrate a harm requiring immediate action.

Respondent maintains that "this exact claim is not meaningfully reviewable at the conclusion of the proceeding." Request at 8. However, the *Collins* analysis also extends to prospective relief.[6] *Leachco* explains that Supreme Court precedent refutes the proposition that one would suffer compensable harm if subjected to proceedings before an ALJ with unconstitutional removal protections. *Leachco*, 103 F.4th at 756-57. *Axon*'s reference to a "here-and-now" injury for removal protections has its origins in *Seila Law*, which considered the issue in the context of a standing determination. *Id.* at 759 (discussing *Seila Law*, 591 U.S. at 212). In *Collins*, the Supreme Court clarified that the "here-and-now" injury discussed in *Seila Law* "should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction." *Collins*, 594 U.S. at 258 n.24. *Axon* does not disturb this clarification.

Respondent asserts no harm other than being subjected to a proceeding before a properly appointed–but unconstitutionally protected–ALJ, and such harm is a requirement to obtain relief. Modification of the ALJ's ruling at the completion of the proceeding is an adequate remedy.

Respondent likewise is not entitled to interlocutory review on the basis of unusual delay or expense. Respondent fails to explain how the costs he would incur are an unusual expense that would justify interlocutory review. As the Board has explained previously, the normal costs of litigation are not the type of expense or irreparable injury that 12 C.F.R. § 308.28(b)(4) was designed to avoid. *In the Matter of Citizens Bank of Clovis*, No. FDIC 91-406b, 1992 WL

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[6] *Collins* is applicable even when the challenged action is ongoing, such as a Removal and Prohibition Order that remain in effect. *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022); *Leachco*, 103 F.4th at 756-57.

812920, at *2 (FDIC May 5, 1992) (holding that "costs of litigation are not the type of expense or irreparable injury which the procedures under Rule 28 are designed to avoid . . . and recognizing costs of litigation as a relevant concern would completely undermine the exceptional nature of the relief" under 12 C.F.R. § 308.28).

V. CONCLUSION

Because Respondent has not met the standards for interlocutory review under 12 C.F.R. § 308.28(b), Respondent's Request for Interlocutory Review is denied.

ORDER

For the reasons set forth above, it is hereby ORDERED that Respondent's Request for Interlocutory Review is DENIED.

Pursuant to delegated authority, upon the advice and recommendation of the Deputy General Counsel, Litigation Branch.

Entered at Washington, D.C. this 23rd day of October, 2025.

/s/
Debra A. Decker
Administrative Officer